ValpoScholar Valparaiso University Law Review

Volume 44
Number 2 *Winter 2010*

*pp.*423-468

Winter 2010

Bad Application of a Bad Standard: The Bungling of Georgia v. Randolph's Third-Party Consent Law

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Notes

BAD APPLICATION OF A BAD STANDARD: THE BUNGLING OF *GEORGIA V. RANDOLPH*'S THIRD-PARTY CONSENT LAW

I. INTRODUCTION

It is late one rainy evening and rookie police officer Donald Mackenzie is riding shotgun in a squad car with his veteran partner, Officer Charles Sheerington.[1] A voice comes over the car's radio and asks them to respond to a domestic violence complaint at a nearby residence. Officers Donald and Charles arrive on the scene; Donald's stomach churns as he responds to his first call. The two quickly approach the door, conscious of their surroundings and cautiously surveying the situation. The two stop in their tracks when the door opens and a female voice asks them to come inside the house. Almost immediately, the grisly voice of a male co-tenant, in less-than-cordial language, commands them not to enter the premises.

Slightly taken aback, Donald and Charles blankly stare at one another, and with the rain pounding down on their hats, both wonder how to proceed. Their hearts race, knowing they have to make a decision promptly, but unsure of how to make that decision. They wonder if they should evaluate the circumstances here, weighing variables such as whether the woman appears in imminent danger of harm; the chance that evidence will be destroyed if they honor the refusal of consent; and the protection of the male's right to privacy. Should they consider the location of the male tenant and the precise wording of the male tenant's refusal of consent, while additionally giving substantial weight to the social expectations of whether an ordinary guest would enter under these circumstances?

Although such an extensive consideration of factors seems impractical in a potentially dangerous situation, if Donald and Charles were currently police officers in the United States, they should act based upon the latter set of considerations.[2] This is because the rules of third-party consent law dictate when the government may justify a warrantless search with consent lawfully obtained from a third party

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[1] This example is fictional. Any resemblance to actual persons, living or dead, or facts is purely coincidental.

[2] *See infra* Part II (discussing the current state of third-party consent law, the law that governs situations such as this, in the United States).

rather than from the person whose property the police plan on searching or seizing.[3] The latter set of considerations confronting Officers Donald and Charles, created by a patchwork of Supreme Court cases, could prevent them from entering a residence in a situation where violence or the destruction of evidence was likely, but allow them to enter when the only potential result is disturbing a quiet home and quashing the male tenant's right to privacy.[4] This result is because of the Supreme Court's holding in *Randolph v. Georgia*, which has added yet another exception to the already exception-laden body of third-party consent law.[5] Officers Donald and Charles, whose real-world counterparts grapple with the same concerns on a daily basis, illustrate the effect of the several fact-sensitive third-party consent law rules.[6] Lower court splits on issues of third-party consent law indicate that it similarly puzzles judges.[7] Given the difficulties confronting police officers and the current split among the circuit courts in determining how and in what circumstances *Randolph* should be applied, it is clear that a more logical and straightforward approach is necessary.[8]

This Note contemplates an approach to resolving the problems created by the *Randolph* holding.[9] In doing so, Part II provides the backdrop necessary to understand third-party consent law, the *Randolph* holding, and the current circuit court split over *Randolph*.[10] Part III then scrutinizes the interpretations of *Randolph* advocated by the various

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3 *See, e.g.*, David J. Sachar, *Overview of Arkansas Search and Seizure Law*, 23 U. ARK. LITTLE ROCK L. REV. 423, 450–51 (2001); Matt McCaughey, *And a Child Shall Lead Them: The Validity of Children's Consent to Warrantless Searches of the Family Home*, 34 U. LOUISVILLE J. FAM. L. 747, 748–51 (1996); Gary L. Wimbish, Note, *The U.S. Supreme Court Adopts "Apparent Authority" Test to Validate Unauthorized Third Party Consent to Warrantless Search of Private Premises in Illinois*, 20 CAP. U. L. REV. 301, 305–06 (1991) (all expounding this same general definition of third-party consent).

4 *See infra* Part II.E (articulating the law espoused in *Georgia v. Randolph*, which established that a search is not constitutional as to physically present co-tenant who objects to the search, based on the consent of another co-tenant).

5 547 U.S. 103 (2006).

6 *See infra* Part III (criticizing the current state of third-party consent law for its over-complication and counter-intuitiveness, and the resulting difficulty for police officers to apply the law while working in the field).

7 *See infra* Part III.A (discussing the Appellate split on interpreting the *Randolph* decision).

8 *See infra* Parts II.F, III.A, and IV (discussing the current circuit split and the proposed reasonableness balancing test aimed at addressing said split).

9 *See infra* Part IV (proposing a four-pronged reasonableness balancing test to replace the fractured third-party consent law rules).

10 *See infra* Part II (reflecting on the history of the Fourth Amendment, the origins of consent law, and the landmark cases in the doctrine of third-party consent).

lower courts and evaluates those implications.[11] Part IV articulates a model approach to determining the efficacy of consent that would best assist courts and law enforcement officers in the field.[12] Finally, Part V returns to Officers Donald and Charles, and resolves their dilemma and this Note.[13]

II. BACKGROUND

The first step in evaluating third-party consent law is to understand its Constitutional and common law origins.[14] To that end, this section establishes the background for the current split among the Federal Courts of Appeals regarding the United States Supreme Court's holding in *Randolph*.[15] Part II.A briefly reviews struggles in interpreting the Fourth Amendment and how these struggles underlie all issues courts face involving the Fourth Amendment.[16] Next, Part II.B discusses consent searches, specifically examining how the Court's decisions regarding consent searches have evolved to their present state.[17] Then Parts II.C and II.D narrow the topic to third-party consent searches, and examine those Supreme Court and lower court decisions prior to *Randolph*.[18] Part II.E engages in a thorough discussion of *Randolph*, paying attention to the rationales of the majority, concurring, and dissenting opinions.[19] Finally, Part II.F sets forth the justifications for the decisions of the Courts of Appeals for the Seventh, Eighth, and Ninth

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11 *See infra* Part III (critiquing the lower court decisions and the social-expectations analysis advanced in *Randolph*, and considering the implications for important public policy issues).

12 *See infra* Part IV (proposing a new balancing approach to determine the efficacy of consent, based on factors identified in the *Randolph* Court's dicta).

13 *See infra* Part V (offering summation and parting remarks about the future of third-party consent).

14 *See infra* Parts II.A–C (providing a history of the Fourth Amendment and landmark Supreme Court cases dealing with consent and third-party consent searches).

15 *See infra* Parts II.A–F (establishing the law prior to the circuit split in Parts II.A–E, and explaining the split in Part II.F).

16 *See infra* Part II.A (discussing the inherent tensions between the Warrant Clause and the Reasonableness Clause and the evolving standards for each advanced by the Supreme Court).

17 *See infra* Part II.B (discussing the means for conducting a consent search, and the varying standards for determining consent).

18 *See infra* Part II.C–D (primarily examining the precursors to *Georgia v. Randolph*, *United States v. Matlock*, and *Illinois v. Rodriguez*, setting forth their rules of law, and discussing how lower courts applied those rules).

19 *See infra* Part II.E (discussing the facts and opinions set forth by the Court in *Georgia v. Randolph*).

Circuits that have created the split necessitating further clarification of the third-party consent standard set out by the Supreme Court.[20]

A. The Fourth Amendment

The third-party consent doctrine falls within the constitutional topic of searches; thus, the Fourth Amendment is the starting point for an understanding of third-party consent.[21] The two clauses upon which the Amendment is predicated are the Reasonableness Clause[22] and the Warrant Clause.[23] These two clauses are viewed by scholars and the courts as both working in concrete and as being in conflict with one another.[24] One of the central difficulties in interpreting the Fourth

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[20] *See infra* Part II.F (presenting the interpretations of *Randolph* reached by the Circuit Courts of Appeals).

[21] U.S. CONST. amend. IV.

> 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.

Id.

[22] Katz v. United States, 389 U.S. 347, 365 (1967) ("The [reasonableness] clause protects 'persons, houses, papers, and effects, against unreasonable searches and seizures. . . .' These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both."). *See also* Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 732 (2007) (discussing how the concept of reasonableness interacts with the core Fourth Amendment concept of a right to privacy to protect individual rights).

[23] *Katz*, 389 U.S. at 365 ("The [warrant] clause of the Amendment . . . establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those 'particularly describing the place to be searched, and the persons or things to be seized.'"). *See also* Sharon L. Davies & Anna B. Scanlon, Katz *in the Age of* Hudson v. Michigan: *Some Thoughts on "Suppression as a Last Resort"*, 41 U.C. DAVIS L. REV. 1035, 1074 (2008) (discussing how, although the placement of the uninformative comma has created debate over the relationship between the two clauses, the Court has held that the warrant clause requires a warrant wherever it is practical to obtain one).

[24] U.S. CONST. amend. IV. *See also* United States v. U.S. Dist. Court, 407 U.S. 297, 315 (1972) ("Though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of ''reasonableness' turns, at least in part, on the more specific commands of the warrant clause."); Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 6–7 (2007) (discussing the tension between the Reasonableness Clause and the Warrant Clause being apparent in the Court's jurisprudence based upon trends where the Court uses the Reasonableness Clause to judge the constitutionality of civil searches and the Warrant Clause to judge the constitutionality of criminal searches); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 558 (1999). The Warrant Clause begins "and no Warrants" and protects against the granting of general warrants. *Id.* General warrants were common during the framers' era and allowed for searches in locations such as "suspected places." *Id.* Conversely, the Reasonableness Clause is the

Amendment has been how properly to construe these clauses together.[25] Supreme Court decisions interpreting the Fourth Amendment mirror the internal tensions between the two clauses, with the Court once preferring warrants that minimally required compliance with the warrant standard, but gradually relaxing its standard.[26] More recently, the Court has moved from its warrant requirement and started to put an emphasis on reasonableness.[27] This movement began with *Katz v. United States*, which established the current controlling test for determining whether an individual has a right to privacy under the Fourth Amendment.[28] Although police officers are still generally required to secure warrants before conducting searches, there are now many exceptions that obviate this requirement.[29] As the Court gradually carved exceptions into the

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general proposition that the government will not violate an individual's right to "be secure" by conducting "unreasonable searches." *Id.* at 557.

[25] Davies, *supra* note 24, at 551 (stating that one of the biggest points of contention with the Fourth Amendment is the difficulty in determining how the two clauses fit together because the Amendment does not indicate when arrests or searches can be discretionary, and when arrests must be made pursuant to probable cause and a warrant). *See also* Russell M. Gold, Note, *Is This Your Bedroom?: Reconsidering Third-Party Consent Searches Under Modern Living Arrangements*, 76 GEO. WASH. L. REV. 375, 378–79 (2008) (discussing the inherent infringements on privacy in allowing warrant-based searches); Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, (1890) (discussing the important right to privacy protected by the Fourth Amendment).

[26] *See, e.g.*, Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 45455 (1971); Katz, 389 U.S. at 347; United States v. Jeffers, 342 U.S. 48, 51 (1951); Trupiano v. United States, 334 U.S. 699, 706 (1948); Agnello v. United States, 269 U.S. 20, 33 (1925) (all stating the same general principle that any warrantless arrest or search is *per se* unreasonable, subject to a few specifically established and well-delineated exceptions).

[27] *See, e.g.,* Matthew J. Hodge, Note, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 100 (2006) (discussing how the *Katz* Court dropped the literal reading of the Fourth Amendment from previous cases, and embraced a two-step approach to reasonableness); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 554 (1990) (discussing decisions subsequent to *Katz*, and how the decision is now used by the government to justify its behavior in accessing intimate details of individual's lives); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 108 (2008) (discussing the ineluctable circularity of gauging the reasonable expectations of privacy); Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 848 (2002) (explaining the two-part test for reasonableness elucidated in *Katz*, and the operational outcomes of such a standard).

[28] 389 U.S. at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"); *See also* Stephanie M. Godfrey & Kay Levine, *Much Ado About* Randolph: *The Supreme Court Revisits Third Party Consent*, 42 TULSA L. REV. 731, 746–47 (2007) (discussing *Katz*'s two-pronged approach to help distinguish reasonable from unreasonable searches).

[29] *See* Justin H. Smith, Comment, *Press One For Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 VAND. L. REV.

requirements for a warrant, it replaced its warrant preference with the current discretionary standard that relies solely on reasonableness.[30] In recent years, the Court has provided police officers with additional justifications to enter residences by creating several specific exceptions to the Fourth Amendment's warrant requirement.[31]

B. Consent Searches

Consent searches are one such evolving exception to the warrant requirement of the Fourth Amendment.[32] In *Amos v. United States*, one of the first decisions addressing consent, the Court held that a search of Amos's home upon his wife's "waiver" of a warrant was an unconstitutional search under the theory of implied coercion.[33] Several years later, the Court departed from this theory in the landmark case of

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1591, 1593 (2002) (indicating that, although there is a warrant requirement, it has become the exception, rather than the rule, with at least twenty exceptions existing as of 1985); Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 536–37 (1997) (discussing the gradual erosion of the warrant requirement from what were once a few narrow exceptions to what is now only a standard of "general reasonableness").

30 *See*, *e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 183–84 (1990); United States v. Robinson, 414 U.S. 218, 235 (1973); Cady v. Dombrowski, 413 U.S. 433, 448 (1973) (stating that the appropriate determination is not made in light of a warrant, but whether the search itself was reasonable in light of the underlying facts and circumstances.); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (discussing exceptions to the warrant requirement).

31 *See supra* notes 24–27 and accompanying text (discussing the relaxing of the warrant standard and the effect of this relaxing); *see also* Wesley MacNeil Oliver, *Toward a Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 BUFF. CRIM. L. REV. 201, 208–18 (2005) (explaining some of the exceptions to the warrant requirement and the functional necessity of creating such exceptions to prevent guilty defendants from escaping conviction).

32 *Compare* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (citing Davis v. United States, 328 U.S. 582, 593–94 (1946); Zap v. United States, 328 U.S. 624, 630 (1946))), *with* Amos v. United States, 255 U.S. 313 (1921). *See also* Ric Simmons, *Not Voluntary But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005) (citing police figures that estimate that some 90 to 98 percent of all searches were conducted under the consent exception to the warrant requirement).

33 255 U.S. at 315–17. In *Amos*, Federal officers arrived at the home of Amos and his wife to search the premises for violations of revenue laws. *Id*. at 315. The officers did not have warrants, but the wife granted access to the home and their adjacent store, during which the officers found illegal whisky that was being sold without proper taxation. *Id*. The Court rejected the government's argument that Amos's wife waived Amos's Fourth Amendment rights, and did not arrive at the question of whether a third party could waive another party's Fourth Amendment rights, instead resolving the issue of consent on the grounds that no such waiver could be intended or effected given the inherent implied coercion in any warrantless search. *Id*. at 317.

Schneckloth v. Bustamonte.[34] There, the Court first established the requirements necessary for a consent exception to the warrant requirement.[35] In *Schneckloth*, the Court made clear that in determining whether an individual had consented to a search, the voluntariness of the consent was the only relevant determination.[36] The Court found a compelling societal justification in that consent searches are often the only means of obtaining reliable and important evidence, and thus weighed the totality of the circumstances to determine voluntariness of consent.[37] Although some commentators have suggested that the Court should abolish consent searches, the Court has instead continued to expand the consent exception, primarily by enlarging the classification of individuals who can grant consent, as evidenced by the third-party

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[34] 412 U.S. at 218. In *Schneckloth*, police officers pulled over a car in which defendant Bustamonte was a passenger. *Id.* at 220. Another passenger, Acala, informed police that his brother owned the car and consented to the police request to search the car. *Id.* Police officers discovered stolen checks during the search, which were used as evidence against Bustamonte and a basis upon which he was convicted. *Id.*. Bustamonte's motion to suppress the checks was denied at the trial court level. *Id*. The California Court of Appeal upheld the trial court's ruling, finding that the voluntariness of consent was a question of fact. *Id.* at 220–21. The California Supreme Court denied review. *Id.* at 221. Thereafter, the respondent sought a writ of habeas corpus in a federal district court, which the court also denied. *Id.* After taking appeal, the Ninth Circuit set aside the district court order, ruling that consent was valid not only if it was not coerced, but also with the knowledge that it could "be freely and effectively withheld." *Id.* at 222. The Supreme Court granted certiorari to determine whether the Fourth and Fourteenth amendments required the showing held by the Ninth Circuit. *Id.* at 222. *See also* George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 545–46 (2003) (discussing the differences of the "pre-*Schneckloth*" standard, and the reluctance of Justice Stewart to release the opinion, and spark more debate over a new Fourth Amendment standard).

[35] *Schneckloth*, 412 U.S. at 249 (holding that the validity of an individual's consent is a question of fact to be determined from all pertinent circumstances). *See also* Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error,* 59 TENN. L. REV. 1, 26 (1991) (discussing how many early decisions used lax standards to find a waiver to search).

[36] *Schneckloth*, 412 U.S. at 233–34 (discussing previous decisions in finding that knowledge of one's right to refuse is not a prerequisite for voluntary consent, but rather, is one consideration the Court takes into account when determining voluntariness). *See also* Bumper v. North Carolina, 391 U.S. 543, 54849 (1968); Johnson v. United States, 333 U.S. 10, 1617 (1948); Davis v. United States, 328 U.S. 582, 593 (1946).

[37] *Schneckloth*, 412 U.S. at 247–48.

> It is also argued that the failure to require the Government to establish knowledge as a prerequisite to a valid consent, will relegate the Fourth Amendment to the special province of 'the sophisticated, v. knowledgeable and the privileged.' . . . The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights . . . .

Id.

consent exception.[38] Thus, consent searches have become a prominent exception to the warrant requirement of the Fourth Amendment, and the category now has its own distinct subcategories.[39]

C. Third-Party Consent Searches Prior to Georgia v. Randolph

Within the body of consent law is third-party consent law, an area that the Court has refined primarily through the holdings of *United States v. Matlock* and *Illinois v. Rodriguez*.[40] The Court expanded the doctrine to its current standard that a member of a shared household has the authority to consent to a search in that household, even if the evidence sought by the search does not concern the individual consenting to the search.[41] Although the question of whether the police obtained voluntary consent is still a concern in third-party consent cases, the primary issue shifts to the circumstances under which the third party's consent is valid.[42]

Prior to the landmark decisions of *Matlock* and *Rodriguez*, courts decided several cases with little analysis, by refusing to grant a third party the ability to consent.[43] Finally, in *Stoner v. California*, the Supreme

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[38] *See* Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 258–71 (2001) (reasoning that the difficulty in distinguishing between coercive and voluntary consent is extremely difficult, especially when a power imbalance, such as that between police officers and individuals faced with consenting, is implicated); Harvard Law Review Association, Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Doctrine*, 119 HARV. L. REV. 2187, 2187–88 (2006) (stating that the consent doctrine has found "few friends" because of the likelihood for racial profiling and law enforcement abuse that it offers).

[39] *See supra* notes 30–35 (reflecting upon the evolution of the consent exception to the warrant requirement, and the gradual loosening of its standard).

[40] *Rodriguez*, 497 U.S. 177 (1990); *Matlock*, 415 U.S. 164 (1974). *See also* Elizabeth A. Wright, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841, 1852–54 (2005) (calling *Matlock* and *Rodriguez* the "most important" and "leading" cases in developing the body of third-party consent law, respectively); Sharon E. Abrams, Comment, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963, 969 (1984) (generally discussing the evolution of the Supreme Court third-party consent law, and its transformation through Matlock and Rodriguez).

[41] *See* Wright, *supra* note 40, at 1857–59 (describing the rationales for allowing third-party consent searches under *Matlock* and *Rodriguez*, which allow consent to be granted by a co-tenant against whom the search is not being performed).

[42] *See generally* Georgia v. Randolph, 547 U.S. 103, 107 (2006); *Rodriguez*, 497 U.S. 177; *Matlock*, 415 U.S. 164 (all focusing on the issue of whether the third party had the requisite authority to grant consent rather than the voluntariness of that consent).

[43] *See* People v. Dent, 19 N.E.2d 1020, 1021 (Ill. 1939); People v. Lind, 18 N.E.2d 189, 191 (Ill. 1938); Hays v. State, 261 P. 232, 234 (Ok. Crim. Ct. App. 1927) (generally stating that, without specific authorization, an individual cannot waive another's constitutional protection against unlawful searches).

Court articulated a more thorough opinion discussing third-party consent, in which it adhered to the same narrow requirements for granting third-party consent as the lower courts.[44] There, the Court held that police had no basis to believe that a hotel clerk had the authority to consent to the search; the clerk had no constitutional stake in the search, so he did not have the power to consent to it.[45] Shortly after deciding *Stoner*, the *Frazier v. Cupp* Court developed the theory of "assumption of risk" as it pertains to third-party consent.[46] In *Frazier*, the Court quickly disposed of the third-party consent issue by refusing to debate "metaphysical subtleties," holding that Frazier had assumed the risk that his friend, Rawls, would allow someone to search his bag when Frazier gave him permission to use a compartment therein and left the bag at Rawls's house.[47]

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[44] 376 U.S. 483 (1964). Acting on tips and positive identifications from robbery witnesses, police asked a hotel clerk if the defendant was at the hotel. *Id.* at 484–85. The clerk informed them that he was staying there, but was currently away. *Id.* at 485. The officers then explained why they needed to enter, and requested the key, to which the clerk obliged. *Id. See also* Chapman v. United States, 365 U.S. 610, 616–17 (1961) (granting no rights to landlords to consent to searches of their tenants' residences, as it would effectively nullify the Fourth Amendment rights of the tenants).

[45] *Stoner*, 376 U.S. at 489.

> [There is no] substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search. Our decisions make clear that the 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.' . . . [i]t was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.

Id.

[46] 394 U.S. 731 (1969). In *Frazier*, police arrested Rawls, who consented to a search of a duffel bag jointly used by Frazier and Rawls, which was left in Rawls's bedroom. *Id.* at 740. The officers found evidence against Frazier in the bag and seized it. *Id.* Frazier argued that Rawls had permission to use only one compartment in the bag, and thus did not have authority to grant a search of the rest of the bag. *Id.* In its holding, the Court established that Frazier "assumed the risk," a theory based on "mutual use of property by individuals generally having joint access or control for most purposes." United States v. Matlock, 415 U.S. 164, 172 n.7 (1974) (under this doctrine, "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.").

[47] *Frazier*, 394 U.S. at 740 ("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.").

The Court returned to *Frazier*'s unreached issue of third-party consent in *Matlock*.[48] There, the question before the Court was whether the consent of a third party for police to search the living quarters of the defendant was legally sufficient to render evidence obtained during the search admissible at trial.[49] The Court held that consent was sufficient because Gayle Graff ("Mrs. Graff") granted her voluntary consent to a search in an area over which she had "common authority."[50] She had common authority over the premises, so she also had actual authority to grant the search of the room.[51] The Court did not decide whether she had apparent authority to consent to the search.[52] In so holding, the Court adopted two justifications for third-party consent: common authority and assumption of risk.[53] After a cursory review of its prior third-party consent decisions, the Court found that assumption of risk

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[48] *See, e.g.*, Madeline E. McNeeley, *Constitutional Law – Search and Seizure – Validity of Consent to Warrantless Search of Residence When Co-Occupant Expressly Rejects*, 74 Tenn. L. Rev. 259, 265–67 (2007) (discussing how *Frazier* set the stage for the Court to decide *Matlock* and *Rodriguez*); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 Wash. U. L.Q. 175, 181–82 (1991) (contemplating factual differences between *Frazier* and *Matlock*, and their outcome-determinative nature).

[49] *Matlock*, 415 U.S. at 166. Police arrested the defendant in the front yard of the house in which he lived with Mrs. Graff. *Id.* at 165. The defendant was placed in a police car a short distance from the house. *Id.* at 179 (Douglas, J., dissenting). Without attempting to gain consent from the defendant, the police obtained consent to search the premises from Mrs. Graff. *Id.* at 165. Upon searching, officers found and confiscated money from a closet in a bedroom that Mrs. Graff indicated she shared with the defendant. *Id.* The defendant was indicted for bank robbery and moved to suppress the money since it was obtained without his consent. *Id.* The district court held that while the government had satisfactorily proven that it reasonably appeared to the officers that Mrs. Graff had the apparent authority to permit the search, but they had not proven that she had the actual authority to consent to the search, both of which were necessary for consent. *Id.* at 167–68. The court of appeals affirmed in all respects, and the Supreme Court granted certiorari. *Id.* at 166–69.

[50] *Matlock*, 415 U.S. at 171 (holding that that permission to search could be granted by a third party who "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.").

[51] *Id.* at 177 n.14 (stating that the government did not reach its contention that the government need only show that the officers "reasonably believed that Mrs. Graff had sufficient authority over the premises to consent to the search").

[52] *Id.* at 171 (because the government carried its burden of proving that Mrs. Graff's voluntary consent to search was legally sufficient, the Court did not arrive at another of the United States's contentions, that the government needed to prove only that the police reasonably believed that Mrs. Graff had authority to consent to a search).

[53] *Id. See also, e.g.*, Davies, *supra* note 35, at 18–19 (discussing *Matlock*'s definitions and usage of the terms "common authority" and "assumption of risk," and how these standards influenced the subsequent *Rodriguez* decision); Rotenberg, *supra* note 48, at 181–82 (scrutinizing the assumption of the risk justification of *Matlock*, and attempting to discern its precise meaning).

served as a rationale for the search.[54] The Court thus derived the overarching principle of common authority—that joint use confers the power to permit inspection.[55] One issue the Court failed to reach in *Matlock* was whether apparent authority of the consenting third party was sufficient for police to conduct a search.[56] The Court addressed precisely this issue in another seminal third-party consent case, *Illinois v. Rodriguez*.[57] There the Court further relaxed the standard for valid third-party consent.[58] The Court held that if police reasonably believe that an individual granting consent to search has the authority to consent, that consent is valid, even if the belief was incorrect.[59] In support of its

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[54] *See* Rotenberg, *supra* note 48, at 181–82. (discussing the Court's previous holdings relating to assumption of risk and intertwining assumption of the risk with the doctrine of common authority). *See also* Shane E. Eden, Note, *Picking the* Matlock: Georgia v. Randolph *and the U.S. Supreme Court's Re-Examination of Third-Party-Consent Authority in Light of Social Expectations,* 52 S.D. L. REV. 171, 201–02 (2007) (tracking the evolution of the assumption of risk doctrine, and its presence in other, less highly regarded, Supreme Court cases).

[55] *Matlock*, 415 U.S. at 172 n.7. The case described "common authority" as the:

> 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.

Id.

[56] *Id.* at 177 n.14.

> Accordingly, we do not reach another major contention of the United States in bringing this case here: that the Government in any event had only to satisfy the District Court that the searching officers reasonably believed that Mrs. Graff had sufficient authority over the premises to consent to the search.

Id.

[57] 497 U.S. 177, 179 (1990). In *Rodriguez*, officers gained entry to the defendant's apartment with the consent of Gail Fischer, who claimed to have been beaten earlier in the day by the defendant. *Id.* at 179. She led police to an apartment that she claimed belonged to her and the defendant, referring to it as "our" apartment and stating that she had clothes and furniture there. *Id.* The police did not obtain a warrant to enter the apartment nor did they request the defendant's consent. *Id.* at 180. Once inside, police arrested the defendant for possession of illegal drugs that the police seized after finding them in plain view. *Id.* The defendant moved to suppress the evidence, which the trial court granted on the grounds that Fischer did not have common authority over the apartment because she had moved out. *Id.* The trial court rejected the government's argument that even if Fischer did not have common authority, there was no Fourth Amendment violation because the police reasonably believed she had authority to consent. *Id.* The appellate court affirmed, and the Supreme Court granted certiorari. *Id.* at 180–81.

[58] *See* Davies, *supra* note 35, at 26 (discussing how *Rodriguez* downgrades the Fourth Amendment by granting authority in "seeming consent" which would not be reasonable since it would not meet either a probable cause standard or a warrant standard).

[59] *Rodriguez*, 497 U.S. at 188.

conclusion, the Court cited *Brinegar v. United States* for the proposition that most discretionary functions police perform utilize a reasonableness standard.[60] From there, the Court attempted to reconcile its holding with the facts in *Stoner* to demonstrate that the holding did not grant police substantial latitude to conduct searches.[61] In sum, the *Matlock* and *Rodriguez* courts departed substantially from the narrow standard announced in *Stoner* to one that allows a third party, who only "appears" to have authority over premises, to be able to consent to a search.[62]

D. Lower Court Split Leading to Georgia v. Randolph

Before *Georgia v. Randolph*, a large number of lower courts split on an issue unconsidered by *Matlock* and *Rodriguez*: whether a search of shared premises is constitutionally valid when both co-tenants are physically present, but one tenant consents while the other does not.[63] The majority position cited the doctrines of common authority and assumption of risk to explain that the physical presence should make no difference in the outcome.[64] This majority included the four Circuit

> Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. . . . [D]etermination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief" that the consenting party had authority over the premises?

Id. (citing Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).

[60] *Rodriguez*, 497 U.S. at 186–88 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949) ("Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.")).

[61] *Rodriguez*, 497 U.S. at 186–88 (demonstrating the present holding would reach a result consistent with *Stoner* by stating that it was illogical for the police in *Stoner* to rely upon the obtained consent because they knew it came from a hotel clerk who would not have general access to or control over rented room exclusively occupied by a guest).

[62] *Compare Stoner*, 376 U.S. at 489, *with Matlock*, 415 U.S. at 171, *and Rodriguez*, 497 U.S. at 186–88.

[63] *See* Wright, *supra* note 40, at 1862 (discussing a circuit court split created, in part, by a lower court's ruling in *Randolph v. State*, predecessor to *Georgia v. Randolph*); *see also* Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 808–09 (2007) (contemplating third-party consent law prior to *Randolph*, and how police had more latitude in a number of circumstances, to justify entry).

[64] *See* United States v. Morning, 64 F.3d 531, 532 (9th Cir. 1995); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (per curiam); Seale v. State, 857 N.E.2d 1048, 1050 (Ind. App. 2006); State v. Rowlett, 859 A.2d 303, 312 (Md. App. 2004); Primus v. State, 813 N.E.2d 370, 376 (Ind. App. 2004) (all holding that an individual's ability to give consent does not depend on his or her physical location).

Courts of Appeals that considered the issue.[65] The First Circuit case of *United States v. Donlin* illustrates the majority position.[66] In *Donlin*, officers entered an apartment belonging to the Donlins when Mr. Donlin did not consent, but Mrs. Donlin did.[67] While searching, the officers discovered several weapons in the apartment.[68] The trial court denied Mr. Donlin's attempt to suppress the weapons found during the search.[69] In upholding the decision, the First Circuit Court of Appeals ruled that a third party with "common authority" over the premises may give valid consent and that this consent remains valid even if another co-occupant specifically objects to it.[70] Conversely, the minority position contended that "common authority" was irrelevant when both parties are present, holding that a third party's consent is invalid if another present co-tenant voices an objection.[71] *State v. Leach*, a prominent minority case, set forth

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65 *See Morning*, 64 F.3d at 533-536; United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); *Hendrix*, 595 F.2d at 885 ; United States v. Sumlin, 567 F.2d 684, 687–88 (6th Cir. 1977).

66 982 F.2d at 3334 (holding that consent by third party with common authority over premises that police intend to search remains valid even when defendant specifically objects to it, and even when there is delay, so long as that delay is reasonable).

67 *Id.* at 32. Following a violent argument between Mr. and Mrs. Donlin, police arrived on the scene to find Mrs. Donlin outside of the Donlins' apartment. *Id.* After learning that Mr. Donlin was violent and intoxicated, police attempted to assist Mrs. Donlin in gaining entry to gather belongings to take elsewhere. *Id.* Mrs. Donlin unlocked the apartment door, which opened only a few inches because the security chain was fastened. *Id.* The Donlins conversed until Mr. Donlin discovered she was accompanied by police officers, at which point he spoke with them. *Id.* Police requested that Mr. Donlin allow them to enter to gather some of Mrs. Donlin's belongings. *Id.* Upon learning that the officers did not have a warrant, Mr. Donlin denied the request, and shut and locked the door. *Id.* Prior to the door shutting, an officer lodged his flashlight in the opening; once the door shut, the flashlight fell inside the apartment. *Id.* Mrs. Donlin unlocked the door with her key a second time, allowing the officers to enter with the intentions to collect her belongings and arrest Mr. Donlin for theft of the flashlight. *Id.* Once inside, the officers found Mr. Donlin yelling and pointing a sawed-off shotgun at them, at which time they determined it would be wise to call for backup. *Id.*

68 *Id.* When backup arrived approximately two hours later, the officers re-entered the apartment. *Id.* During their search, they found an illegal sawed-off shotgun disassembled on the ground, as well as other weapons, but not Mr. Donlin. *Id.* Upon further search, Mr. Donlin was found lying on the seat of his pickup truck in the parking lot. *Id.* at 33.

69 *Id.* The trial court held that the use of Mrs. Donlin's key justified the first two entries as valid consent searches and justified the third entry as valid because of exigent circumstances and probable cause. *Id.* The Court of Appeals reasoned that Mrs. Donlin's unlocking of the door constituted implicit consent for the officers to search. *Id.*

70 *Id.* (citing *Matlock*, 415 U.S. 164; J.L. Foti Constr. Co. v. Donovan, 786 F.2d 714, 716–17 (6th Cir. 1986); Donovan v. A.A. Beiro Constr. Co., 746 F.2d 894, 898–900 (D.C. Cir. 1984)).

71 *See* Lucero v. Donovan, 354 F.2d 16, 21 (9th Cir. 1965); State v. Brunetti, 883 A.2d 1167, 1178 (Conn. 2005); Saavedra v. State, 622 So. 2d 952, 956 (Fla. 1993); State v. Leach, 782 P.2d 1035, 1040 (Wash. 1989); Silvia v. State, 344 So. 2d 559, 562 (Fla. 1977); Tompkins v. Superior Court, 378 P.2d 113, 116 (Ca. 1963) (all holding that an express objection of a present co-tenant restricts another co-tenant's ability to consent. These decisions put emphasis on the

the rationale for the minority position.[72] In *Leach*, after a series of burglaries to neighboring businesses, Duncan Leach's ("Leach") girlfriend signed a consent-to-search form and unlocked Leach's office, wherein the officers arrested him without requesting his consent.[73] Leach made a pretrial motion to suppress the evidence obtained from the detective's search of his office, but the court denied the motion and eventually convicted him.[74] The Supreme Court of Washington held that "should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent. Any other rule exhalts [sic] expediency over an individual's Fourth Amendment guarantees. Accordingly, we refuse to beat a path to the door of exceptions."[75] Rules in stark contrast with one another made the issue ripe for Supreme Court review.[76]

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importance of the distinction between being physically present and objecting, and not being physically present. They assert that, given that in this scenario both co-tenants are essentially equal, any preferential treatment to the occupant granting consent is equivalent to nullifying the Fourth Amendment rights of the objecting co-tenant). *See also* W. LAFAVE, 2 SEARCH AND SEIZURE § 8.3 at 708 (1978); Lloyd L. Weinreb, *Generalities of the Fourth Amendment,* 42 U. CHI. L. REV. 47, 63 (1974) (contending that one party's right to consent in their own right does not outweigh an equal claim to privacy by a co-occupant on the scene).

72 782 P.2d 1035 (Wash. 1989). *See also* Kristy Duckwall, *Ohio Supreme Court Decisions: 2004, Cases Concerning Constitutional Law,* State v. Leach, 31 OHIO N.U. L. REV. 474, 479–82 (2005) (commenting on the *Leach* decision and explaining how the Supreme Court had never addressed the issue, while the circuit courts were split on the issue).

73 782 P.2d at 1036. Shortly after Duncan Leach opened a travel company, a series of burglaries occurred in Leach's office complex. *Id.* A little over one week later, Leach's girlfriend, Cynthia Armstrong, met a detective to show him property that had been stolen from one of the businesses and Leach's photo. *Id.* The next day, Leach's girlfriend signed a consent-to-search form and escorted the detective to Leach's business, which she unlocked with a key Leach had given to her. *Id.* After placing Leach under arrest and handcuffing him to a chair, the detective conducted a search, which turned up several items reported stolen by other businesses in the complex. *Id.* at 1036–37.

74 *Id.* at 1035–37. The trial court conducted an evidentiary hearing to determine whether Leach's girlfriend had authority over the business to consent to the search. *Id.* Upon a positive showing, the trial court convicted Leach of second-degree burglary and second-degree attempted theft. *Id.* Leach appealed on the ground that the detective unconstitutionally seized evidence used to convict him. *Id.* at 1035. In holding that the analysis of whether consent is valid must focus on the relative privacy interests of the suspect objecting to consent and of the consenting party, the Washington Court of Appeals remanded to the trial court for additional findings. *Leach*, 761 P.2d at 87. The State then sought review. *Id.* at 1035.

75 *Leach*, 782 P.2d at 1040. The court rejected the contention that common authority applies even when both co-occupants are present, reasoning that the Fourth Amendment rights of the non-consenting party are essentially ignored under that rationale, because in this circumstance both parties are on equal footing. *Id.* The court further stated that it did not look kindly on the police's failure to get a warrant when it had ample opportunity to do so, and when there is the risk of evidence being suppressed due to claims of an illegal search and seizure. *Id.*

76 *See* Duckwall, *supra* note 72, at 481 (discussing the circuit court split).

With individual rights gradually eroding under the Supreme Court's third-party consent cases, and a majority of lower courts extending the general rules of *Matlock* and *Rodriguez*, the outcome of any subsequent third-party consent cases appeared certain to continue the trend. A growing number of split decisions from the lower courts on whether search of a residence's common areas is reasonable when both co-occupants are physically present, and one gives consent while the other refuses to consent, made the Court's resolution of the question all but inevitable.[77]

E. Georgia v. Randolph

The inevitable occurred when the Court granted certiorari in *Georgia v. Randolph* to address the above issue and resolve the circuit split.[78] The dispute in the case arose after Randolph's ("Randolph") wife, ("Mrs. Randolph"), informed police that her husband took their young son from their home.[79] When police arrived at the couple's house, Mrs. Randolph informed them that her husband used and possessed drugs in the home.[80] With an unequivocal "no," Randolph denied an officer's request for consent to search the home, at which time the officer turned to Mrs. Randolph and asked for consent, which she provided.[81] In an upstairs bedroom, an officer seized a section of drinking straw with a white

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77 Georgia v. Randolph, 547 U.S. 103, 106 (2006).

78 *Id.* at 108. (specifically stating the issue as "whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search."). *See also* Meagan Rasch-Chabot, Comment, *The Home as Their Castle: An Analysis of* Georgia v. Randolph*'s Implications for Domestic Disputes*, 30 HARV. J. L. & GENDER 507, 515 (2007) (setting forth the procedural posture of *Randolph*).

79 *Randolph*, 547 U.S. at 106. Randolph and Mrs. Randolph separated in May 2001, at which time Mrs. Randolph left their residence in Georgia and took their son with her to Canada. *Id.* Mrs. Randolph and the couple's son returned in July 2001 to the couple's residence for reasons unknown. *Id.*

80 *Id.* at 107. Mrs. Randolph contended that 'Randolph's use of cocaine caused the couple financial problems. *Id.* She also informed the police of the couple's separation and that their son had been staying with her parents for several weeks. *Id.* Randolph arrived back at the house shortly thereafter, explaining that he removed their child to a friend's house because he feared that his wife would take him out of the country again. *Id.* Randolph claimed that he did not use cocaine, but that his wife abused alcohol and drugs. *Id.* One officer accompanied Mrs. Randolph to the friend's house to recover the child. *Id.* When she and the officer returned to the Randolphs' house, she stated that there was evidence of drug use in the house. *Id.*

81 State v. Randolph, 590 S.E.2d 834, 836 (Ga. App. 2004). Upon granting consent, Mrs. Randolph led officers to an upstairs bedroom of the house, which she claimed to be 'Randolph's room. *Randolph*, 547 U.S. at 107.

powdery substance that he suspected to be cocaine.[82] The court used the confiscated evidence to indict Randolph for possession of cocaine, which he moved to suppress on the basis that the police obtained the evidence through a warrantless and unauthorized search of his home.[83] The trial court denied the motion.[84] On appeal, the Court of Appeals of Georgia reversed, and the Georgia Supreme Court upheld the Court of Appeals ruling.[85]

In *Randolph*, the Court engaged in an early discussion of the limited exceptions to the warrant requirement of the Fourth Amendment, discussing the rules elucidated from prior third-party consent cases.[86] Finding that no previous decisions specifically fit the facts in the present case, the Court turned to the underlying rationales for the decisions.[87] Considering those rationales, the Court determined that previous cases had given great significance to the underlying social expectations of each situation.[88] The Court then engaged in an analysis of *Minnesota v. Olson*,

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[82] *Randolph*, 547 U.S. at 107. After leaving the house to get an evidence bag, the officer called the district attorney's office, which advised him to stop the search and secure a warrant. *Id.* Once the officer returned to the house, Mrs. Randolph revoked her consent for the search. *Id.* The officers took the evidence, along with the Randolphs, back to the police station while they awaited a warrant. *Id.* Upon receiving a warrant, the police re-entered the premises, and found more evidence of drug use. *Id.*

[83] *Id.* Randolph contended that his wife's consent did not trump his denial of consent, and thus the search was unauthorized. *Id.*

[84] *Id.*

[85] *Id.* at 108. The Court of Appeals reversed on the reasoning that "ordinarily, persons with equal rights in a place would accommodate each other by not admitting persons over 'another's objection while he was present'" (citing State v. Leach, 782 P.2d 1035, 1038 (1989) and noting that only underlying troubled circumstances would lead to one co-tenant granting consent while the other denied consent. State v. Randolph, 590 S.E.2d 834, 836–37 (Ga. App. 2004). The Georgia Supreme Court reasoned that the consent of one co-occupant could not trump the denial of another present co-occupant because "'a present, objecting party should not have his constitutional rights ignored . . . [due to a] property interest shared with another.'" (quoting Silva v. State, 344 So.2d 559, 562 (Fla.1977)).

[86] *Randolph*, 547 U.S. at 109 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)). The Court then gave a cursory recitation of the rules elicited from prominent consent and third-party consent cases, noting that none dealt with both co-occupants being present at the time of the search. *Id.* at 109. *See also* Gold, *supra* note 25, 378–79 (discussing the inherent infringements on privacy in allowing warrant-based searches); Adrienne Wineholt, Note, Georgia v. Randolph: *Checking Potential Defendants' Fourth Amendment Rights at the Door*, 66 MD. L. REV. 475, 478–81 (2007) (discussing the exceptions to the warrant requirement arising from *Katz* and its progeny).

[87] *Randolph*, 547 U.S. at 111. *See also* Noah Stacy, Note, *Apparent Third Party Authority and Computers: Ignorance of the Lock is no Excuse*, 76 U. CIN. L. REV. 1431, 1438 (2008) (explaining that the Court turned to the "constant element" in its prior third-party consent decisions to find a commonality among the decisions).

[88] *Randolph*, 547 U.S. at 111. The Court continued by analyzing the rationale in terms of *Matlock*, stating that the rules derived there were applications of social expectations in those circumstances, but that *Matlock* was not on point because two present co-occupants

a case in which it had recently held that overnight house guests had a legitimate expectation of privacy.[89] The Court reasoned that if overnight house guests enjoyed this level of privacy, it naturally followed that a co-occupant with a property interest in the residence has an even greater expectation of privacy.[90]

Relying on the social expectations of each party in the situation, the Court stated that no caller standing at the door would enter if one tenant were inviting him or her inside, while the other tenant was telling him or her to stay out.[91] Qualifying its statement, the Court indicated that a good reason, such as fear for the co-occupant offering consent or someone else inside, could provide justification for entry, even in the

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would not have the expectation of one being able to override the other's express denial of consent if neither had superior rights over the other. *Id.* at 111–114.

[89] *Id.* at 111. In *Olson*, police suspected Olson of driving a getaway car used in a robbery and murder. 495 U.S. 91, 93 (1990). The police discovered Olson was staying with two women, whose house they surrounded. *Id.* at 94. Police telephoned the house to request that Olson come out and, without seeking permission, entered the house and arrested Olson. *Id.* After weighing twelve factors to determine a houseguest's expectation of privacy, the Court held that the social expectations of a house guest are that he will find shelter and privacy in another's home, and thus the search was unconstitutional. *Id.* at 99–100. In reaching this conclusion, the Court reasoned that a house guest should have just as much privacy as a temporary guest in a phone booth, which is "a temporarily private place whose momentary 'occupants' expectations of freedom from intrusion are recognized as reasonable" *Id.* at 99 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

[90] *Randolph*, 547 U.S. at 113 ("If that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim."). *See also* John M. Burkoff, *Search Me?*, 39 TEX. TECH. L. REV. 1109, 1132–36 (2007) (discussing thoroughly the Court's reliance on "widely shared social expectations" in reaching its decision in *Randolph* and the implications thereof).

[91] *Randolph*, 547 U.S. at 113 (stating that the caller's reluctance would be based upon a common understanding that the disputes of co-tenants must be voluntarily resolved by one another, and not by an outside authority). The Court further stated that unless there is a recognized hierarchy, such as parents and children, there is no inferior and superior co-tenant, which is reflected by domestic property law, that "'[e]ach cotenant . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants.'" (quoting R. Powell, 7 *Powell on Real Property*, § 50.03[1] (M. Wolf gen. ed. 2005)). *Id.* at 114. *See also* George M. Dery III & Michael J. Hernandez, *Blissful Ignorance? The Supreme Court's Signal to Police in* Georgia v. Randolph *to Avoid Seeking Consent to Search from all Occupants of a Home*, 40 CONN. L. REV. 53, 72–73 (2007) (discussing the societal norms and legal rules considered by the Court in arriving at the social-expectations test); Renee E. Williams, Note, *Third Party Consent Searches After* Georgia v. Randolph: *Dueling Approaches to the Dueling Roommates*, 87 B.U. L. REV. 937, 948–49 (2007) (analyzing the Court's hypothetical situation presented to illustrate the social-expectations test).

face of a disputed invitation.[92] The Court then balanced the competing individual and governmental interests in searching, finding that one occupant's consent does not tip the scales against the occupant denying consent.[93] The majority added that the state's countervailing interests in *Randolph* did not add enough to outweigh the defendant's Fourth Amendment interests.[94]

Following this logic, the five-justice majority affirmed the Georgia Supreme Court's decision, holding that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."[95] Upon reaching this conclusion, the majority carefully articulated that it was not overruling *Matlock* or *Rodriguez*, noting that its present decision applied only to a physically present objecting co-tenant, not a nearby co-tenant or a physically present non-objecting co-tenant.[96]

Despite joining the majority in part, Justice Stevens also penned a concurring opinion considering how changes in society have

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92 *Randolph*, 547 U.S. at 113 (citing Mincey v. Arizona, 437 U.S. 385, 393 (1978)). *See also* Tuerkheimer, *supra* note 63, at 808–09 (discussing other justifications police may use in order to enter a residence, regardless of third-party consent).

93 *Randolph*, 547 U.S. at 113. The Court stated "[u]nfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Camara v. Mun. Court of City & County of San Francisco, 387 U.S. 523, 536–37 (1967).

94 547 U.S. at 115. The *Randolph* Court rejected the state's contention that police expediency was a countervailing interest justifying the search. *Id.* at 115 n.5. *See also* John D. Castiglione, Hudson *and* Samson: *The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 111–12 (2007) (contemplating the balance among "individual privacy, autonomy, and dignity with the concrete interest of government in law enforcement" that necessitated the majority's holding in *Randolph*).

95 *Randolph*, 547 U.S. at 120. In holding so, the majority rejected the dissent's contention that such a holding shields domestic abusers because their denial of consent can prevent police from entering premises to protect a victim. *Id.* at 117. The majority states that so long as the police have reason to believe that such a threat exists, there is no doubt that they can lawfully enter over an objection, and while inside arrest a suspect and seize any evidence lawfully. *Id.* at 118. *See also* Abraham Tabaie, *Protecting Privacy Expectations and Personal Documents in SEC Investigations*, 81 S. CAL. L. REV. 781, 818 (2008) (commenting on the Court's holding, but also considering the wider implications of the holding based upon the "strong language" as to the reasonable expectation of privacy an individual has in their own home).

96 *Randolph*, 547 U.S. at 121. The Court justifies its assertion that the above individual "loses out" by arguing that the rule is valuable because there are two simple companion rules, one that recognizes the co-'tenant's consent when no other occupants are present, and this rule, which grants weight to a co-'occupant's denial of consent. *Id.* at 121–22. So long as the police do not remove a potentially objecting co-tenant for the purpose of circumventing his denial of consent, this simple rule is a fair counterpart to those found in *Matlock* and *Rodriguez*. *Id*.

necessitated a new approach for determining the constitutionality of a search.[97] Similarly, Justice Breyer wrote a separate concurring opinion, focused more on the problem of bright-line rules in Fourth Amendment cases.[98] In his opinion, Justice Breyer instead advocated an approach that considers the totality of the circumstances, citing the ease of measuring "[r]easonableness" by such an approach.[99] Asserting that in the instant case, the totality of the circumstances did not justify accepting one co-tenant's consent over another's refusal of consent, Justice Breyer remarked that if the circumstances should change significantly, he felt the result should as well.[100] Justice Breyer felt that special circumstances, such as domestic violence, would create an immediate reason for entry, even if one co-tenant denied consent.[101] He joined the Court's holding and opinion because of the factually specific holding and because the search in the present case would not have been justified under his totality-of-the-circumstances approach.[102]

In the first of three dissenting opinions, Chief Justice Roberts opened with a critical attack on the majority for its grant of protection on a

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97 *Id.* at 123–24 (Stevens, J., concurring) (stating that a historical inquiry is not dispositive here because there have been hierarchical changes between man and woman, and now, unlike in the eighteenth century when the Fourth Amendment was written, a female co-occupant should have rights equal to those of her male counterpart).

98 *Id.* at 125 (Breyer, J., concurring) ("[T]he Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms "unreasonable searches and seizures.").

99 *Id.* (citing Ohio v. Robinette, 519 U.S. 33, 39 (1996); Illinois v. Wardlow, 528 U.S. 119, 136 (2000) (Stevens, J., concurring in part and dissenting in part); Florida v. Bostick, 501 U.S. 429, 439 (1991); Michigan v. Chesternut, 486 U.S. 567, 572–73 (1988); Florida v. Royer, 460 U.S. 491, 506 (1983) (plurality opinion)).

100 *Randolph*, 547 U.S. at 125–26 (Breyer, J., concurring) (asserting that the circumstances here are a search solely for evidence; a clear and direct objecting party was physically present and the officers did not justify their search on grounds of possible evidence destruction).

101 *Id.* Citing the frequency of domestic violence complaints in the circumstances that are mostly likely to give rise to this issue, Justice Breyer said that law enforcement officials must be able to respond effectively when confronted with domestic violence. *Id.* at 126–27. This must be permissible to protect the victim and to obtain evidence that might not be available if the police must secure a warrant. *Id.* at 127. *See also* Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 503–04 (2009) (discussing Justice Breyer's concerns about how the *Randolph* decision would impact certain situations in which police suspect domestic violence, but both co-tenants assure them that there are no issues).

102 *Randolph*, 547 U.S. at 125–27. Justice Breyer disagreed with the dissent's contention that the majority's holding would protect criminal activity such as domestic abuse because of the narrow, fact-specific nature of the holding. *Id.* at 127.

"random and happenstance basis."[103] Arguing that the precedent established in *Matlock* was correct, he contended that the physical presence of the objecting co-tenant did not change the fact that the co-tenant already assumed the risk that the items or information would be shared with the government.[104] Chief Justice Roberts further asserted that even if there were uniform social expectations for the scenario, deciding the case on the social expectations of the parties was incorrect because third-party consent was not an issue of privacy.[105] He contended that the only way to maintain privacy, and thus not assume the risk of another co-tenant consenting to a search of one co-tenant's belongings, would be to place the items in an area over which others do not share control or access.[106]

The Chief Justice arrived at another principal issue of the third-party consent doctrine in his dissent: the effect on potential domestic violence victims.[107] He reasoned that because the abuser who prompted the police's arrival could prevent them from entering to protect the victim, the rule harms victims of domestic violence.[108] The Chief Justice

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[103] *Id.* at 136–37 (citing as an example that while a co-tenant near the door when the officers request consent could deny consent, a co-tenant who is asleep on a couch in the next room, could not).

[104] *Id.* at 128 (Roberts, C.J., dissenting). "The Chief Justice stated,

> [J]ust as an individual who has shared illegal plans or incriminating documents with another cannot interpose an objection when that other person turns the information over to the government, just because the individual happens to be present at the time, so too someone who shares a place with another cannot interpose an objection when that person decides to grant access to the police, simply because the objecting individual happens to be present.".

Id. The Chief Justice countered the majority's assertion that social expectations prevent an individual at the door from entering the premises upon the invitation of one co-tenant despite the other 'co-tenant's objection, with scenarios in which the social expectation would be for the guest to enter. *Id*.

[105] *Id.* at 130 (contending that the cases on which the majority relies for its analysis of widely shared social expectations are cases involving a legitimate expectation of privacy, and because the issue that gave rise to the present case is one of shared information, space, and materials, privacy cannot possibly be implicated).

[106] *Id.* at 135. *See* Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L.J. 997, 1021 (2008) (discussing Chief Justice Roberts's penchant for considering the practical, rather than the abstract, application of the rules of law the Court proposes; in *Randolph*, this resulted in his discussing the social expectations as a "common stalemate of two gentlemen insisting that the other enter a room first").

[107] *Randolph*, 547 U.S. at 137–39 (arguing that the majority's frequent use of the phrase "as to him" is illogical because it implies that the search would be constitutional as to someone else).

[108] *Id.* at 140–41. The Chief Justice acknowledged the majority's contention that the police would likely be able to enter under these circumstances, calling it a "consent plus a good

condemned the decision because he felt the majority's decision minimally protected victims and because the decision failed to meet its aim of adding to privacy rights.[109] Finally, he concluded by condemning the decision for its complete lack of guidance to police or lower courts.[110] The final two dissenting opinions did not significantly alter the substantive discussion of third-party consent law.[111] However, one might also say that even those opinions formulating new rules for third-party consent law did not add anything substantive to the body of law, given the subsequent holdings of lower courts.[112]

*F. Third-Party Consent Post-*Georgia v. Randolph

Immediately after the Court handed down its decision in *Randolph*, lower courts began applying the law inconsistently, relying on widely different interpretations of *Randolph* and declining to follow or distinguishing the case.[113] The most prominent of these decisions interpreting *Randolph* have come from the Seventh, Eighth, and Ninth Circuit Courts, where the courts' holdings have varied dramatically, creating a circuit split over the breadth of the *Randolph* holding.[114] While some courts have applied principles gleaned from *Randolph* to the facts

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reason" rule, which he ultimately dismissed as an unnecessary modification to "a great deal of established Fourth Amendment law." *Id.* at 141.

109 *Id.* at 141–42.

110 *Id.* at 142.

111 *Id.* at 143–45 (Justice Scalia's opinion, in which he defended originalism, seemed to be written in regard to a personal riff with Justice Stevens, who attacked originalism in his concurring opinion. Justice Thomas stated in his dissent that he would have decided the case on the precedent of *Coolidge v. New Hampshire*, where the Court held that no Fourth Amendment search occurs where the spouse of the accused voluntarily gives the police evidence of their spouse's wrongdoing in an effort to clear him of suspicion, and thus would never have arrived at the issue of third-party consent).

112 *See infra* Part III.B (discussing the flaws in the *Randolph* holding).

113 *See* United States v. Reed, 539 F.3d 595, 598 (7th Cir. 2008); United States v. Hicks, 539 F.3d 566, 570 (7th Cir. 2008) (a sampling of the many cases offering inconsistent interpretations of *Randolph* or distinguishing or declining to extend its rule); Moore v. Andreno, 505 F.3d 203, 210–13 (2nd Cir. 2007); United States v. Cos, 498 F.3d 1115, 1124 (10th Cir. 2007); State v. Hurt, 743 N.W.2d 102, 108 (N.D. 2007); Commonwealth v. Ocasio, 882 N.E.2d 341, 344 (Mass. App. 2008); State v. Por Hue Vue, 753 N.W.2d 767, 770 (Minn. App. 2008); *see also* Jason E. Zakai, Note, *You Say Yes, But Can I Say No?*, 73 BROOK. L. REV. 421, 444 (2007). (discussing the Court's holding and the likelihood of lower courts reaching differing conclusions in interpreting the holding).

114 *Compare* United States v. Murphy, 516 F.3d 1117 (9th Cir. 2008), *with* United States v. Henderson, 536 F.3d 776 (7th Cir. 2008), *and* United States v. Hudspeth, 518 F.3d 954 (8th Cir. 2008).

of their cases, others have contended that the holding in *Randolph* is fact-sensitive, and applies only to cases with a nearly-exact set of facts.[115]

In *United States v. Murphy*, the Ninth Circuit became the first circuit to interpret *Randolph*.[116] There, officers had followed Cozo and Wyman, individuals suspected of operating a methamphetamine lab, to a storage facility after having observed them purchasing ingredients used to manufacture methamphetamines.[117] Murphy responded to the officers' knocks at the door, and Officer Thompson recognized Murphy as a known methamphetamine manufacturer.[118] Murphy refused to consent to a search of the premises, so Officer Thompson performed a protective sweep of the units and left the scene to secure a warrant.[119] When Roper, the landlord of the units, arrived on the scene later that afternoon, he provided written consent for the police to search the units.[120] Upon searching, police seized evidence of methamphetamine production, which they later used as evidence at Murphy's trial.[121] Murphy attempted to suppress the evidence, challenging the protective sweep and Roper's consent to search.[122] The Ninth Circuit Court heard the case on appeal, considering the motion in light of the then-newly-decided *Randolph* case.[123]

The Ninth Circuit quickly disposed of the issue whether the protective sweep violated Murphy's Fourth Amendment rights, citing

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115 *See* Tracy Maclin, *The Good and the Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 74–75 (2008); David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 292–93 (2006) (both discussing how *Randolph*'s protection will be extended only to those in factual circumstances where an individual is physically present at the time of the search, and raises an objection at that time).

116 *Murphy*, 516 F.3d 1117.

117 *Id.* at 1119. The officers also knew that Murphy was in the storage units. *Id.* When Wyman left, they apprehended him and he informed them that Cozo was still inside the facility. *Id.* After Cozo left, police also apprehended him. *Id.* The officers then knocked on the door, and Murphy answered, holding a piece of metal pipe. *Id.*

118 *Id.* Initially, the officer had difficulty in getting Murphy to drop the pipe, but eventually he complied. *Id.*

119 *Id.* at 1119–20. From his position at the doorway, Officer Thompson observed a methamphetamine-manufacturing device operating in plain view inside the storage facility, and therefore arrested Murphy. *Id.* at 1119.

120 *Id.* at 1120. When Roper arrived, police arrested him on unrelated outstanding warrants. *Id.* Roper claimed he had given Murphy permission to reside in the facility, but had no knowledge of the methamphetamine production therein. *Id.*

121 *Id.*

122 *Id.* Initially, the district court denied Murphy's motion to suppress and entered a conditional plea of guilty while reserving the right to appeal his plea. *Id.* In light of the Supreme Court's March 2006 holding in *Georgia v. Randolph*, Murphy filed a motion to reconsider, which the district court also denied. *Id.*

123 *Id.*

United States v. Delgadillo-Velasquez for the protective sweep exception to the warrant clause.[124] On the issue of the search to which Roper consented, the court held that *Randolph* controlled and that "when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant."[125] The court reasoned that the rule from *Randolph* preventing the police from removing a co-tenant to avoid his potential objection logically extended to prevent the police from arresting a subject, and subsequently ignoring an objection that he had already made.[126]

Only weeks later, the Eighth Circuit Court announced its decision in *United States v. Hudspeth*, a case almost factually analogous to *Murphy*.[127] There, the police discovered child pornography on Hudspeth's business computer during a legal search, and arrested him for possession of child pornography.[128] Before taking him to jail, police requested Hudspeth's

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[124] United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1298 (9th Cir. 1988) (stating that so long as protective sweeps are supported by "'specific and articulable facts supporting [the] belief that other dangerous persons may be in the building or elsewhere on the premises'" they are valid) (quoting United States v. Whitten, 706 F.2d 1000, 1014 (9th Cir. 1983)). The court found the protective sweep to be valid because Officer Thompson knew Roper, who had outstanding warrants, was not accounted for at the time; because Thompson limited his protective sweep to the immediate area of storage unit, the state met its burden of demonstrating that the sweep was valid. *Murphy*, 516 F.3d at 1120–21. *See also* Audrey Benison, Matthew J. Gardner, Amy S. Manning, *Warrantless Searches and Seizures*, 87 Geo. L.J. 1124, 1164–65 n.249 (1999) (explaining the *Delgadillo-Velasquez* holding).

[125] *Murphy*, 516 F.3d at 1124. The court rejected the state's contention that the search was justified because the officer saw the methamphetamine in plain view; there is no plain-view exception to the warrant requirement except in exigent circumstances. *Id.* The court stated that Roper was "in between a landlord, who may not consent to a search, and a co-tenant, who may" (citation omitted) and was considered to have the same rights as a co-tenant for the purposes of the opinion. *Id.* at 1121 n.2. The court further held that Murphy had sufficient control over the storage unit to deny consent to search despite not having paid for the unit because Roper visited him in the unit without asking him, indicating Roper tacitly consented to Murphy's use of the unit. *Id.* at 1122–23.

[126] *Id.* at 1124–25. The court held that because of this, there was no significance in Murphy's not being present when Roper consented to the search, which was the case in *Randolph*. *Id.* at 1124. The court further stated that it saw no reason to limit *Randolph*'s holding to circumstances in which police remove the objecting co-tenant. *Id.* at 1125. "Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects." *Id.*

[127] *Hudspeth*, 518 F.3d 954 (8th Cir. 2008).

[128] *Id.* at 955. Drug enforcement officials had arrived at Hudspeth's business, Handi-Rak Services, Inc., with a search warrant, to find evidence relating to large-quantity sales of pseudoephedrine tablets. *Id.* Hudspeth agreed to talk with Missouri State Trooper Corporal Nash during the search. *Id.* The child pornography discovered on the office

consent to search his home computer, which he refused.[129] When the officers arrived at Hudspeth's home, they requested Mrs. Hudspeth's permission to search the home, without indicating that her husband had previously denied consent.[130] After a short discussion and after having failed to reach her lawyer, she acquiesced in the search.[131] The officers found more child pornography on Hudspeth's home computer.[132]

The grand jury in the district court indicted Hudspeth for possession of child pornography, and after the court denied his motion to suppress the child pornography, the court sentenced Hudspeth to sixty months' imprisonment, which he appealed.[133] On appeal, the court held that one co-tenant could permit the search of shared premises despite a non-contemporaneous objection of a non-physically present co-tenant.[134] The *Hudspeth* court reasoned that the deliberately "fine line" drawn by the *Randolph* court factually distinguished the present case from *Randolph* and made applicable a totality-of-the-circumstances test derived from

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computer, along with information volunteered by Hudspeth, led Corporal Nash to believe that Hudspeth's home computer may contain child pornography as well. *Id.*

129 *Id.* The officers transported Hudspeth to jail, and then went to his house, where his wife and children met them. *Id.*

130 *Id.* at 956. Mrs. Hudspeth initially refused the search, and Corporal Nash asked if he could take the home computer (which was located in the garage). *Id.* at 955–56. Mrs. Hudspeth indicated she did not know whether she should agree and asked Corporal Nash what the ramifications would be if she declined. *Id.* at 956. He explained that, until the police secured a search warrant, an armed, uniformed officer would be left at the house to ensure that they did not destroy any evidence. *Id.*

131 *Id.*

132 *Id.* (including CDs bearing the same markings as those found at his office, images on the hard drive that had been downloaded from websites and online newsgroups, and video of his stepdaughter semi-nude and nude that he had secretly recorded of her with a web camera).

133 *Id.* After the suppression was denied, Hudspeth entered a conditional plea of guilty to possession of child pornography, reserving the right to appeal the denial of his motion to suppress. *Id.* During appeal but prior to the appellate court filing its opinion, the Supreme Court decided *Randolph. Id.* The appellate court requested further briefing on the impact of *Randolph* on its decision, and thereafter unanimously affirmed the denial of suppression and Hudspeth's sentence, dividing over the application of *Randolph*. *Hudspeth*, 459 F.3d at 932–33. The majority held that under *Randolph*, Mrs. Hudspeth's consent did not overrule 'Hudspeth's non-contemporaneous denial of consent. *Id.* at 932. The Eighth Circuit Court granted a rehearing on the issue of whether the warrantless seizure of Hudspeth's home computer was valid under *Randolph*. *Hudspeth*, 518 F.3d at 956.

134 *Hudspeth*, 518 F.3d at 956. Because it considered none of the cases completely on-point, the court decided the case based on *Matlock* and *Rodriguez* in addition to *Randolph*. *Id.* at 959. The court considered the fact that officers in *Hudspeth* were not confronted with a "social custom" issue, because both co-tenants were not voicing competing interests at the same time, to be an important distinction from *Randolph*. *Id.* at 960.

prior third-party consent law.[135] Under the totality-of-the-circumstances test, the search passed as reasonable.[136]

In the similarly reasoned case of *United States v. Henderson*, the Seventh Circuit handed down its decision only a few months later, in August 2008.[137] There, officers responded to a domestic violence complaint to find Patricia Henderson ("Mrs. Henderson") standing in her yard.[138] Police entered the Henderson residence, and after a brief verbal exchange with Kevin Henderson ("Henderson"), Henderson told them to leave.[139] Instead, the officers arrested Henderson for domestic battery.[140] After police took Henderson to the station, Mrs. Henderson signed a consent form, agreeing to a search of the home.[141] During the search, officers discovered firearms, crack cocaine, and other items indicative of drug dealing.[142]

At his trial, Henderson moved to suppress the seized evidence, arguing that *Randolph* required such suppression because he was a present and objecting resident whose express refusal to allow a search overrode Mrs. Henderson's later consent.[143] Upon granting review, the Seventh Circuit Court of Appeals held that once police had validly arrested a co-tenant and removed him from the home, his denial of

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135 *Id.*

136 *Id.* (in weighing the factors, the court considered that Corporal Nash had voluntarily informed Mrs. Murphy of her options, and because Mr. Murphy was not present at the time of his objection).

137 536 F.3d 776.

138 *Id.* at 777. Mrs. Henderson told officers that after choking her, Henderson threw her out of the house when he learned that she had called 911. *Id.* Officers believed her story, as she had visible red marks around her neck. *Id.* The Hendersons' teenage child arrived soon after the police and provided them with a key to enter the house. *Id.* Prior to entering, Mrs. Henderson informed the police that Henderson had weapons inside and had a long history of drug and weapons-related arrests. *Id.*

139 *Id.* Upon entering, the police found Henderson sitting in the living room, at which time he told them, specifically, to "[g]et the [expletive] out of my house[,]" which the court interpreted as an objection to the search. *Id.* at 777–78. Mrs. Henderson did not hear or observe the encounter. *Id.* at 778.

140 *Id.*

141 *Id.* During the course of the search, at which Mrs. Henderson was present, she signed an additional consent form for the officers to search the Hendersons' vehicle, where they discovered additional crack cocaine. *Id.*

142 *Id.* (finding the following items: crack cocaine, drug-dealing paraphernalia, four handguns, a shotgun, a rifle, a machine gun, a machete, a crossbow, live rounds of ammunition, and an M-1000 explosive device).

143 *Id.* The district court agreed as to the house, and suppressed all evidence found therein. *Id.* The government appealed the decision, and Henderson moved to dismiss the government's appeal and cross-appealed as to the search of the car—the latter of which he later voluntarily dismissed. *Id.* at 778 n.1. After both parties filed briefs, the appellate court denied the motion to dismiss. *Id.* at 778.

consent was no longer an effective bar to another co-tenant's consent.[144] Narrowly distinguishing the case from *Randolph*, the court reasoned that parties denying consent do not have an absolute veto, and they cannot expect their denial of consent to be effective for an indeterminate time after they leave.[145]

While these cases all received review from their respective circuit courts because of *Randolph*, the decisions confirm the prediction that courts would continue to apply prior third-party consent law.[146] While the *Randolph* decision did not purport to overrule the previous third-party consent decisions, commentators and lower courts have erroneously further limited *Randolph*, rendering the decision almost useless as a precedential opinion.[147] The question thus arises how courts should resolve the problems created, or left unanswered, by *Randolph* and appellate court interpretations thereof.[148]

III. ANALYSIS

These questions of how to resolve the issue with third-party consent law are not ones that courts can easily answer by looking to *Randolph* itself.[149] By circumventing and limiting the breadth of *Randolph*'s holding, lower courts have eroded the potential for a clear standard of third-party consent law founded in *Randolph*.[150] This is troubling

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144 *Id.* at 785. The court viewed the physical presence and immediate objection to the other co-tenant's consent as indispensable to the *Randolph* decision, and thus, found *Matlock* and *Rodriguez* the more apt law to follow. *Id.* at 783.

145 *Id.* at 785. Noting that the *Randolph* court went out of its way to limit the holding to the specific factual scenario, the court found the position of the Ninth Circuit and dissent untenable because it required expanding the *Randolph* holding to other scenarios, which goes against the expressly narrow holding. *Id.* at 784–85.

146 Madeline E. McNeeley, Note, *Constitutional Law – Search and Seizure – Validity of Consent to Warrantless Search of Residence When Co-Occupant Expressly Objects*, 74 TENN. L. REV. 259, 274 (2007) (stating that the Supreme Court would be well-advised to hear another case on the subject, as *Randolph* offers almost no precedential value because it is exceedingly narrow).

147 *See supra* notes 127 and 137 (examples of courts narrowing the decision even further); *see also* Monique N. Bhargava, Note, *Protecting Privacy in a Shared Castle – The Implications of* Georgia v. Randolph *for the Third Party Consent Doctrine*, 2008 U. ILL. L. REV. 1009, 1010–11 (2008) (stating that the decision is based on a "social expectations" analysis that is applicable only to set circumstances, thus allowing courts to minimize the impact of the case).

148 *See infra* Parts III, IV (contemplating the question, and the ideal approach to resolve said problems).

149 *See infra* Part III.B (explaining the shortcomings of the *Randolph* decision, particularly the faults of the social-expectations test on which *Randolph* is predicated).

150 *See supra* Part II.F; *infra* Part III.A (discussing the current split among Circuit Courts of Appeals and the accompanying rationales by each court for granting varying breadth to the *Randolph* holding); *see also* Godfrey & Levine, *supra* note 28, at 746–47 (stating that because

because a clear and concise standard would be helpful to police officers and courts.[151] Only the Ninth Circuit Court of Appeals held that *Randolph* could apply to cases with factual dissimilarities, while the other circuits distinguished their cases based on dissimilarities.[152] Because outcome-determinative factual distinctions prevent reconciling the circuit courts of appeals' decisions, the rationales each lower court offered for distinguishing their cases from one another and *Randolph* are especially interesting.[153]

Addition to the current framework by *Randolph* and the appellate interpretations thereof only further convolutes the already complicated body of third-party consent law.[154] This is especially disappointing given that the majority in *Randolph* began to articulate what could have been the basis for a sensible and concise reasonableness balancing approach to third-party consent, but instead chose not to use this approach as the basis for its holding.[155] Given the concerns plaguing the *Randolph* decision, further Supreme Court clarification of third-party

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Randolph applies only in certain limited factual circumstances, and because there are so many bases for distinguishing the case, courts may have difficulty in determining when or if it applies).

151 *See infra* Part III.B (indicating the importance of an easily accessible standard for police officers and courts to apply).

152 *See supra* Part II.F (discussing the Ninth Circuit Court of Appeal's rationale for extending *Randolph* to its facts, and the Seventh and Eighth Circuit Courts of Appeals' rationales for distinguishing *Randolph* from their facts).

153 Without the possibility of distinguishing the cases, there is no danger that future interpretations will use the factual differences between the cases to explain away the different outcomes, meaning that there is a bona fide dispute among the courts. *See Henderson*, 536 F.3d at 783 (stating "*Hudspeth* and *Murphy* are materially indistinguishable from each other and from this case[,]" but all three cases bear more similarity to *Matlock* and *Rodriguez* than they do to *Randolph*).

154 *See* Bhargava, *supra* note 147, at 1040 ("[T]he Supreme Court succeeded in producing a decision which inexplicably deviated from previous Fourth Amendment jurisprudence and further complicated the third-party consent doctrine for courts and police.").

155 *See* Georgia v. Randolph, 547 U.S. 103, 114–17 (2006).

> Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly, in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches, the cooperative 'occupant's invitation adds nothing to the 'government's side to counter the force of an objecting 'individual's claim to security against the 'government's intrusion into his dwelling place.

Id. at 114–15 (citation omitted) (significantly, the Court's discussion of the circumstances with reference to how the scales do not tip in either side's favor "without more"). The Court instead used the social-expectations test. *Id.*

consent law is necessary.[156] A future decision by the Court will need to establish a test that lower courts can easily apply and that police officers, seeking to determine if they can conduct a search, can easily understand.[157]

To the end of creating such an easy-to-apply test, this Part analyzes the current state of third-party consent law following *Randolph* and the appellate cases interpreting it.[158] Part III.A considers the appellate court decisions, specifically flaws in *Randolph* that the decisions illuminated, and the strengths of each lower court decision.[159] Part III.B concentrates on these flaws, analyzes the viability of the social-expectations test, and evaluates it against the reasonableness test the *Randolph* majority discussed in dicta.[160] Part III.C addresses the substance of countervailing public policy, the influence these concerns have had on courts, and the accuracy of scholarly concerns regarding the public policy issues.[161] Finally, Part III.D summarizes the current law and discusses briefly how third-party consent law should continue to develop.[162]

A. Appellate Court Decisions

The contradictory appellate decisions of *Murphy*, *Hudspeth*, and *Henderson* only increased uncertainty of the *Randolph* standard.[163] The Seventh and Eighth Circuits, when deciding their cases in light of *Randolph*, focused on the factual basis for *Randolph's* holding rather than the rules upon which the Court predicated its holding.[164] This focus is

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156 *See infra* Part III.A (discussing the ease with which courts have limited *Randolph* by distinguishing it and the flaws with the social-expectations analysis).

157 *See Randolph*, 547 U.S. at 120–21 (discussing the "practical value" of simple and clear rules because they will be less time consuming to interpret for courts and police officers in the field).

158 *See infra* Parts III.A–D (critiquing the areas of third-party consent law impacted by the *Randolph* decision).

159 *See infra* Part III.A (discussing the Seventh, Eighth, and Ninth Circuit cases creating the split).

160 *See infra* Part III.B (analyzing the flawed social-expectations test, and indicating where these flaws could be corrected with the reasonableness balancing approach).

161 *See infra* Part III.C (analyzing the law of third-party consent's effect on individual privacy and domestic violence).

162 *See infra* Part III.D (providing a brief conclusion and look forward into third-party consent law).

163 *See infra* Part III.A (analyzing the ways in which these appellate decisions arrived at substantively different conclusions when interpreting the same legal rules, and almost identical factual scenarios).

164 *See Henderson*, 536 F.3d at 785 (neglecting to answer the philosophical question of what social expectations in the factual circumstances would dictate because *Randolph* "went out of its way to limit its holding to the circumstances of the case: a disputed consent by two then-present residents with authority."); *Hudspeth*, 518 F.3d at 960 (ignoring the

understandable, given that the Court explicitly limited its holding to narrow factual circumstances to avoid overruling *Matlock* and *Rodriguez*.[165] However, these lower courts placed such an emphasis on the limited nature of *Randolph*'s holding that they refused to apply the *Randolph* standard to any other factual circumstances.[166]

The *Hudspeth* majority illuminated another flaw in the *Randolph* rule—that police could remove an objecting co-tenant and later obtain consent from another co-tenant.[167] This would be permissible because the objecting co-tenant would no longer be physically present, as required by *Randolph*, to renew his objection.[168] This application of *Randolph* allows police to isolate a co-tenant who they anticipate will not object to the search and to secure that co-tenant's consent away from the objecting co-tenant.[169] In *Hudspeth*, the police took this rule a step further, arresting Hudspeth away from the premises after he objected to the search and later requesting his wife's consent to a search.[170] As illustrated by *Hudspeth*, police officers may exploit a fact-sensitive rule and circumvent its intent by acting in ways that tailor factual circumstances so as to avoid the rule.[171]

The *Randolph* Court attempted to prevent circumvention of the law by adding social expectations to the fact-sensitive inquiry.[172] However,

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principles of *Randolph* because the facts do not fit the "fine line" drawn by the Court in *Randolph*).

[165] *Randolph*, 547 U.S. at 121. Instead, the Court fashioned a rule that it felt would serve as a companion rule to *Matlock* and *Rodriguez*. *Id.*

> [W]e have to admit that we are drawing a fine line [with the holding] . . . there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

Id. at 121–22.

[166] *See Henderson*, 536 F.3d at 784 ("[T]he specific limiting language in the majority opinion itself, convince[s] us that *Randolph*'s holding ought not be extended beyond the circumstances at issue there."); *see also Hudspeth*, 518 F.3d at 960 (arguing that the "fine line" drawn by *Randolph* requires that the defendant be both physically present and voice an immediate objection, otherwise *Randolph* is inapplicable).

[167] *See Hudspeth*, 518 F.3d at 960.

[168] *See id*.

[169] *See id.* at 959 (reaffirming the *Randolph* principle that a nearby co-tenant who does not participate in the dialogue "loses out" on being able to deny consent).

[170] *Id.* at 955–56. Hudspeth's wife was unaware that her husband had denied the police consent to search when they asked for her consent while at the Hudspeth residence. *Id.*

[171] *See infra* Part IV (proposing a balancing test to replace the current fact-sensitive rules that can be easily exploited or misunderstood by police and courts).

[172] *See supra* Part II.E (discussing the Court's addition of social expectations, which would require courts to consider whether the typical caller would enter in light of the circumstances, to *Randolph* to prevent circumvention of the law).

decisions of the Seventh and Eighth Circuit Courts of Appeals reveal the flaws of the social-expectations test, with majority and dissenting opinions in each that found varying social expectations for different factual scenarios.[173] If one court cannot surmise the same social expectations from the facts before it, it is difficult to expect uniform application by different courts throughout the country.[174] These differences also illustrate another problem with *Randolph*—even with its "bright line" holding, the Court did not clarify whether the objecting co-tenant's geographic location affects his power to object.[175]

Only the Ninth Circuit granted *Randolph* precedential value, and while this decision was favorable for its broadness, it is not likely to become the majority view because it interpreted *Randolph* expansively.[176] This decision would be favorable because of its willingness to grant power to one co-tenant's denial of consent without distorting the analysis by considering geographic location or other factors not contemplated by *Randolph*.[177] However, the *Murphy* interpretation has its own flaws, mostly because of the emphasis it places on the Court's

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[173] *See Henderson*, 536 F.3d at 786–87 (Rovner, J., dissenting) (arguing that his colleague's are incorrect in concluding that once an objecting co-tenant is no longer present, a guest would not consider the absent co-tenant's objection. Rovner "doubt[s] that a social visitor would feel welcome in a shared residence once the visitor has been told by one of the tenants to stay out, especially in the profanity-laced manner employed by Henderson[,]" contending that only in a Hobbesian world would social obligations be limited to what an individual was present to physically enforce); *see also Hudspeth*, 518 F.3d at 964 (Melloy, J., dissenting) (arguing that the expectation of privacy that one enjoys in one's own home is not contingent on geographic location, as the majority contends it is).

[174] *See infra* Part III.B (discussing the shortcomings of the social-expectations test, including the likelihood that the standard will vary greatly in different localities, due to cultural norms, among other things, affecting social expectations).

[175] *See Hudspeth*, 518 F.3d at 963 (Melloy, J., dissenting). Melloy argues that the majority in *Hudspeth* distinguished *Hudspeth* from *Randolph* because the defendant in *Hudspeth* was not physically present, when *Randolph* never explicitly required the defendant be physically present as a prerequisite for withholding consent. *Id.* Rather, the dissent claims, "the Supreme Court's language reflects a geographic mandate, but rather a conscious effort to '"'decide the case before [it], not a different one.'"' *Id.* (quoting *Randolph*, 547 U.S. at 120 n.8). *See also Henderson*, 536 F.3d at 786 (Rovner, J., dissenting) ("My colleagues conclude that Henderson's valid arrest and removal from the scene sapped his objection of its force and allowed the police to search the house with Patricia Henderson's consent. In my view, this interprets the admittedly limited *Randolph* decision too narrowly.").

[176] *See* Craig M. Bradley, *Supreme Court Review: The Case of the Uncooperative Husband*, 42 TRIAL 68, 68 (June 2006) (discussing how the Court went out of its way to stress the narrowness of its holding).

[177] *See* Williams, *supra* note 91, at 958–59 (contending that the broad view of *Randolph* is favorable because it is consistent with prior Supreme Court third-party consent jurisprudence, and because it preserves the holdings of *Matlock* and *Rodriguez*, while still granting *Randolph* some effect).

social-expectations test.[178] Part III.B discusses the flaws of courts engaging in a social-expectations analysis similar to the *Randolph* Court's and centers around the subjectivity of social expectations and the difficulty of establishing uniform social expectations.[179]

B. Reasonableness Dicta and the Social-Expectations Test

The *Randolph* Court's attempt to wedge *Randolph* as a companion to *Matlock* and *Rodriguez* failed because of the difficulty the lower courts had in discerning *Randolph*'s standards and the ease lower courts have had in distinguishing factually similar cases from *Randolph*.[180] Instead, the Court should have advocated a reasonableness approach deriving from the factors it implicitly presented while discussing the circumstances in which police may be able to enter premises without consent.[181] Had the Court used this as the basis for a reasonableness analysis in its opinion, it would have created a simple and consistent standard for courts and law enforcement officials to determine the validity of third-party consent.[182]

Rather than focusing on the analysis of reasonableness, the majority in *Randolph* based its decision on a flawed analysis of social expectations.[183] In an effort to bolster the social-expectations test, the majority and commentators have pointed to its use in prior third-party

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[178] *See Murphy*, 516 F.3d at 1119; *see also infra* Part III.B (discussing the flaws of the social-expectations analysis as employed by the *Randolph* Court).

[179] *See infra* Part III.B (analyzing the Court's attempt to bolster its rule in *Randolph* with the social-expectations test, which has proven unsuccessful due to the subjectivity and uncertainty of social expectations).

[180] *See supra* Part II.F (discussing the facts and holdings of *Hudspeth* and *Henderson*, and the ease with which the courts distinguished those cases from *Randolph* by referring to the *Randolph* Court's desire to draw a bright-line rule applicable to very limited factual circumstances).

[181] *See generally Murphy*, 516 F.3d at 1124–25. Given that the Ninth Circuit has been the only court unwilling to avoid presumptuously by arbitrarily limiting *Randolph* and the only court willing to extend *Randolph* to facts deviating even mildly beyond its holding, this seems to be the only way to give the *Randolph* decision precedential value. *Id.*

[182] *See generally Randolph*, 547 U.S. at 142 (Roberts, C.J., dissenting) (discussing how the "case-by-case" standard that the majority uses will soon become analogous to *Matlock* and *Rodriguez* and suggesting that a better standard is needed to avoid a scenario similar to *Randolph*, where "[t]he end result is a complete lack of practical guidance for the police in the field, let alone for the lower courts").

[183] *See* Bhargava, supra note 147, at 1021 ("The 'social expectations' analysis applied by the majority is largely unsupported by evidence and does not provide the necessary foundation for the Court's conclusions."); *see also* Dery & Hernandez, *supra* note 91, at 84 ("The unintended legacy of *Randolph* could thus be distrustful citizens and willfully ignorant police, the very antithesis of the values of the Fourth Amendment.").

consent cases, noting its effectiveness in those cases.[184] What the majority fails to note, however, is that the Court previously had not used the social-expectations test for the issue of consent.[185]

The social-expectations analysis falters given the myriad of subtleties that can inform one's social expectations, which would cause difficulty in administering a social-expectations test without subjectivity.[186] One of the greatest concerns surrounding social expectations is that they vary according to local culture, so the outcomes of cases with the same facts as *Randolph* could vary from state to state.[187] As the lower courts have demonstrated, even the same court can reach widely divergent conclusions about social expectations, so it is difficult to see how the test could receive uniform application nationwide.[188] While there are some positives in the social-expectations analysis, it is puzzling that the Court based its holding on social expectations rather than on a more concrete and comprehensive analysis.[189]

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184 *Randolph*, 547 U.S. at 111 ("The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules."); *see also* Williams, *supra* note 91, at 958–59 (discussing the usage of the test in *Matlock* and *Rodriguez*, and advocating the *Randolph* social-expectations test, as it "is in "harmony" with" those cases).

185 *Randolph*, 547 U.S. at 130–31 (Roberts, C.J., dissenting). "[T]he social-expectations concept has not been applied to all questions arising under the Fourth Amendment, least of all issues of consent." *Id.* at 130. Chief Justice Roberts asserts that the Fourth Amendment cases the majority cites for supporting the notion that social expectations are an element into a Fourth Amendment reasonableness inquiry actually refer to a "legitimate expectation of *privacy*." *Id.* at 131 (citation omitted); *see also* Eden, *supra* note 54, at 201 (noting that the social-expectations analysis's complete absence from the *Matlock* and *Rodriguez* decisions suggests that the analysis is not so crucial to Fourth Amendment law).

186 *Randolph*, 547 U.S. at 131 (Roberts, C.J., dissenting) ("A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by a variety of labels—courtesy, good manners, custom, protocol, even honor among thieves."); *see also* Rubenfeld, *supra* note 27, at 108 ("The pertinent social expectations will almost always turn on the specific identity of the caller, including his relationship to and knowledge of the individual claiming a privacy violation."); Eden, *supra* note 54, at 200 (stating that the social-expectations test has an uncertain foundation, and that the application of the analysis is at best an educated guess as to how modern co-tenants interact).

187 *See* Spencer, *supra* note 27, at 850–51. Spencer anticipates this problem with the social-expectations test, and suggests that the Supreme Court propose "baseline" decisions that detail the most basic privacy expectations, rather than attempting to dictate or determine the social expectations of each state. *Id.* However, this would require local courts to interpret their own constitutions independent from federal provisions, instead of just duplicative, and would add their own state's norms to the equation. *Id.* at 851.

188 *See supra* Part III.A (discussing the disagreements between justices in the same lower court cases as to what the social expectations in each circumstance dictated).

189 *See* Gold, *supra* note 25, at 402–04 (arguing that *Randolph*'s social-expectations analysis has provided an important compliment to *Matlock* and *Rodriguez* because it considers

The Court alluded to the ability of courts and police officers to consider social expectations as one of several inquiries before searching.[190] Rather than explain some of these other variables, the Court should have enumerated additional factors and incorporated them into a reasonableness test that considered social expectations as one factor for evaluating consent.[191] Commentators and courts alike have become understandably fixated on the murkiness of social expectations, so a different standard is necessary.[192] By emphasizing the social-expectations test, the *Randolph* holding allows lower courts to decide cases without considering objective criteria, which ultimately could result in courts subverting the *Randolph* standard.[193]

However, treating social expectations as only one element of the inquiry would minimize the potential for subjectivity.[194] With a multi-factored reasonableness test, a court would grant weight to other pertinent factors the current approach ignores.[195] Granted, in this analysis subjectivity would still be present, but the likelihood that one individual's aberrant social expectations would create an improper

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modern shared living arrangements and maintains the "owner" of each room's subjective intent to privacy).

190 *See Randolph*, 547 U.S. at 115–17 (discussing additional factors, such as hot pursuit, protection of domestic violence victims, protecting the safety of police officers, and other factors that would justify police entering the premises without a warrant).

191 *See infra* Part IV (proposing a reasonableness test that retains, yet minimizes, social expectations and considers other pertinent factors).

192 *See* Godfrey & Levine, *supra* note 28, at 746–47 (engaging in a prolonged discussion of the uncertainty of the specific social expectations present in *Randolph*).

193 *See* Zakai, *supra* note 113, at 449 (asserting that, in addition to objective reasons for distinguishing *Randolph*, lower courts are finding other reasons to distinguish *Randolph*, as they are concerned about its public policy implications).

194 *See* Peter B. Rutledge, *Miranda and Reasonableness*, 42 AM. CRIM. L. REV. 1011, 1018 (2005).

> [O]ne tempting alternative [is] a blended approach. That is to say that the inquiry is ultimately an objective one but the subjective considerations are relevant to the inquiry. Such an approach holds open the balance of operating as a type of "'meta-principle'" that allows for all of the preceding values to factor into the mix and to allow a court to choose among them in a given case.

Id.

195 *See Randolph*, 547 U.S. at 140 (Roberts, C.J., dissenting). Other factors generally fall under the categories of the likelihood of harm to governmental interests by not conducting the search and the probability of harm to individual interests by conducting the search. *Id.* In balancing competing individual and governmental interests in conducting searches, the Court explicitly stated that exigent circumstances—such as hot pursuit, protecting the safety of the police officers, imminent destruction to building, likelihood that suspect will imminently flee, expedient law enforcement—with additional reason for conducting the search—including disputed permission, protection of one's home, and social expectations—can help determine the reasonableness of conducting a search. *Id.*

outcome is minimized.[196] The appropriate method for analysis must also consider other concerns elucidated by the appellate courts; therefore, Part III.C discusses the central areas of public policy concerns.[197]

C. Public Policy Concerns

Shortly after the Supreme Court handed down its decision in *Randolph*, commentators advocating various public policy interests began expressing concern about the decision; these concerns have been exacerbated by the appellate courts' application of *Randolph*.[198] The balancing test that the *Randolph* Court discusses in passing addresses two primary public policy concerns in third-party consent cases: (1) individual privacy rights and (2) governmental interests.[199] In Fourth Amendment cases, individual privacy rights typically arise because of a person's expectation that the government will not unreasonably intrude upon his or her home.[200] Governmental interest typically is to protect domestic violence victims, which is a palpable concern because of the staggering number of reported intimate-partner violence incidents in the United States.[201]

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196 *See generally* Cyrus E. Dugger, *Rights Waiting for Change: Socio-Economic Rights in New South Africa*, 19 FLA. J. INT'L L. 195, 275–76 (2007) (citing United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947)). Dugger generally discusses Judge Hand's belief that incorporating objective elements, such as probability, would result in a more objective reasonableness standard. *Id.* This is true primarily because the additional objective variables minimize the impact of each nonobjective variable. *Id.* Therefore, one miscalculated variable will not be as damaging to the entire analysis. *Id.* The analysis still has potential for subjectivity due to the subjective variables, but the objective variables strengthen the analysis's objectivity. *Id.*

197 *See infra* Part III.C (addressing the concerns of protecting individual privacy rights and potential domestic violence victims).

198 *See infra* Part IV.C (discussing commentator criticism of *Randolph*'s treatment of important public policy concerns).

199 547 U.S. 103, 115–116 (2006) (phrasing these competing interests initially as the "individual's claim to security against the government''s intrusion into his dwelling place," while simply describing governmental interests as something more than a "generalized interest in expedient law enforcement").

200 Wilson v. Layne, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."); *see also* Warren & Brandeis, *supra* note 25, at 193. In one of the earliest discussions of what privacy entails, Warren and Brandies advocate privacy as "the right to be let alone." *Id.*

201 *See* Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, NATIONAL INSTITUTE OF JUSTICE iii (2000), http://www.ojp.usdoj.gov/nij/pubs-sum/181867.htm. According to a 1995–96 study, approximately 32.6 percent of all Americans are physically or sexually assaulted by an intimate partner at some point in their lives. *Id.*; Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey*, NATIONAL INSTITUTE OF JUSTICE iv (2000), http://www.ojp.usdoj.gov/nij/pubs-

The *Randolph* Court did an insufficient job of protecting individual privacy rights because it left too great a potential for police to circumvent the protection *Randolph* supposedly offers.[202] Both the *Hudspeth* and *Henderson* courts have demonstrated this in their conclusions that *Randolph* protects only a physically present objecting co-tenant.[203] Under this interpretation, there is too great a chance that police will simply work around individual rights by separating co-tenants before they can voice objections.[204] Further, the standard does nothing to protect co-tenants in any other scenarios, which is cause for concern in light of the erosion of privacy rights in third-party consent cases before *Randolph*.[205]

One positive result courts can achieve by applying *Randolph* is increased protection for domestic violence victims.[206] This is true despite the majority's holding that the decision "has no bearing on the capacity of the police . . . to protect a resident from domestic violence" because the Court performs the important task of clarifying existing means of police protection for domestic violence victims.[207] Still, given the high

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sum/183781.htm. More than two million men and women are physically assaulted by an intimate partner in the United States each year. *Id.*

202 *See* Dery & Hernandez, *supra* note 91, at 55 (stating that the Court's bright-line rule relies too heavily on a potential defendant's physical location, and could allow police to remove a potential objector from the scene so long as there is no evidence that that was the purpose of the removal).

203 *See supra* Part II.F (discussing the limited holdings of *Hudspeth* and *Henderson*).

204 *See* Dery & Hernandez, *supra* note 91, at 82 ("The differing results in *Randolph* and *Matlock* thus send a strong signal to police—should you wish to enter a home without a warrant, isolate the most likely potential objector so that you may ask permission from those more willing to allow entry.").

205 *See Randolph*, 547 U.S. at 134 n.1 (Roberts, C.J., dissenting).

> [T]he differences between the majority and this dissent reduce to this: Under the majority's view, police may not enter and search when an objecting co-occupant is *present at the door*, but they *may* do so when he is asleep in the next room; under our view, the co-occupant's consent is effective in both cases. It seems a bit overwrought to characterize the former approach as affording great protection to a man in his castle, the latter as signaling that "'the centuries of special protection for the privacy of the home are over.'"

Id. (citation omitted); *see also* Wright, *supra* note 40, at 1871 (discussing the ease with which police could circumvent the *Matlock* rule by removing a potential objector from the scene to avoid an objection and obtaining consent to search the premises from another party, signifying a weakening of individual privacy rights).

206 *See infra* notes 207–09 and accompanying text (noting how the Court clarified how the standard could interact with rules of exigency, and this alone will provide some guidance to police officers in the field).

207 *Randolph*, 547 U.S. at 104. The majority contends that in asserting that the holding would harm domestic violence victims, the dissent conflates when the police may enter without committing a trespass with when the police may enter to search for evidence. *Id.*

bar for meeting the exigency standards, these protections still may not be enough.[208]

Some scholars have expressed further concern because *Randolph* does nothing to protect domestic violence victims when it is not clear to police that domestic violence is occurring.[209] Because *Randolph* deals with scenarios in which police interact with the potential domestic violence parties and provides police an appropriate standard to satisfy in order to enter to stop domestic violence, it gives the police ample entry opportunity to stop domestic violence from occurring if they have reason to be aware that it is occurring.[210]

It is unreasonable to direct at *Randolph* the grievance that police may not always recognize domestic violence as it is occurring, when it is simply a natural result of the fact that police work involves human error, and thus is imperfect.[211] Given that protecting potential victims of domestic violence is not the only aim of third-party consent law, the courts are forced to accept compromises that provide substantial protection to domestic violence victims while still protecting an

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[208] Vale v. Louisiana, 399 U.S. 30, 34 (1970) (holding that a search may be conducted only when the exigency is absolutely compelling or certain, and not when it is merely likely or even probable).

[209] *See Randolph*, 547 U.S. at 140 (Roberts, C.J., dissenting). In his dissent, Chief Justice Roberts objects to the majority's rule because he feels it would be more logical for the rule to address domestic-violence concerns directly by always allowing one tenant's consent to search to trump another tenant's objection, rather than have exceptions to the rule. *Id*. Roberts's dissent proves unpersuasive, as he provides little substantive rationale to explain his issue with the exception, instead attacking it for "alter[ing] a great deal of established Fourth Amendment law." *Id.; see also* Tuerkheimer, *supra* note 63, at 808–09 (objecting to *Randolph* because it does not allow one co-tenant's consent to trump another co-tenant's objections to allow police to always enter, which would always protect domestic violence victims, but rather, requires a showing that police have reason to believe domestic violence is occurring or is likely to occur before entering to protect domestic violence victims); Zakai, *supra* note 113, at 452. Zakai argues that the *Randolph* standard may cause police to hesitate before searching a premise when it is not clear whether domestic violence is occurring, because it would then not be clear whether exigent circumstances were present. *Id.* Zakai bases this on Chief Justice Roberts's dissent. *Id*.

[210] Rasch-Chabot, *supra* note 78, at 516 ("[S]ufficient tools . . . previously held constitutional under the Fourth Amendment, remain at the disposal of law enforcement to aid them in effectively protecting victims of domestic violence.").

[211] *See generally* Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1199 (1995) (examining human police error and the impossibility of police administering the law perfectly); Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 ST. THOMAS L. REV. 547, 552–67 (1997) (discussing how human error impacts police work, when it should be tolerated, and how it can be minimized but not completely eliminated); Jonathan B. Zeitlin, *Voluntariness with a Vengeance:* Miranda *and a Modern Alternative*, 14 ST. THOMAS L. REV. 109, 110 (stating that, given human nature, it is unreasonable to expect police officers to make no errors when investigating crimes).

individual's right to privacy.[212] As argued, the reasonableness balancing approach would be the optimal approach to third-party consent, as it would address current public policy concerns raised by the *Randolph* standard by granting sufficient protection to the two countervailing interests.[213]

D. The Future of Third-Party Consent Law

It is difficult to predict how the Court will treat the *Randolph* decision if one of these many lower court cases receives the grant of certiorari.[214] Because of difficulty lower courts have had interpreting the requirements of the bright-line rule, the likelihood of courts misapplying the social-expectations test, and the difficulty the test presents to police officers in the field, a new cohesive standard is necessary.[215] It seems logical that the Court would adopt a reasonableness test similar to the one in *Randolph*'s dicta because of the ease with which the lower courts could apply it and its positive treatment of public policy concerns.[216] Clearly, the scant mention of factors in *Randolph* does not even begin to contemplate how a test would operate or what variables it would consider, but it will be interesting to see how the Court credits the origins of such a test, if it arrives at one.[217]

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[212] *See* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995) ("[W]hether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" (quoting Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 619 (1989))); *see also* Zakai, *supra* note 113, at 449 (noting the importance in Fourth Amendment cases of balancing governmental interests with individual privacy interests to adequately protect both).

[213] *See supra* notes 198–210 and accompanying text (explaining the precise concerns and the merits of each such concern).

[214] *See Randolph*, 547 U.S. at 141 (Roberts, C.J., dissenting) ("Perhaps one day, as the consequences of the majority's analytic approach become clearer, today's opinion will be treated the same way the majority treats our opinions in *Matlock* and *Rodriguez*—as a 'loose end' to be tied up.") (citation omitted); *see also supra* Parts II.F, III.A (discussing the lower court cases, the conflicts between the cases, and the problems with each, all of which justify the Court revisiting this case).

[215] *See supra* Parts III.A–B (enumerating the various factors that have made *Randolph* difficult to apply).

[216] *See infra* Part IV.A (discussing the benefits of such a test as compared to the social-expectations analysis the Court conducts in *Randolph*).

[217] Specifically, the question is whether the Court will show a reluctance to admit that *Randolph* was poorly decided and attempt to expand its holding by modifying the reasonableness balancing approach or whether it will expressly overrule *Randolph* with such an approach.

IV. CONTRIBUTION

The approach to third-party consent law under *Randolph* and its predecessors offers multiple convoluted approaches, making it difficult for courts and law enforcement officials to determine which rule governs under the particular circumstances confronting them.[218] A reasonableness approach considering factors similar to those discussed by the Court's dicta in *Randolph* can best address the overly complicated and exceptions-laden patchwork of third-party consent law and resulting inconsistent applications of it.[219]

In establishing such a reasonableness test, four prongs would aid in producing an objective and accurate balancing test.[220] Those prongs are: (1) the likelihood of harm to governmental interests by not conducting the search; (2) the probability of harm to individual interests by conducting the search; (3) the likelihood of harm to individuals by not conducting the search; and (4) the social expectations of the situation.[221] Such a test would grant weight to the governmental and individual interests, and also consider social expectations which would bolster factors otherwise ignored by the other prongs of the test.[222]

This section considers the proposed approach, beginning in Part IV.A with a discussion of the benefits to courts and police of replacing the current mix of rules with a single reasonableness balancing approach.[223] Part IV.B then considers the critiques offered to the *Randolph* standard and the proposed approach to addressing these concerns.[224] Finally, Part IV.C concludes with an explanation of the benefits of the reasonableness balancing approach on public policy concerns raised by third-party consent law.[225]

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218 *See supra* Parts II.C–F (explaining the approaches of the landmark third-party consent cases and the circuit court cases interpreting *Randolph*).

219 *See supra* Part III.B (critiquing the *Randolph* holding and encouraging the adoption of a balancing approach considering factors discussed by the majority in *Randolph*).

220 *See supra* notes 189–94 and accompanying text (contemplating the need for multiple factors to minimize the inherent subjectivity in each such factor).

221 *See supra* notes 190–95 and accompanying text (discussing the factors discussed by the Court in *Randolph* and advocating similar tests composed of said factors).

222 *See supra* notes 173–79 and accompanying text (discussing the need to minimize the subjectivity of the social-expectations test and the best means of doing so).

223 *See infra* Part IV.A (evaluating the proposed reasonableness approach against the social-expectations test and enumerating the benefits of the former approach).

224 *See infra* Part IV.B (discussing the critiques offered by the lower courts and Chief Justice Roberts' dissent in *Randolph*).

225 *See infra* Part IV.C (discussing the benefits of the reasonableness approach to combating domestic violence and preserving individual privacy).

A. Practical Benefits of the Reasonableness Approach to Courts and Police

Current fact-sensitive approaches are failing because the law is disjointed and difficult for police and courts to apply.[226] This difficulty, as it relates to *Randolph* and its progeny, is caused partially by the social-expectations standard utilized in *Randolph*.[227] The social-expectations standard is too subjective for use as a legal standard because widely divergent social expectations inform each justice who considers the case.[228] Adding to the difficulty is that the current rules vary based upon the factual circumstances; *Randolph* is a prime example of this, with its limited holding that applies only to a very specific factual scenario.[229] These issues with third-party consent law have caused difficulties in administering the law and protecting public policy interests, and thus, necessitate a new clear-cut standard.[230] In order to implement such an approach, the Supreme Court would need to grant certiorari to one of the aforementioned cases from the Seventh, Eighth or Ninth Circuits.[231] In that reconsideration, the Court would be advised to overrule virtually the entire body of third-party consent law by instituting a reasonableness approach for all situations involving third-party consent.[232]

The proposed reasonableness balancing test is easier for courts and police to apply given that it is more intuitive and relies less on subjective determinations.[233] A reasonableness approach would ease the burden on lower courts by providing one cohesive standard regardless of the

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[226] *See supra* Part III.B (commenting on the difficulty for courts and police to apply the current law).

[227] *See supra* Parts III.A–B (explaining the difficulties caused by the social-expectations test).

[228] *See supra* Part III.A (discussing the decisions of the Eighth and Ninth Circuits in interpreting *Randolph*, in which majority and dissenting opinions in each case found different social expectations).

[229] *See* Part II.E (explaining the *Randolph* Court's attempt to issue a fact-sensitive rule).

[230] Given the current smorgasbord of third-party consent law, unless it is to continue with its propensity to establish inconsistent and individualized rules, the Court will need to overrule previous decisions in order to establish a more unified rule.

[231] *See supra* Part II.F (explaining the current circuit split in interpreting *Randolph* is indicative of the flaws in the *Randolph* holding).

[232] *See infra* notes 234–40 and accompanying text (contending that the balancing approach would be easier to apply than the current multifarious approach).

[233] Daniel A. Farber & John E. Nowak, *Beyond the* Roe *Debate: Judicial Experience with the 1980s "Reasonableness" Test*, 76 VA. L. REV. 519, 533, 538 (1990) (asserting that the reasonableness standard does not create a burden on lower courts because of the ease and practicality of its application); *see also* Stephen D. Thill, *Assigning Error to* Viar v. North Carolina Department of Transportation *and* State v. Hart: *A Proposal for Revision of the North Carolina Rules of Appellate Procedure*, 85 N.C. L. REV. 1799, 1834 (2007) (contending that a reasonableness standard is easier to apply than other standards because it is encountered in a wide number of judicial contexts).

factual scenario and allowing the court to weigh the appropriate variables.[234] This would also be more effective for law enforcement officials, given the time-sensitive nature of their work.[235] They would no longer have to seek legal counsel prior to seeking consent because of the unforeseeable outcomes of convoluted approaches, but could simply consider the circumstances, and act accordingly.[236]

Circumstances vary widely, and officers handling the situations are best able to consider the situation and grant each the appropriate weight, so the proposed reasonableness approach utilizes factors that an ordinary police officer would naturally consider when determining the efficacy of a third party's consent.[237] Granted, the reasonableness test still allows police offers to exercise discretion, and is thus subjective, but the standard offers the most objective approach possible.[238] Additionally, objectivity adds to the fair and uniform application of the law, so considerations naturally made by the police officer must be counterbalanced with factors limiting discretion.[239] In sum, the proposed reasonableness approach would result in more consistent application of the law by courts, and more effective and reliable police decisions.[240]

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[234] *See Wineholt*, *supra* note 86, at 495 (contending that the Court's conflation of tests, including the unworkable social-expectations test, will confuse lower courts attempting to apply *Randolph*).

[235] *See* Lee N. Abrams, Roxane C. Busey, James R. Loftis, III & Thomas M. Wilson, III, *60 Minutes with Laurel A. Price, Chair, National Association of Attorneys General Multistate Antitrust Task Force*, 62 ANTITRUST L.J. 247, 263 (1993) ("Time sensitivity creates an incentive to have all public law enforcement review completed within a discrete time frame."). *But see Randolph*, 547 U.S. at 116 n.5 (2006) ("A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search."); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) ("The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.") (citation omitted).

[236] *See* Bhargava, *supra* note 147, at 1029–30 (stating that despite *Randolph*'s supposed bright line rule, the multiple doctrines that police would have to consider when conducting searches have the anticipated effect of causing confusion among police officers).

[237] As appellate courts commonly defer to trial courts on issues where first-hand impressions are paramount, so too should courts defer to police judgment on matters where hearing a recitation of the facts is an inadequate substitute for experiencing the facts.

[238] *See supra* Part III.B (analyzing the subjectivity of the social-expectations test, and offering less subjective alternatives).

[239] *See supra* notes 234–37 and accompanying text (discussing the objectivity of specific prongs of the test).

[240] *See supra* notes 233–40 and accompanying text (discussing how the approach would result in a more uniform application of the law by courts and provide a more manageable standard for police, which would then result in fewer overturned convictions).

B. Addressing Criticism of Georgia v. Randolph

The reasonableness approach could also satisfy courts and critics taking issue with the *Randolph* standard.[241] One of the concerns Chief Justice Roberts voiced about the Court's approach in his dissent is that it altered "a great deal of established Fourth Amendment law."[242] Yet, in his analysis, the Chief Justice mistakes the application of the majority rule with reasonableness scenarios presented by the majority's dicta in which the police would be able to enter.[243] Roberts's dissent hinges on his belief that the majority's analysis altered too much third-party consent law for the sake of one factual scenario.[244] However, his main qualm appears to be related to the limited case-by-case holding; if the added scenarios were a substantive part of the opinion rather than dicta, they would expand the breadth of the decision to any factual scenario concerning third-party consent.[245] It is doubtful that Chief Justice Roberts would voice these same concerns if the majority opinion had altered so much third-party consent law for the sake of the entire body of law, rather than just one factual scenario.[246]

In its ease of application, a reasonableness balancing approach would also satisfy the issues lower courts have had with the *Randolph*

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[241] *See supra* notes 163–80 and accompanying text (particularly discussing critics' objections to *Randolph* on the grounds of it being a bright-line rule that is easily distinguished and difficult to understand; the reasonableness standard, which has neither of these issues, could satisfy these critics).

[242] *Randolph*, 547 U.S. at 141 (Roberts, C.J., dissenting) (discussing how the Court has not used various considerations in determining consent that are present in the majority opinion, and should not, given that the decision applies only to one factual circumstance).

[243] Rasch-Chabot, *supra* note 78, at 515. Rasch-Chabot contends that the dissent's attempt to undermine the majority by stating that the majority created a new exception to the warrant requirement fails because the majority was simply stating how its rule would interact with other, already existing, variables. *Id.* Further, Rasch-Chabot contends that the police would be able to enter in these circumstances, regardless of the *Randolph* decision, due to exigency. *Id.*

[244] *Randolph*, 547 U.S. at 141 (Roberts, C.J., dissenting). The Chief Justice states several times that the majority alters too much established third-party consent law, including this:

> Considering the majority's rule is solely concerned with protecting a person who happens to be present at the door when a police officer asks his co-occupant for consent to search, but not one who is asleep in the next room or in the backyard gardening, the majority has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy.

Id.

[245] *See id.* at 142 (Roberts, C.J., dissenting) (disagreeing with the Court's case-by-case approach because it "constitutionalize[s] such an arbitrary rule" rather than utilizing a cohesive approach or rule).

[246] *See supra* notes 103–12 and accompanying text (discussing the grounds for the Chief Justice's dissent).

standard.[247] This optimal approach obviates any need to consider whether courts should interpret *Randolph* broadly or narrowly because the reasonableness analysis would effectively replace *Randolph*'s holding.[248] It is difficult to speculate how the appellate courts would have resolved *Murphy*, *Hudspeth*, and *Henderson* in light of this reasonableness test, but it seems likely that the results would have been the same, but with different reasoning.[249]

C. Public Policy Benefits of the Reasonableness Approach

The proposed reasonableness approach would effectively balance the opposing public policy goals of protecting governmental and individual interests.[250] Not conducting a search may harm governmental interests because a co-tenant could destroy evidence or may flee if the officers are required to secure a warrant.[251] These interests would additionally extend to a number of other bona fide governmental interests in conducting the search.[252] Individual interests include protecting the objecting co-tenant's right to privacy, the consenting co-tenant's rights in his or her property, and protecting police officers from potential bodily harm.[253]

In discussion of protecting governmental interests, some assert that police officers currently have limited authority to enter under the doctrine of exigency.[254] However, scholars and courts alike have noted

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[247] *See supra* Part III.A (discussing the vast differences in interpretation between courts, including issues involving differing beliefs as to social expectations within the same court and whether an objector must be physically present at the time of the other co-tenant's consent).

[248] *See supra* notes 231–32 (explaining how the Court would need to grant certiorari to one of the circuit court cases to overrule *Randolph* and establish the proposed balancing approach).

[249] *See supra* Parts II.F, IV.A–B. These sections speculate as to how the reasonableness test would generally alter case outcomes. While this is difficult to predict, the bases for reaching the same conclusions would be because the social expectations would remain unchanged in both cases, and the majority in both cases found the social expectations dictated allowing the search. In light of there being no other reasonableness factors to add to either side of any of the cases (at least from the facts as currently known) it seems the analyses would remain unchanged.

[250] *See supra* Part III.C (discussing the public policy concerns created by the *Randolph* standard).

[251] *See supra* Part III.B (considering the primary governmental interests).

[252] *See supra* Part III.B (discussing the governmental interests, typically the same as those under the exigency doctrine, that the *Randolph* Court contemplated as relevant in determining the reasonableness of conducting a search).

[253] *See supra* Part III.C (noting the ways, both successfully and unsuccessfully, in which the current third-party consent law balances these competing interests).

[254] *See supra* notes 206–09 and accompanying text (discussing exigency).

concern that current third-party consent law does not protect these interests.[255] To address those concerns, the functional result of this reasonableness test would be a lower threshold for entering under such circumstances than is required under exigency.[256] Some commentators may express apprehension that this would further erode the warrant requirement of the Fourth Amendment, but that apprehension would exist regardless of the rule allowing third-party consent.[257] The only way to eliminate this concern is to eliminate the third-party consent exception to the warrant requirement.[258]

This reasonableness test would further positive public policy goals by securing as much individual privacy as possible and protecting victims of domestic violence.[259] With the proposed approach, it is possible that more searches would be justifiable in the face of a denial of consent, but this trade-off is acceptable, as the standard would protect all co-tenants without the possibility of police circumvention.[260] The reasonableness approach would also protect domestic violence victims because it explicitly allows police lawful entry to protect a victim if the police have good reason to believe that domestic violence is occurring.[261]

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[255] *See supra* notes 209–10 and accompanying text (noting the concerns of some courts and scholars who believe that the current law exacerbates the already high domestic violence problem in America).

[256] *See supra* notes 206–09 and accompanying text (elaborating on exigency). Unlike under exigency, the police under the third-party consent balancing test would be able to enter not only when it is an emergency situation, but also whenever consent has been granted by at least one co-tenant, and the balance is satisfied. The balance could presumably be satisfied in non-emergency situations, thus rendering the threshold lower than that of exigency.

[257] *See supra* Part II.C (explaining third-party consent and acknowledging that the body of law generally erodes the Fourth Amendment's warrant requirement).

[258] *See supra* Parts II.A–C (discussing the Fourth Amendment and the exceptions thereto).

[259] *See supra* Part III.C (discussing the two large public policy concerns—individual privacy and prevention of domestic violence—implicated by third-party consent law).

[260] *See supra* notes 167–75 and accompanying text. These sections contemplate the possible circumvention of the *Randolph* approach. The possibility that more searches would be justified despite one co-tenant denying consent is because other factors may work to override that denial. However, police would not circumvent the *Randolph* standard because under the reasonableness approach, the physical location of a potential objector would be irrelevant and police would not be able to isolate one co-tenant to silence his or her objection. The reasonableness standard will thus not raise as many individual privacy right concerns despite allowing more searches even in the face of a denial of consent, because the potential for circumventing the test will be minimized.

[261] *Randolph*, 547 U.S. at 118 ("[T]he question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes."); s*ee also* Andrew E. Taslitz, *Privacy as Struggle*, 44 SAN DIEGO L. REV. 501, 508 (2007) ("Roberts likely misread the majority's rule, which permits warrantless entry where there is still some individualized suspicion—reasonable suspicion—such as when interspousal domestic violence is suspected.").

This result thus offers the best possible protection to domestic violence victims because it allows police entry in some circumstances, while not overreaching to allow entry when there is no reason for police to believe that domestic violence is likely to occur.[262]

In addition to these public policy benefits, the reasonableness approach is beneficial in its simplicity for law enforcement officials to recall and employ the approach.[263] Because it is unlikely that officers will have knowledge of the varied and illogical exceptions to third-party consent law, the current approach has failed.[264] The proposed approach is practical because it conforms closely to decisions police officers will make in the field regardless of any court holdings on the matter.[265] Thus, courts will not exclude otherwise legitimately obtained evidence and valid arrests because of non-adherence to arbitrary and nonsensical rules.[266] Clearly, the benefits of consolidating the rules governing third-party consent into the more logical and intuitive balancing approach proposed here will generate positive effects.[267]

V. CONCLUSION

Flash back to that rainy evening where Officers Donald and Charles stand frozen in their tracks, having received contradictory messages from the female and male co-tenants on whether the officers may

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[262] *See generally Randolph*, 547 U.S. at 119 n.7. The Court notes this same tension occurs between protecting individual privacy rights and domestic violence victims. The Court states that:

> We understand the possibility that a battered individual will be afraid to express fear candidly, but this does not seem to be a reason to think such a person would invite the police into the dwelling to search for evidence against another. Hence, if a rule crediting consent over denial of consent were built on hoping to protect household victims, it would distort the Fourth Amendment with little, if any, constructive effect on domestic abuse investigations.

Id.

[263] *See supra* notes 233–67 and accompanying text (discussing the concerns addressed by, and the benefits reaped from, the proposed approach).

[264] *See supra* Parts II.B–C (explaining the current fact-sensitive rules of third-party consent law).

[265] *See supra* notes 234–40 and accompanying text (discussing the importance of utilizing a method that is most conducive to effective and efficient police work).

[266] This statement is based on anecdotal evidence gleaned from the third-party consent cases and the general speculation that police are unable to apply the current law; thus, otherwise legitimately obtained evidence is being suppressed in court based on inconsequential procedural mistakes.

[267] *See supra* notes 221–66 and accompanying text (contemplating the benefits of replacing the current rules with a uniform reasonableness balancing approach).

enter.[268] At this point, if Officers Donald and Charles were aware of the complex rules currently governing third-party consent law, they still would be contemplating their response. The current standard of third-party consent, derived from *Randolph* and its predecessors, leaves them perplexed as to what rule of law they should apply and whether they should enter.

Fortunately, a new test, the third-party consent reasonableness test, is the method for determining the efficacy of consent in Donald's and Charles's jurisdiction.[269] After the initial shock of the contradictory sentiments from the co-tenants, Donald and Charles quickly survey the situation, noticing the disheveled and flustered look of the female co-tenant who granted consent and that the man seems to be intoxicated. Their minds whirl as they weigh the pertinent factors in the third-party consent reasonableness test, and they determine that the balance favors granting efficacy to the female tenant's consent. They promptly enter and discover that their analysis was correct: they encounter the male co-tenant, drunken and armed. The officers cautiously disarm and arrest the male co-tenant for spousal abuse.

As indicated in the above analysis, depending upon several variables, Donald and Charles may not have arrested the male co-tenant under the current third-party consent law. Just as likely, without understanding the convoluted body of third-party consent law they would have made the arrest, but risked having a court suppress evidence seized from the arrest.

Such is the current state of third-party consent law: unnecessarily complex and impractical for police officers to use in the field or for courts to apply consistently. The current law is further problematic because of its consequences on important public policy interests. In light of the difficulties in applying the current standard, the flaws in applying the standard, and the public policy shortcomings, the Court should overrule its current third-party consent law precedent.

The Court should then elucidate a cohesive reasonableness test to replace the erratic current standards, which will contemplate similar factors as those discussed in the *Randolph* dicta. Incorporated into the new test, those factors will provide a unified and more manageable approach for police officers and courts to administer the law. As demonstrated by Charles and Donald, such an approach will resolve the

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[268] *See supra* note 1 and accompanying text (introducing Donald and Charles and their dilemma).

[269] Only for the purposes of this hypothetical example does the proposed third-party consent balancing test govern.

issues created by the current law, finally resulting in a consistent standard for third-party consent law.

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