Denver Law Review

Volume 84 | Issue 2 Article 9

January 2006

Disputed-Consent Searches: An Uncharacteristic Step toward Reinforcing Defendants' Privacy Rights

Andrew Fiske

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation

Andrew Fiske, Disputed-Consent Searches: An Uncharacteristic Step toward Reinforcing Defendants' Privacy Rights, 84 Denv. U. L. Rev. 721 (2006).

This Note is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

Disputed-Consent Searches: An Uncharacteristic Step toward Reinforcing Defendants' Privacy Rights

This note is available in Denver Law Review: https://digitalcommons.du.edu/dlr/vol84/iss2/9

DISPUTED-CONSENT SEARCHES: AN UNCHARACTERISTIC STEP TOWARD REINFORCING DEFENDANTS' PRIVACY RIGHTS

INTRODUCTION

The Fourth Amendment of the U.S. Constitution protects citizens' rights to privacy by prohibiting unreasonable government searches and seizures.[1] Government officials, however, may overcome this barrier by obtaining a warrant based upon probable cause.[2] Courts assess probable cause through a totality of the circumstances approach that, in order for a finding, requires information sufficient to justify a reasonably prudent individual in believing that an offense has been committed.[3] In general, a person claiming a violation of his or her Fourth Amendment rights must satisfy two requirements. First, that individual must prove that a search or seizure actually occurred within the meaning of the Fourth Amendment.[4] Second, the person must show that the search or seizure violated reasonableness.[5] Failure to establish both requirements destroys any Fourth Amendment claim. However, the warrant requirement embodied in the Fourth Amendment is not unconditional, and several exceptions exist which may allow police officers to engage in a warrantless search. Specifically, exceptions include: searches incident to a lawful

1. U.S. CONST. amend. IV.

2. *Id.*; *see also* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance,* 30 SUFFOLK U. L. REV. 53, 54-65 (1996) (providing a general discussion of the Fourth Amendment).

3. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (explaining further that probable cause is a practical, non-technical consideration based on the everyday observations of reasonable people).

4. *See, e.g.*, PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 10-12 (2005) (explaining that standing requires a showing that 1) the complaining party's privacy right is at issue, 2) a government agent conducted the search or seizure, and 3) the search or seizure was of the party's person, house, paper, or effects).

5. *Id.* at 167 (explaining that unreasonableness determinations require a balancing of the degree and nature of intrusiveness against the weight of the government interest served by the search or seizure); *see also* Katz v. United States, 389 U.S. 347, 357 (stating generally that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions").

arrest,[6] searches made under exigent circumstances,[7] moving vehicle searches,[8] and searches made upon voluntary consent.[9]

This comment addresses the voluntary consent exception to the warrant requirement, as applied in the recent *Georgia v. Randolph*[10] decision. Initially, the Supreme Court qualified the consent exception as applicable against the individual who provided consent to police.[11] However, soon thereafter, the Court verified the legitimacy of consent given by a third party, holding that any person reasonably presumed to possess common authority over the premises could consent to a warrantless search.[12] Specifically, the Court upheld the lawfulness of a search made pursuant to consent given by a *present* occupant against the subsequent objection of the *absent* nonconsenting co-occupant.[13] Although these cases were instructive for interpreting the consent exception when the nonconsenting party was absent, the Court did not address the constitutionality of a warrantless search when two or more present co-occupants disagreed as to whether police could enter. Tellingly, lower courts across the nation facing this issue reached opposite holdings concerning the validity of disputed consent searches based on differing interpretations of the relevant Supreme Court precedents.[14]

Spurred by this unsettling disparity, the Supreme Court recently addressed the issue in *Georgia v. Randolph*.[15] In Part I, this comment will provide an overview of the relevant Supreme Court decisions that evaluate the Fourth Amendment warrant requirement as it relates to the voluntary consent exception. Part II will review the majority, concurring, and

---

6. *E.g.*, Chimel v. California, 395 U.S. 752, 763 (1969) (holding that "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.").

7. *E.g.*, Cupp v. Murphy, 412 U.S. 291, 295-96 (1973) (defining exigent circumstances as those that would endanger the lives of the responding officers, or of others, in the absence of a timely investigation).

8. *E.g.*, Carroll v. United States, 267 U.S. 132, 153-58 (1925) (permitting warrantless searches of moving vehicles if probable cause suggests the vehicle contains contraband, instruments of a crime, or evidence of a crime).

9. *E.g.* Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973) (permitting warrantless searches without probable cause when express or implied consent is given).

10. 126 S. Ct. 1515 (2006).

11. *Schneckloth*, 412 U.S. at 243-45 (stating, however, that under some circumstances a third party may give lawful consent).

12. *See* United States v. Matlock, 415 U.S. 164, 171 (1974) (holding that a co-occupant possessing common authority over the home may consent to a police search against another occupant of that home, even in spite of that absent, nonconsenting party's refusal); *see also* Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990) (holding that whether the occupant truly possesses common authority over the premises is immaterial in determining the legality of the consent given; instead, the only consideration courts must address is whether police were objectively reasonable in thinking that individual possessed common authority).

13. *Matlock*, 415 U.S. at 170.

14. *Compare* Primus v. State, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004) (holding that a search of Defendant's premises upon consent of his roommate was valid despite the defendant's presence), *with* State v. Randolph, 604 S.E.2d 835, 837 (Ga. 2004) (holding that a search of Defendant's home upon consent of his wife, but in his presence and with his clear refusal, was invalid).

15. Georgia v. Randolph, 126 S. Ct. 1515, 1528 (2006).

dissenting opinions in *Georgia v. Randolph*.[16] Finally, Part III will analyze the Court's decision by focusing on: 1) the practical implications of the decision, specifically with regard to the inherent conflict between personal privacy and law enforcement, 2) the holding's place within the established jurisprudential trend of limiting privacy through the third-party consent legal standard, 3) the benefits and latent costs of the logic employed in the *Randolph* opinion, and 4) potential solutions available for addressing the problems likely to arise in the decision's aftermath. Ultimately, this comment will conclude that *Randolph* occupies a position of limited authority because its interpretation of the Fourth Amendment applies only to the rare situation in which multiple, present co-occupants disagree on the issue of consent. Further, it will be suggested that the *Randolph* holding encourages police to circumvent the protective nature of the holding. And finally, this comment will suggest that *Randolph* is likely to generate confusion amongst lower courts and law enforcement agents, because it is presently unclear whether the holding signals a reversal of the Court's view of Fourth Amendment searches, or merely a deviation from a viable trend.

I. BACKGROUND

Among the several exceptions to the warrant requirement, investigating officers find the voluntary consent exception particularly attractive as an alternative to obtaining a warrant.[17] This is true for several reasons. First and foremost, police often seek consent from a suspect because it permits entry in situations where probable cause does not exist to substantiate a warrant.[18] Further, even when probable cause does exist, consent searches function as an instrument of convenience that police can use to skirt the burdensome process of obtaining a warrant.[19] This factor is particularly true when police would otherwise have to travel long distances to acquire a warrant.[20] Last, officers often prefer consent searches in lieu of a warrant because the scope of a permissible search may extend to areas it likely would not reach under the auspices of a warrant.[21]

---

16. *Id.* at 1515-43.

17. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 250 (4th ed. 2004) (stating that "[t]he practice of making searches based on consent is by no means a disfavored one.").

18. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 5 (4th ed. 2004) (explaining that the scope of a consent search is frequently broader than the scope of a search justified by a warrant, because the consenting party rarely conditions or qualifies the scope of consent).

19. *See id.* at 4-5.

20. *See id.* at 5.

21. *See id.* (explaining that the objectively reasonable scope of a consent search is frequently broader than that justified by a search warrant, because the consenting party rarely conditions or qualifies the scope of consent).

The general rule governing the voluntary consent exception to the Fourth Amendment warrant requirement holds that the consenting individual must give permission voluntarily and under non-coercive circumstances.[22] Courts regularly uphold both written and verbal consent, whether given pursuant to a police request, or of the suspect's own volition. And further, the Supreme Court has upheld the lawfulness of consent searches even under circumstances in which the suspect is not aware of the right to refuse,[23] as well as situations where police have already taken the suspect into custody.[24] In addition to the requirement that consent to a police search be given voluntarily, these searches are limited in scope by a standard of "objective reasonableness."[25] Specifically, "objective reasonableness" evaluates what a reasonable person would understand the scope of consent to include after considering the interchange between the officer and the suspect.[26] The Supreme Court has addressed the voluntary consent exception to the Fourth Amendment warrant requirement on several occasions.[27] Those decisions are briefly characterized here.

A. Reasonableness as the Standard

In *Stoner v. California*,[28] the Court considered whether a hotel clerk could lawfully provide police with consent to search a guest's room. Though recognizing that a clerk does possess some limited right of entry for purposes such as cleaning or inspecting the room, the Court decided that a hotel employee does not retain the authority to consent to a search against the guest.[29] The Court reasoned that police have no rational foundation to conclude that a hotel clerk possesses such authority.[30] Three years later, in *Katz v. United States*,[31] the Court elaborated on the

22. *Schneckloth*, 412 U.S. at 248 (holding that the prosecution has the burden of showing by a preponderance of the evidence that consent was "in fact voluntarily given and not the result of duress or coercion, express or implied.").

23. *Id.* at 248-49 (stating, however, that a person's knowledge of the right to refuse should be taken into account in the totality of the circumstances determination of whether the consent was voluntary).

24. *See, e.g.*, United States v. Watson, 423 U.S. 411, 424 (1976), *but see* Florida v. Royer, 460 U.S. 491, 507-08 (1983) (holding that, on the contrary, when consent given by a suspect *unlawfully* taken into custody is acted on, it should be considered involuntary and therefore in violation of the Fourth Amendment).

25. *See* Florida v. Jimeno, 500 U.S. 248, 249 (1991).

26. *Id.* (referring to "area of consent" as meaning the actual physical parts of the premises that the consenter has given the officer permission to search).

27. *See generally* Nancy J. Kloster, Note, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99, 104-15. (1996) (providing a detailed analysis of the Court's trend in deciding co-occupant consent cases).

28. 376 U.S. 483 (1964).

29. *Stoner*, 376 U.S. at 489.

30. *Id.* at 488; *see also* Chapman v. United States, 365 U.S. 610, 616-18 (1961) (holding that a landlord may not consent to a search of the home leased to a tenant, because it is not reasonable for police to assume that a landlord possesses that authority).

31. 389 U.S. 347 (1967).

meaning of "reasonableness" by holding that Fourth Amendment's protection against warrantless searches was not confined to the home.[32] Instead, this protection extended to all areas where the suspect enjoys a reasonable expectation of privacy.[33] Of particular influence in subsequent cases was Justice Harlan's concurring opinion which established a two-prong inquiry focusing on whether: 1) the suspect had a subjective expectation of privacy, and 2) society would view that expectation as reasonable.[34]

B. Assumption of the Risk and Third Party Consent

In *Frazier v. Cupp*,[35] the Court upheld the legality of consent given by a third-party based on an assumption of the risk doctrine. Specifically, the Court held that whenever two or more people jointly use an item or place, each individual implicitly assumes the risk that the co-occupant (or co-possessor) might share that item or place with others.[36] Two years later, in *Coolidge v. New Hampshire*,[37] the Court considered whether the husband-wife relationship supported an inference that either spouse could consent to a search against the other.[38] Acting on the standard established in *Katz*, the Court determined that this relationship did support such an inference because, unlike the situation in *Stoner*, it is reasonable for police to assume that one spouse has the authority to consent to a search of the home in the other spouse's absence.[39] Shortly thereafter, the Supreme Court decided the seminal case of *United States v. Matlock*,[40] and held that any time two or more individuals possess "common authority" [41] over a premises, the consent of any individual alone trumps the subsequent objection of another, absent co-occupant.[42] In *Minnesota v. Olson*[43] however, the Court upheld the privacy rights of an overnight social guest arrested in the course of a warrantless search, and held that houseguests have privacy rights parallel to those of occu-

32. *Katz*, 389 U.S. at 359 (finding, under the factual circumstances, that this protection extended to the content of phone conversations made in a public phone booth).

33. *Id.* (stating specifically that "[t]hese considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.").

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

35. 394 U.S. 731 (1969).

36. *Frazier*, 394 U.S. at 740 (holding that when two cousins shared use of a bag, one cousin had authority to consent to a police search because through their joint use, both parties assumed the risk that the other would share the contents of the bag).

37. 403 U.S. 443 (1971).

38. *Coolidge*, 403 U.S. at 489-90.

39. *Id.* at 474, 487-90.

40. 415 U.S. 164 (1974).

41. BLACK'S LAW DICTIONARY 292 (8th ed. 1999) (defining common-authority as: "the principle that a person may consent to a police officer's search of another person's property if both persons use, control, or have access to the property.").

42. *Matlock*, 415 U.S. at 171.

43. 495 U.S. 91 (1990).

pants because "it is unlikely that [the host would] admit someone who want[ed] to see or meet with the guest over the objection of the guest."[44]

C. Further Limiting Privacy

In *Schneckloth v. Bustamonte*,[45] the Court faced the issue of whether, in order for the search to comply with the "voluntary" requirement,[46] police were required to inform the consenting occupant of his or her right to refuse the search. In light of the expansive view the Court had taken with regard to warrantless searches, it unsurprisingly held that a suspect did not have to be aware of the right to refuse the warrantless search in order for consent to remain valid.[47] Finally, in *Illinois v. Rodriguez*[48] the Court took its greatest leap yet in restricting defendants' privacy rights. In *Rodriguez,* the Court considered a third-party consent search when the individual who provided consent to police did not actually reside at the home, and had no common authority over it.[49] Nevertheless, the Court held that whether the third-party actually possesses common authority over the premises is irrelevant to the determination of the search's validity.[50] Instead, courts must only address whether it was objectively reasonable for police to have believed that the third-party had common authority.[51]

Therefore, prior to *Georgia v. Randolph*, the Court established a clear trend of gradually eroding defendants' Fourth Amendment privacy rights, while correspondingly broadening the scope of lawful police searches. By late 2005, an opportunity arose for the Court to address the consent exception as it applied to multiple co-occupants possessing common authority over the premises, but who disagreed over consent to a police search.[52] In light of precedent, as well as the Court's trend of limiting privacy, little hope must have remained for pro-privacy advocates seeking reinstatement of the protective measures once apparent in the Fourth Amendment.

---

44. *Olson*, 495 U.S. at 99.
45. 412 U.S. 218 (1973).
46. *See, e.g.*, *Schneckloth*, 412 U.S. at 227 (referring to the requirement that consent be given voluntarily, and under non-coercive circumstances).
47. *Id.* (holding that, as long as the consenter isn't coerced by police, the prosecution need not show that the consenter had knowledge of his or her right to refuse in order to establish that consent was voluntary).
48. 497 U.S. 177 (1990).
49. *See Rodriguez*, 497 U.S. at 179.
50. *Id.* at 188-89.
51. *Id.* (holding that the search was valid despite the consenting third-party not having common authority, because it was objectively reasonable to assume that party had common authority when she was holding a baby and referring to the apartment as "ours").
52. *Randolph*, 126 S. Ct. at 1520 (stating "[n]one of our co-occupant consent-to-search cases . . . has presented the further fact of a second occupant physically present and refusing permission to search").

II. *GEORGIA V. RANDOLPH*

A. Facts

In late May of 2001, Scott and Janet Randolph separated when Janet, along with their son, left the family's Georgia residence and moved to her parents' home in Canada.[53] Janet and her son did not stay long though, and they returned to Scott at the family's home in Georgia within two months.[54] On the morning of July sixth, police responded to a domestic dispute at the Randolph home.[55] When the police arrived, Janet informed the officers that Scott had removed their son from the home, and that he would not tell her where the child was.[56] Furthermore, Janet informed police that Scott was a cocaine addict, and that there were "items of drug evidence" in the home.[57] Scott proceeded to inform the officers that he had taken the child to a neighbor's house out of fear that Janet would leave the country with him again, and further, that it was Janet and not he who abused drugs and alcohol.[58] After locating the Randolph's child at the neighbor's house, the responding officers confronted Scott and Janet, both of whom were present outside the house, and asked for consent to search the home.[59] Despite Scott's unwavering refusal to consent, Janet gave the officers her permission to enter the house.[60] Acting on Janet's consent, the officers entered and followed her into an upstairs bedroom where they found a straw caked with cocaine residue.[61]

B. Procedural History

Scott Randolph was subsequently indicted for possession of cocaine on the basis of the evidence obtained by the search.[62] Upon a motion to suppress the evidence, the trial court denied Scott's motion. Specifically, the trial court held that the search was valid because Janet had common authority over the home, and therefore had the power to consent to the search.[63] After losing at trial, Scott appealed the ruling to the Georgia Court of Appeals. In reviewing the decision, that court reversed the trial court's holding, and was later upheld by the state supreme court on the basis that "consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant

---

53. *Id.* at 1519.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* (referring to common authority as defined in *Matlock*).

who is physically present at the scene."[64] The Georgia Supreme Court acknowledged *United States v. Matlock*[65] in its decision, but distinguished it because Scott Randolph was physically present to refuse consent.[66] The U.S. Supreme Court granted certiorari to evaluate the decision. It affirmed, 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."[67]

C. The U.S. Supreme Court's Decision

1. Majority Opinion

The majority opinion in *Georgia v. Randolph* holds "that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."[68] The majority rests its decision on three points: 1) the social expectations analysis originally outlined by Justice Harlan in his concurring opinion in *Katz v. United States,*[69] 2) United States Supreme Court precedents, and 3) the resolution of potentially troublesome implications of their holding.

a. "Social Expectation" Analysis

The majority's primary theory evaluates reasonableness as a function of social expectations between co-occupants.[70] To that end, the opinion presents a hypothetical situation in which someone arrives at a shared residence and encounters two co-occupants: one inviting entrance, and another refusing.[71] In such a situation, the majority assumes that, due to widely understood social expectations, "no sensible [visitor] would go inside."[72] The majority then analogizes the hypothetical guest to a police officer seeking permission to search, and concludes that because it would be unreasonable for the guest to enter facing such a disagreement, it would likewise be unreasonable for the officer to enter.[73] The majority's syllogistic logic leads it to conclude that "[d]isputed permission is thus no match for this [privacy] value of the Fourth Amend-

---

64. *Id.* (quoting Randolph v. State, 590 S.E.2d 834 (Ga. Ct. App. 2003)).
65. 415 U.S. 164 (1974).
66. Randolph v. State, 604 S.E.2d 835, 836-37 (Ga. 2004).
67. *Randolph*, 126 S. Ct. at 1526.
68. *Id.* at 1528.
69. 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).
70. *Randolph*, 125 S. Ct. at 1521 (citing *Matlock* for the proposition that "the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.").
71. *Id.* at 1522-23.
72. *Id.* at 1523.
73. *Id.*

ment, and the State's other countervailing claims do not add up to outweigh it."[74]

b. Precedent

Additionally, the majority considers a prior case that "took a step toward the issue" of warrantless searches.[75] In *Minnesota v. Olson*,[76] the Court assessed the privacy rights of an overnight social guest arrested in the course of a warrantless search, and held that houseguests have privacy rights parallel to those of occupants because "it is unlikely that [the host would] admit someone who want[ed] to see or meet with the guest over the objection of the guest."[77] Based on that decision, the majority goes on to reason that "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."[78] Accordingly, the U.S. Supreme Court reinforced the Georgia Supreme Court's holding that *Randolph* is distinguishable from *Matlock*, and therefore not contradictory, due to the physical presence of the nonconsenting occupant.[79]

c. "Loose Ends"[80]

The majority concludes by addressing two potentially troublesome results, and then attempting to dispel them as inconsequential concerns that are not weighty enough to overpower its ultimate holding.[81] First, it tackles the apparent double standard created by comparing this holding with the Court's long-standing endorsement of citizens bringing criminal activity to light.[82] Ultimately, the majority reconciles the two by stating that "society can often have the benefit of [citizens bringing to light criminal activity of others] without relying on a theory of consent that ignores an inhabitant's refusal to allow a warrantless search."[83] Specifically, the majority reasons that the consenting co-occupant can either deliver the incriminating evidence to police,[84] or inform police of the relevant information to assist in obtaining a warrant.[85] Second, the majority addresses the dissent's primary objection that the holding will

---

74. *Id.* at 1524.
75. *Id.* at 1522 (referring to *Olson*, 495 U.S. 91 (1990)).
76. 495 U.S. 91 (1990).
77. *Randolph*, 126 S. Ct. at 1522 (quoting *Olson*, 495 U.S. at 99).
78. *Id.*
79. *See id.* at 1527.
80. *Id.* at 1524.
81. *Id.*
82. *Id.* at 1527; *see, e.g., Coolidge*, 403 U.S. 443, 488 (1971) (stating that "it is no part of the policy underlying the Fourth . . . Amendment[ ] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.").
83. *Randolph*, 126 S. Ct. at 1524.
84. *Id.* (citing *Coolidge*, 403 U.S. at 487-89 (referring to a situation where the defendant's wife turned incriminating guns over to the police)).
85. *Id.*

shield spousal abusers.[86] While recognizing the prevalent domestic violence problem,[87] the majority characterizes this criticism as a "red herring"[88] and argues that "this case has no bearing on the capacity of the police to protect domestic victims."[89] In support of this proposition, the majority asserts that police may always enter, under the exigent circumstances exception, when there is reasonable evidence that a domestic threat exists.[90]

2. Concurring Opinions

a. Justice Stevens

Justice Stevens writes a very brief concurring opinion which largely strays from addressing the issue of disputed consent searches. The concurrence, which appears to be directed at (and later responded to by) Justice Scalia, serves almost exclusively to criticize "originalism" as a tool for constitutional interpretation because it fails to account for changes in contemporary society.[91] Specifically, Stevens explains that when the Constitution was adopted in 1791 only a man's consent would be of import as a female could not at that time make legal decisions.[92] Accordingly, under an originalist's viewpoint, police officers seeking consent to search would only be required to receive permission from the husband. However, taking special care to highlight the discrepancy, Stevens points out that this concept is no longer valid because, "as a matter of constitutional law . . . the male and the female are equal partners."[93]

b. Justice Breyer

Justice Breyer also writes a concurring opinion, his purpose being to defend against the dissent's assertion that this holding will shield spousal abusers. Specifically, Breyer stresses the importance of reasonableness when determining the legality of Fourth Amendment searches, and further, that evaluation of reasonableness must turn on the totality of the circumstances.[94] Accordingly, Breyer notes that under circumstances in which police officers engage in a consent-based search with the sole objective being to recover evidence, and one occupant makes a clear objection, the search would be unreasonable absent any other Fourth Amend-

86. *Id.* at 1525.

87. *Id.* (citing numerous government and private statistical reports addressing the widespread domestic violence problem plaguing U.S. society).

88. *Id.* at 1526.

89. *Id.* at 1525.

90. *See id.* at 1526 (citing United States v. Donlin, 982 F.2d 31, 32 (1st Cir. 1992); United States v. Hendrix, 595 F.2d 883, 885-86 (D.C. Cir. 1979) (per curiam); People v. Sanders, 904 P.2d 1311, 1313-15 (Colo. 1995)).

91. *Id.* at 1528-29 (Stevens, J., concurring) (referring to all societal changes, including specifically the modern day equality of sexes).

92. *Id.*

93. *Id.* at 1529 (citing Reed v. Reed, 404 U.S. 71 (1971)).

94. *Id.* (Breyer, J., concurring).

ment exceptions.[95] However, Breyer goes on to remark that "were the circumstances to change significantly, so should the result."[96] In making this statement, Breyer implies that any sign of domestic violence or other dangerous conditions would alter the totality of the circumstances, and potentially make entrance reasonable under the exigent circumstances exception.

3. Dissenting Opinions

a. Chief Justice Roberts

In the dissenting opinion, Chief Justice Roberts, who is joined by Justice Scalia, begins by pointing to several deficiencies in the majority holding. Ultimately, they conclude by identifying what, in their opinion, is "the correct approach."[97]

First, the dissenters argue that the holding establishes a rule that will apply to various police searches in such a random fashion that it misses the true interest protected by the Fourth Amendment: a reasonable right to privacy.[98] In making this point, the dissent draws attention to the factual similarities present between *Randolph*, and those in the *Matlock*[99] and *Illinois v. Rodriguez*.[100] This comparison suggests that because *Randolph* implicitly contradicts the precedents, the holding is illogical.[101] In other words, the dissenters argue, a rule that endorses protection for defendants lucky enough to be standing at the threshold,[102] but not those sleeping in an adjacent room or detained in a nearby squad car[103] is arbitrary and unfair.[104] Specifically, the dissent challenges the decision to draw such a fine line between the nonconsenting occupant who is present at the threshold to refuse consent, and the nonconsenting occupant who happens to be away when the police arrive, but later contests the validity of the search.[105]

The second criticism, which the dissenters argue as being rooted in the randomness deficiency, suggests that the holding will shield spousal abusers by prohibiting police intervention when the perpetrator refuses to

95. *Id.* at 1530.
96. *Id.*
97. *Id.* at 1531 (Roberts, C.J., dissenting).
98. *See id.* at 1531, 1536, 1539.
99. 415 U.S. 164.
100. 497 U.S. 177 (1990).
101. *Randolph*, 126 S. Ct. at 1536 (Roberts, C.J., dissenting) (stating that "when the development of *Fourth Amendment* jurisprudence leads to such arbitrary lines, we take it as a signal that the rules need to be rethought").
102. *Id.*
103. *Id.* at 1534, 1536 (comparing the protection provided to the defendant in *Randolph* with the lack of protection afforded to the defendant in *Matlock*, who was detained in the police squad car; or the defendant in *Rodriguez*, who was napping in the next room).
104. *Id.* at 1536.
105. *See id.*

consent.[106] Although they acknowledge the majority's response,[107] Roberts and Scalia rebut the majority's presumption that domestic violence automatically gives rise to the exigent circumstances necessary to authorize warrantless entrance.[108] And even in circumstances where it does apply, justifying the rule on such a contingency is, according to the dissent, unreasonably "strange."[109]

Third, the dissenters argue that the social expectation analogy is plagued with unfounded assumptions and faulty logic for presupposing that any reasonable houseguest would automatically leave upon disagreement between roommates.[110] The dissenters attack this assumption with their own hypotheticals which suggest less clear "social expectations." For example, what if the guest was a family member; what if the guest had traveled long distances; or what if the guest was accepted by several, and only rejected by one roommate?[111] And further, the dissent questions, if the law recognizes no superiority or inferiority between co-occupants as the majority so clearly pronounces,[112] then why should the law implicitly assume that the occupant refusing consent prevails?[113]

Finally, the dissent asserts that the majority opinion incorrectly applies the social expectation analysis as originally articulated in *Katz*.[114] Specifically, the dissent argues that the majority is mistaken because it uses the analysis to review the issue of consent, rather than correctly

---

106. *Id.* at 1531 ("[T]he cost of affording such random protection is great, as demonstrated by the recurring cases in which abused spouses seek to authorize police entry into a home they share with a nonconsenting abuser."); *see also id.* at 1537 ("Perhaps the most serious consequence of the majority's rule is its operation in domestic abuse situations . . . .").

107. *Id.* at 1538 (referring to the majority response that the dissent's spousal abuse argument is a "red herring," and the ruling will not shield spousal abusers because of the continued prevalence of the exigent circumstances exception).

108. *Id.* (citing United States v. Davis, 290 F.3d 1239, 1240-41 (10th Cir. 2002) (finding no exigent circumstances justifying entry when police responded to a report of domestic abuse, officers heard no noise upon arrival, defendant told officers that his wife was out of town, and wife then appeared at the door seemingly unharmed but resisted husband's efforts to close the door)); *see also id.* at 1537 (inferring, as well, that in circumstances where domestic abuse is present but no exigent circumstances exist to allow police entry, the nonconsenter will "inflict retribution" on the consenter as soon as police leave).

109. *Id.*

110. *Id.* at 1532 (stating that "such shifting expectations are not a promising foundation on which to ground a constitutional rule, particularly because the majority has no support for its basic assumption – that an invited guest encountering two disagreeing co-occupants would flee – beyond a hunch about how people would typically act in an atypical situation").

111. *Id.*

112. *Id.* at 1523 (Souter, J.) (stating that "there is no societal understanding of superior and inferior" between co-occupants).

113. *Id.* at 1532 (Roberts, C.J., dissenting) (responding to the majority's presumption that a co-occupant has no authority to demand his guest be admitted by stating that "it seems equally accurate to say . . . that the objector has no 'authority' to insist on getting *his* way over his co-occupant's wish that her guest be admitted."); *see also id.* at 1541 (Scalia, J., dissenting) (stating that "men and women are no more 'equal' in the majority's regime, where both sexes can veto each other's consent, than on the dissent's view, where both sexes cannot").

114. *Id.* at 1532 (Roberts, C.J., dissenting) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (referring to the two-part test which asked whether: 1) the suspect had a subjective expectation of privacy, and 2) society would view that expectation as reasonable)).

applying it to the overall inquiry of reasonableness in the expectation of privacy.[115] Moreover, as Chief Justice Roberts points out, "the social expectations concept has not been applied to all questions arising under the Fourth Amendment, least of all issues of consent."[116] Therefore, according to the dissenters, the majority utilizes the social expectation analysis inappropriately, because it confuses the contextual meaning of reasonableness. As a result, the dissent claims, social expectations should not be used to evaluate the Fourth Amendment's protection of privacy as it relates to the consent exception.[117]

The dissent ultimately offers a "correct approach"[118] to the issue presented in *Randolph*, based on the same assumption of the risk doctrine prevalent throughout the precedents.[119] Its rationale is very simple: "[i]f an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or places* with the government."[120] Accordingly, it is reasonable for police to search the premises upon the consent of any single occupant, because all other occupants impliedly assume that risk by living together.[121] The dissent argues that its approach is preferable because it flows naturally from the precedents,[122] and is logically grounded in the concept of privacy.[123]

b. Justice Scalia

In addition to joining Chief Justice Roberts, Justice Scalia offers an independent response to Justice Stevens's criticism of "originalism."[124] First, he challenges Stevens's assertion that "originalism" would have justified police in searching the home over the objection of a married woman when the Constitution was adopted in 1791.[125] He further defends "originalism" by arguing that this mode of constitutional interpretation can operate flexibly, despite Stevens's doubts. Specifically, Scalia states that "there is nothing new or surprising in the proposition" that the Constitution may remain unchanged while bodies of law to which it refers do change.[126] Scalia concludes by criticizing Stevens's "celebration"[127] of the majority's professed endorsement of women's rights, ar-

---

115. *Randolph*, 126 S. Ct. at 1537.
116. *Id.* (suggesting that the social expectations concept should not be used to examine the issue of whether consent was reasonable).
117. *Id.*
118. *Id.* at 1531.
119. *See, e.g.*, *Frazier*, 394 U.S. 731, 740 (1969).
120. *Randolph*, 126 S. Ct. at 1531 (Roberts, C.J., dissenting).
121. *Id.* at 1534 (citing *Matlock*, 415 U.S. at 171 n.7).
122. *Randolph*, 126 S. Ct. at 1536.
123. *Id.*
124. *Id.* at 1539-41 (Scalia, J., dissenting).
125. *Id.* at 1540.
126. *Id.* (arguing that "originalism" does not prohibit the Constitution from taking account of changes in other bodies of law).
127. *Id.* at 1541.

guing that in light of domestic violence patterns the decision will actually defeat the basis of their pronouncement, and instead lay the foundation for even greater violence toward women.[128]

c. Justice Thomas

Justice Thomas pursues a simple argument unaddressed in the other opinions. Specifically, he asserts that *Coolidge v. New Hampshire*[129] "squarely controls this case."[130] In *Coolidge*, officers questioned the wife of an absent defendant pursuant to a homicide investigation. Subsequently, and of her own accord, the wife invited the officers into the home and permitted them to conduct a search. By their search, the police obtained guns and clothing belonging to her husband. The evidence later served to convict him of murder.[131] Thomas relies upon the holding in *Coolidge* that "when a citizen leads police officers into a home shared with her spouse to show them evidence . . . that citizen is not acting as an agent of the police, and thus no Fourth Amendment search has occurred."[132] In doing so, Thomas argues that the facts in *Randolph* are indistinguishable from *Coolidge*.[133] Accordingly, Janet Randolph was not acting as an agent of the officers. For that reason, Justice Thomas explains, no Fourth Amendment search ever occurred. Therefore, the trial court's initial denial of the motion to suppress was appropriate.[134]

III. ANALYSIS

The Supreme Court's decision in *Georgia v. Randolph*[135] addressed whether police could lawfully search the home when one occupant disputes another occupant's consent.[136] Under existing law, lower courts had reached incongruous results in answering this question,[137] and the justice system as a whole needed an authoritative ruling from the Supreme Court. In *Randolph*, the Court answered by formulating a clear rule[138] which will help lower courts shape future decisions. Jurisdictional differences in holdings deciding this issue, albeit a limited one, will disappear and the justice system should benefit from a consistent

128. *Id.*
129. 403 U.S. 443 (1971).
130. *Randolph*, 126 S. Ct. at 1541 (Thomas, J., dissenting).
131. *Coolidge*, 403 U.S. at 446.
132. *Randolph*, 126 S. Ct. at 1541-42 (Thomas, J., dissenting) (citing *Coolidge*, 403 U.S. at 488-498).
133. *Randolph*, 126 S. Ct., at 1542.
134. *Id.* at 1542-43.
135. 126 S. Ct. 1515 (2006).
136. *Randolph*, 126 S. Ct. at 1518-19.
137. *Compare* Primus v. State, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004) (holding that a search of Defendant's premises upon consent of his roommate was valid despite the Defendant's presence), *with* Randolph v. State, 604 S.E.2d 835, 837 (Ga. 2004) (holding that a search of Defendant's home upon consent of his wife, but his presence and clear refusal, was invalid).
138. *Randolph*, 126 S. Ct. at 1526 ("We therefore hold 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.").

and predictable approach to the validity of disputed-consent searches. To that extent, the holding in *Randolph* is clearly beneficial.

However, the *Randolph* holding simultaneously forecasts a novel set of problems that lower courts will have to address as a result. Generally, this analysis will to point out *Randolph's* potential deficiencies, balancing them with the decision's clear benefits for a comprehensive assessment. Attention will focus on unanticipated practical effects likely to arise in the aftermath of the holding, scrutinizing the tension between citizens' privacy rights, and the police's ability to enforce the law. Additionally, the Court's well-established trend of limiting Fourth Amendment privacy rights will be evaluated, paying heed to issues that may arise as a result of *Randolph's* departure from this trend. And finally, potential solutions available to both courts and police will be suggested to assist in dealing with these new issues.

A. *Privacy Rights Versus Law Enforcement: Practical Implications of* Georgia v. Randolph

1. Practical Implications for Citizens' Privacy Rights

At first glance, the *Randolph* decision appears to expand privacy rights, for the first time in several decades of Supreme Court Fourth Amendment decisions,[139] by holding in favor of the defendant on a voluntary consent issue.[140] The Court announces a straightforward holding that attempts to limit the scope of permissible police searches in favor of protecting the refusing defendant's privacy.[141] However, in spite of this seemingly simple directive, there is a strong possibility that *Randolph* will actually act to *limit* the right of privacy even further. This restriction of rights is most likely to manifest itself through changing police behavior in response to situations of disputed consent.

Specifically, *Randolph* creates an incentive for police, upon encountering a situation in which co-occupants might disagree on the issue of consent, to immediately detain and remove the occupant most likely to refuse a search. In taking this action, police can then pursue consent from the remaining occupant without regard to whether the detained occupant would agree.[142] Accordingly, the holding encourages police to take action that, from a practical standpoint, completely undermines the rule's original purpose of preserving a nonconsenting co-occupant's privacy rights in the face of another, consenting occupant.[143] This induce-

139. *See supra* Part I.

140. *Randolph*, 126 S. Ct. at 1528 ("This case invites the straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant.").

141. *Id.*

142. *See id.* at 1527 ("[T]he potential objector, nearby but not invited to take part in the threshold colloquy, loses out.").

143. *See id.* at 1528.

ment is further supported because the holding does not purport to overrule *United States v. Matlock*[144] or *Illinois v. Rodriguez*,[145] but merely distinguishes them. In those two cases, the Court held that neither an occupant sleeping in the next room,[146] nor one detained in a squad car,[147] could later object to a search. By refusing to overrule those two decisions, the Court essentially endorsed their holdings as good law, thereby informing lower courts and police that searches made under similar circumstances are still legally viable.[148] As a consequence, *Randolph* will likely encourage police to circumvent its holding by removing potential nonconsenting occupants, thereby nullifying the very Fourth Amendment protections it seeks to espouse.

A second implication of this decision concerns its limited effect on Fourth Amendment jurisprudence. As the majority opinion readily admits,[149] *Randolph* confines its authority to such a unique set of circumstances that it will very rarely apply.[150] It is interesting that the majority so readily admits the narrowness of its holding, because earlier in the opinion it justifies acceptance of this issue in the first place on the judicial system's need for a decision on this issue.[151] Nevertheless, this decision will be of only limited effect in protecting privacy rights because, coupled with police incentive to detain hostile suspects, it will be the rare situation in which lower courts and legal counsel can point to *Randolph* as authoritative, controlling authority. Instead of "drawing a fine line,"[152] as it did, the Court might have been better served by opting to rely on the broad and longstanding precedents through application of the assumption of the risk doctrine,[153] as it concerns co-occupancy. Though reliance on this doctrine would have forced the Court to come to the opposite conclusion,[154] doing so would have enabled the Court to avoid the

---

144. 415 U.S. 164 (1974).
145. 497 U.S. 177 (1990).
146. *Rodriguez*, 497 U.S. at 180.
147. *Matlock*, 415 U.S. at 179 (Douglas, J., dissenting).
148. *Randolph*, 126 S. Ct. at 1527.
149. *See id.* ("[I]f [*Rodriguez* and *Matlock*] are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.").
150. *See id.*
151. *Compare Randolph*, 126 S. Ct. at 1527 ("*[W]e have to admit that we are drawing a fine line*; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.") (emphasis added), *with Randolph*, 126 S. Ct. at 1520 ("We granted certiorari to resolve a split of authority on 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.").
152. *Randolph*, 126 S. Ct. at 1527.
153. *See, e.g.*, *Frazier*, 394 U.S. 731, 740 (1969).
154. *Randolph*, 126 S. Ct. at 1531 (Roberts, C.J., dissenting) (suggesting that if the Court had relied on the assumption of the risk doctrine, it could only have come to the conclusion that the search against Mr. Randolph did not violate the Fourth Amendment).

implicit contradiction with the relevant precedents,[155] while simultaneously reinforcing the vitality of a consistent line of decisions dealing with Fourth Amendment consent searches.[156]

2. Practical Implications for Law Enforcement

Because all Fourth Amendment decisions implicitly struggle with the delicate balance between citizens' privacy rights and law enforcement capabilities, *Randolph* equally carries with it practical implications for police officers in the course of their work. Although it is difficult to predict the full extent of changing police behavior following this decision, both the majority and dissenting opinions reflect on one recurring situation this holding is almost sure to affect on a regular basis: domestic violence. Because domestic violence already plagues U.S. society,[157] and because this rule undisputedly affects police response to domestic violence situations,[158] the opposing opinions devote considerable attention to the rule's likely effect on the issue.[159] Not surprisingly, they reach wholly inconsistent conclusions.

While the majority presents a solid argument that the dissent's criticism is a "red herring,"[160] its opinion fails to look beyond the legal theory in order to appreciate the reality of domestic violence. Moreover, evidence of domestic violence may permit police entry under the exigent circumstances exception[161] in some disputed-consent circumstances; however, often times no such evidence will exist to, literally, open the door to a search. It is easy to foresee a situation in which police respond to a domestic violence call only to find that no actual violence has yet been inflicted. Police are powerless to act at that point. However, as recognized by the dissent, consider the retribution that will be carried out once the police leave.[162] Similarly, it is likely that police will rarely get an opportunity to view evidence of violence in the first place, as the bat-

155. *E.g.*, *Matlock*, 415 U.S. 164; *Rodriguez*, 497 U.S. 177, 188-89 (1990) (referring to contradiction created when comparing the decision in *Randolph* which disallows searches made when the suspect is standing at the door, to the decisions in *Matlock* and *Rodriguez* which allow searches made when the suspect is either detained in the nearby squad car, or sleeping in an adjacent room).

156. *See supra* Part I.

157. *See* Kapila Juthani, Note, *Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy*, 59 N.Y.U. ANN. SURV. AM. L. 51, 56 (2003). *See generally Randolph*, 126 S. Ct. at 1525 (presenting a substantial list of government and private reports analyzing the extent and nature of the domestic violence problem in the U.S.).

158. *See, e.g.*, *Randolph*, 126 S. Ct. 1515; *see also* Scheiber v. City of Philadelphia, 156 F. Supp. 2d 451, 458-59 (E.D. Pa. 2001) (referring to two, of many, relevant Fourth Amendment consent cases where the original police response arose from domestic violence).

159. *See Randolph*, 126 S. Ct. at 1525-26 (explaining the majority's perspective of the holding's affect on domestic violence); *see also id.* at 1537-38 (Roberts, C.J., dissenting).

160. *Randolph*, 126 S. Ct. at 1526 (referring to its failure to account for the exigent circumstances exception).

161. *Id.* at 1525 n.6 (listing the exigent circumstances that render consent irrelevant).

162. *See id.* at 1537 (Roberts, C.J., dissenting) (arguing that violence will be exacerbated when domestic disputes are reported, but police are unable to take action due to the lack of evidence which would permit intervention).

tered and frightened woman will remain out of view for fear of severe future consequences if she comes out and pleads for protection.

On a broader level, *Randolph* will also have the practical effect of contributing to police officers' general confusion concerning a suspect's privacy rights. Responding officers will constantly confront unclear situations where there is not an obvious consenting or nonconsenting occupant standing at the doorway. Does the refusal still trump if the refusing occupant is shouting his rebuff up the stairs from the basement? What if either occupant is under the influence of alcohol or drugs? What if the nonconsenting occupant is on the telephone with the consenting occupant, stating his refusal through the phone? Prior to *Randolph*, these potential contingencies did not present an issue. Police officers, operating under the established assumption of the risk principle,[163] needed only to concern themselves with obtaining consent from the co-occupant standing in the doorway. Thus, although these possibilities were irrelevant prior to *Randolph*, drawing such a fine line makes these questions suddenly important.

B. A Departure from the Court's Trend of Limiting Privacy Rights

Beginning with the decision in *Frazier v. Cupp*,[164] and extending over thirty years up to *Randolph*, the Supreme Court adhered to a generally recognized trend of expanding the validity of warrantless, consent-based police searches, and correspondingly limiting defendants' privacy rights under the Fourth Amendment.[165] Consequently, *Randolph*, which reinforces the individual privacy interest at the expense of valid police searches,[166] comes as an unexpected departure from this trend.[167] While the consequences of departing from an identifiable trend in constitutional interpretation may not necessarily be severe, the resulting judicial uncertainty creates problematic issues.

Prior to *Randolph*, lower courts across the nation benefited from a clear understanding of the Supreme Court's consistent trend of upholding the validity of police searches. However, post-*Randolph*, courts are suddenly placed into a state of confusion about the direction of Fourth Amendment search and seizure jurisprudence. Specifically, state courts will struggle to decide whether this decision forecasts an impending reversal in Fourth Amendment decision-making, or whether it's merely a detour in the continued path of generally limiting privacy. This creates a

163. *Supra* Part I.B.
164. 394 U.S. 731 (1969).
165. *See generally* Kloster, *supra* note 26, at 104 (providing a detailed analysis of the Court's trend in deciding Fourth Amendment search cases).
166. *Randolph*, 126 S. Ct. at 1526.
167. *See supra* Part I (referring to the trend of limiting privacy rights and expanding the boundaries of valid warrantless police searches).

negative impact on the judicial system as a whole because it signals inconsistency and unpredictability.

C. Unreasonable Reasoning

The logic employed by the majority opinion can be questioned with regard to two specific facets of the decision. First, a recurrently problematic result of the holding concerns its apparent neglect of precedent. Moreover, the majority attempts to deal with this problem by "drawing a fine line"[168] and dismissing the contradiction with precedent cases as a "loose end"[169] to be tied up.[170] However, the reality of the holding, especially concerning *Matlock* and *Rodriguez*, is that the decisions considered collectively bear little logical relationship to one another. Worse, the logic employed by the Court in each decision serves to effectively contradict the logic used in the others.[171] Consideration of the holdings together begs the question of how justice may be reconciled when a nonconsenting occupant lucky enough to be standing at the threshold prevails, but a nonconsenting occupant napping in the next room, or detained in a nearby squad car, loses out. Factually, the differences are so minute that the majority struggles to distinguish them.[172] Consequently, following *Randolph* a stalemate of Supreme Court decisions pits limited privacy rights against expansive police discretion to search, and the determinative factor as to which rule will apply falls solely upon the arbitrary circumstances surrounding the suspect's location with respect to the doorway.

Additionally, the "social expectation" reasoning utilized by the majority as a tool to assess reasonableness is questionable for two reasons. Initially, the model is faulty because it misses the true inquiry of reasonableness as defined by precedent, which is the individual's "legitimate expectation of privacy."[173] The majority mistakenly equates this legitimate expectation with the disputed-consent social expectation hypothetical,[174] assuming without explanation that it leads to the correct conclusion that entry violates reasonableness. However, as the dissent points out, social expectations comprise a very different set of assumptions than those encompassing the legitimate expectation of privacy.[175] Accordingly, one might assume that his roommate won't turn over evidence of

168. *Randolph*, 126 S. Ct. at 1527.

169. *Id.*

170. *See supra* Part II.C.1.c.

171. *Randolph*, 126 S. Ct. at 1527 (referring to the *Randolph* holding as compared to *Matlock* and *Rodriguez*).

172. *Id.* (admitting that they are drawing a fine line, and arguing that the "formalism is justified").

173. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

174. *See Randolph*, 126 S. Ct. at 1522-23 (referring to the hypothetical situation laid out in the majority opinion, where a social guest arrives at a residence and is greeted by two co-occupants in disagreement over whether the guest may enter).

175. *Id.* at 1533.

his drug problem to police, based on social expectations between them.[176] However, because he shares a living space with that roommate, any legitimate expectation of privacy with regard to their shared dwelling has "already been frustrated,"[177] and regardless of friendship-based expectations between them, there can be no legitimate expectation of protection from police searches if consent is given by one roommate. Thus, the majority's reliance on the social expectation hypothetical could be considered inappropriate because it equates the social expectations of co-occupants with the legitimate expectations of privacy. The concepts are different, and accordingly yield different results.[178]

The second problem that arises with regard to the hypothetical is the majority's unwarranted assumption that the nonconsenting occupant's decision prevails in the event of a disputed-consent situation.[179] Moreover, the majority opinion clearly holds that whenever two co-occupants disagree on the issue of consent to a police search, the nonconsenting occupant prevails. This assumption generates query as to why, when the occupants share an equal status of authority,[180] the party refusing consent must be considered the winner.[181] Thus, the social expectation analysis could be considered imperfect even within its own boundaries, because it stresses the fact that co-occupants share equal authority, but then assumes without justification that the nonconsenting occupant prevails in situations of dispute.

D. Solutions

Despite the unanticipated problems likely to arise following the Supreme Court's holding in *Randolph*, some possible solutions exist that may assist to alleviate any negative affects. First and foremost, judges deciding Fourth Amendment disputed-consent search cases should engage in an intensive fact-based analysis of the situation in front of them, and require the particular situation to precisely match *Randolph*'s distinct factual background before applying it as precedent. Although *Randolph* seems to inherently conflict with prior precedents such as *Matlock* and *Rodriguez*, if courts can devote special attention to the factual background so as to apply the respective precedents only to identical factual

176. *Id.*

177. United States v. Jacobsen, 466 U.S. 109, 117 (1984) (referring to the meaning of a legitimate expectation of privacy in the context of co-occupancy).

178. *Id.*

179. *Randolph*, 126 S. Ct. at 1523 (stating that "there is no societal understanding of superior and inferior" between co-occupants).

180. *Id.* at 1523 ("[T]here is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.").

181. *Id.* at 1532 (Roberts, C.J., Scalia, J., dissenting) ("It seems equally accurate to say – based on the majority's conclusion that one does not have a right to prevail over the express wishes of his co-occupant – that the objector has no 'authority' to insist on getting *his* way over his co-occupant's wishes that her guest be admitted." (emphasis added)).

situations, no overbearing contradictions will arise. Doing this will alleviate the confusion created by the Supreme Court's seemingly conflicting decisions by limiting the scope of future holdings to situations which match the appropriate precedents.

Second, courts should embrace a Preliminary Effort Test,[182] which requires officers pursuing a co-occupant consent search to, at least, make an initial attempt to obtain consent from all accessible inhabitants. Specifically, this test would initially require responding officers engaged with any occupant of the residence to inquire as to whether any other co-occupants are present on the premises. If the officers are led to believe that other occupants are at home, this test would additionally require the police to obtain consent from all additional occupants before entering to search. Adoption of this test would be beneficial for several reasons. First, the Preliminary Effort Test is commensurate with the reasonableness inquiry explicit in the Fourth Amendment,[183] because it requires police to take the simple step of initially asking whether other occupants are present, and then obtaining consent from any that are there. Similarly, this test reinforces the enduring vitality of the warrant requirement in the Fourth Amendment[184] because police would be required to pursue the alternate course of obtaining a warrant in the event that a roused co-occupant decides to refuse the search. Last, application of this test would benefit the judicial system by preventing officers from circumventing the purpose of *Randolph's* holding by immediately detaining potential non-consenting occupants.[185] Incongruous situations similar to *Matlock* or *Rodriguez* would not arise to frustrate the holding, because police would be required to make an initial effort to seek out other inhabitants, and receive consent from them before engaging in a search. Although this test creates an added burden on police, it would greatly reduce the possibility of engaging in an illegal search.

Finally, in the event that police are unable to obtain a warrant, they should be encouraged to pursue the traditional alternatives to a warrantless search more readily. For one, officers responding to situations of disputed consent should simply request that the consenting occupant retrieve and hand over any incriminating evidence that the officers hope to discover in the event of a search. This alternative is likely to be viable in many disputed consent circumstances where the two occupants are at odds with one another,[186] as the consenting individual will be willing to

182. *See* Elizabeth A. Wright, Note, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841, 1874-77 (2005) (proposing the "Reasonable Attempt Test"); Gregory S. Fisher, *Search and Seizure, Third Party Consent: Rethinking Police Conduct and the Fourth Amendment*, 66 WASH. L. REV. 189, 202-08 (1991) (proposing "Discretionary Restraint" as a framework for addressing third-party consent).

183. U.S. CONST. amend. IV.

184. *Id.*

185. *See supra* Part III.A.2

186. *See, e.g.*, *Randolph*, 126 S. Ct. at 1519.

take whatever steps are necessary to implicate their co-occupant. Additionally, when the consenting occupant is unable or unwilling to deliver the incriminating evidence to the responding officers, they can at least aid the officers in obtaining a legitimate search warrant by establishing probable cause. In choosing to pursue either of these warrantless search alternatives, police will benefit by preserving the ability to obtain incriminating evidence against the suspect, while at the same time eliminating the possibility of engaging in a warrantless search.

CONCLUSION

In the immediate wake of *Georgia v. Randolph*, the decision's long-term impact on Fourth Amendment search and seizure jurisprudence is unclear. While the holding may signal a pending reversal in the Court's prior predilection to limiting citizens' privacy rights, it may also represent only a slight divergence in a continually viable trend. Perhaps the Court will have the opportunity to resolve this query in future decisions, potentially even those based on *Randolph's* shortcomings. Regardless of its eventual impact, *Randolph* currently holds a position of limited application which is likely to create confusion and foster practical dilemmas. As *Randolph* begins to assert its presence in the world of Fourth Amendment privacy rights, one can only hope that, as the majority opinion suggests, these problematic issues prove to be mere "loose ends"[187] capable of being tied up.

Andrew Fiske[*]

187. *Id.* at 1527.

*. J.D. Candidate, 2008, University of Denver Sturm College of Law. The author would like to thank Professor Alan Chen for his valuable input.