

2009

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Recommended Citation

Matthew W. J. Webb, *Third-Party Consent Searches After Randolph: The Circuit Split over Police Removal of an Objecting Tenant*, 77 Fordham L. Rev. 3371 (2009).

Available at: <https://ir.lawnet.fordham.edu/flr/vol77/iss6/11>

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Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law. Thank you to Professor Fabio Arcila for his guidance, insight, and feedback throughout this process, and to my wife and family for their unwavering support and encouragement.

THIRD-PARTY CONSENT SEARCHES AFTER *RANDOLPH*: THE CIRCUIT SPLIT OVER POLICE REMOVAL OF AN OBJECTING TENANT

Matthew W. J. Webb*

In Georgia v. Randolph, the U.S. Supreme Court held that, where two occupants of a home disagree over whether to grant police permission to search, the “physically present co-occupant’s stated refusal to permit entry prevails.” Courts are now split, however, over whether police may nevertheless conduct a warrantless search with the consent of one resident after a co-occupant who expressly denies consent is arrested and removed by the police. This Note examines the rationales of those U.S. courts of appeals that have confronted these circumstances and ultimately concludes that the Supreme Court’s complicated—and sometimes contradictory—Fourth Amendment jurisprudence does not offer a satisfactory solution to the problem. In its place, this Note offers a different approach to third-party consent cases, advocating a division between two distinct types of searches: investigative consent searches and searches invited by a citizen in distress.

INTRODUCTION

On July 16, 2001, Scott Randolph’s wife called the police to report a domestic disturbance at her home.¹ When the police arrived, Janet Randolph accused her husband of using “large amounts of cocaine” and of taking their child away from the home, which led the police to request consent to search the house.² Scott Randolph refused to consent to a search, but his wife allowed police inside and led the officers to an upstairs room, where they recovered a straw that contained cocaine residue.³ After police seized the cocaine straw, Mrs. Randolph withdrew her consent to search the home, but the officers were able to procure a warrant based on the initial seizure.⁴ During the ensuing search of the entire home, police seized further drug-related items.⁵ At trial, Scott Randolph moved to

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1. *Randolph v. State*, 590 S.E.2d 834, 836 (Ga. Ct. App. 2003).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

suppress the seized evidence on the grounds that the search “over his express objection violated his Fourth Amendment rights,” but his motion was denied.⁶

The U.S. Supreme Court, in *Georgia v. Randolph*,⁷ held that “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.”⁸ Thus, the search of Randolph’s home violated the Fourth Amendment. *Randolph* is easy to apply in circumstances identical to those that faced the police on Scott Randolph’s doorstep, but courts are now beginning to struggle with variations on that fact pattern.

The U.S. Court of Appeals for the Eighth Circuit recently referred to *Randolph* in deciding *United States v. Hudspeth*,⁹ a case that began when Missouri state police, investigating the sale of pseudoephedrine-based cold tablets, executed a search warrant on Roy Hudspeth’s business.¹⁰ During the search of the office, the officers came across compact discs (CDs) containing child pornography and requested Hudspeth’s permission to search his home computer.¹¹ Hudspeth refused and was arrested and transported to the county jail.¹² Despite Hudspeth’s refusal, the police went to his home, where they met Georgia Hudspeth, Roy’s wife.¹³ Mrs. Hudspeth eventually consented to the police request to seize the home computer.¹⁴ The police found additional child pornography, which was introduced at trial.¹⁵ Hudspeth argued that *Randolph* mandated suppression of the evidence,¹⁶ but the trial court rejected this claim, and the Eighth Circuit eventually affirmed.¹⁷ Roy Hudspeth was sentenced to five years imprisonment.¹⁸

The U.S. Court of Appeals for the Seventh Circuit also considered *Randolph* in deciding *United States v. Henderson*.¹⁹ In that case, police arrived at Kevin Henderson’s home in response to a 911 call made by his wife, Patricia, who claimed that her husband had choked her and thrown her out of the house.²⁰ Mrs. Henderson gave the police a key to the house, whereupon they entered and found Kevin Henderson in his living room.²¹

6. *Id.*

7. 126 S. Ct. 1515 (2006).

8. *Id.* at 1519.

9. 518 F.3d 954 (8th Cir. 2008).

10. *United States v. Hudspeth*, 459 F.3d 922, 924 (8th Cir. 2006), *rev’d in part, aff’d in part en banc*, 518 F.3d 954 (8th Cir. 2008).

11. *Id.* at 925.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 926.

16. Letter Brief of Petitioner-Appellant at 4–5, *Hudspeth*, 459 F.3d 922 (No. 05-3316).

17. *United States v. Hudspeth*, 518 F.3d 954, 961 (8th Cir. 2008).

18. Appellant’s Opening Brief at i, *Hudspeth*, 459 F.3d 922 (No. 05-3316).

19. 536 F.3d 776 (7th Cir. 2008).

20. *United States v. Henderson*, No. 04 CR 697, 2006 WL 3469538, at *1 (N.D. Ill. Nov. 29, 2006), *rev’d*, 536 F.3d 776.

21. *Id.*

Although Henderson immediately ordered the officers out of his house, they arrested him and removed him from the scene.²² Patricia Henderson consented to a search of the home and helped the officers find drugs and weapons.²³ Kevin Henderson moved to suppress the evidence, relying on the Supreme Court's holding in *Randolph*, and the trial court granted the motion.²⁴ However, the Seventh Circuit reversed, finding that the case was distinguishable from *Randolph* and that Henderson's objection to the search lost its force once he was arrested and removed from the scene.²⁵ Kevin Henderson filed a petition for a rehearing en banc on September 17, 2008, and is awaiting a decision by the Seventh Circuit.²⁶

Finally, the U.S. Court of Appeals for the Ninth Circuit found *Randolph* to be relevant to its analysis in *United States v. Murphy*.²⁷ Police officers conducting a drug investigation knocked on Stephen Murphy's storage unit door and requested permission to search the premises. Although Murphy refused, the officers could see a methamphetamine lab in plain view and therefore arrested him.²⁸ Later that day, the police were able to obtain consent to search from another individual who had given Murphy permission to use the storage unit.²⁹ The district court—before *Randolph* was decided—denied Murphy's motion to suppress the evidence and then refused Murphy's request to reconsider after the Supreme Court's decision.³⁰ Murphy was sentenced to ten years imprisonment before the Ninth Circuit reversed and held that, in light of *Randolph*, the warrantless search of the storage unit after Murphy's objection violated the Fourth Amendment.³¹

This Note examines how the circuit courts apply—or refuse to apply—*Randolph* to situations where an individual who refuses to consent to a warrantless search is removed from the scene by police officers, only to have his refusal overridden by a co-tenant or co-occupant. Part I reviews the development of Fourth Amendment jurisprudence and the basis for the Supreme Court's consent search doctrine, focusing on the Court's landmark third-party consent search cases: *United States v. Matlock*,³² *Illinois v. Rodriguez*,³³ and *Georgia v. Randolph*. Part II provides a detailed analysis of the conflict that has developed among the Seventh, Eighth, and Ninth Circuits over whether *Randolph* requires suppression of any evidence obtained from a warrantless consent search where one occupant, although

22. *Id.*

23. *Henderson*, 536 F.3d at 777.

24. *Id.*

25. *Id.* at 783–84.

26. Defendant-Appellee's Petition for Rehearing with a Suggestion for Rehearing En Banc, *Henderson*, 536 F.3d 776 (No. 04 CR 697).

27. 516 F.3d 1117 (9th Cir. 2008).

28. *Id.* at 1119.

29. *Id.* at 1120.

30. *Id.*

31. *Id.* at 1125.

32. 415 U.S. 164 (1974).

33. 497 U.S. 177 (1990).

not physically present at the time of the search, expressly refuses to consent before being removed by police officers. Part III argues that the “widely shared social expectations”³⁴ analysis used in *Randolph* is fundamentally flawed and a primary cause of the current circuit split. This part also argues for use of Professor Jed Rubenfeld’s “test of generalizability” to develop a new understanding of third-party consent searches. In particular, Part III advocates for recognition of a significant distinction between cases where police seek consent as a result of their own independent investigations, and those where a citizen requesting police assistance grants officers consent to search. Where police are in an investigative, rather than protective role, they should be required to have probable cause and obtain a warrant in order to search, rather than requesting consent from a third party.

I. THE FOURTH AMENDMENT FRAMEWORK: PROPERTY, PRIVACY, SECURITY, AND THE ABILITY TO CONSENT

This part outlines the development of Fourth Amendment jurisprudence from the Framers’ original intent to the modern-day conception of the amendment as protecting reasonable expectations of privacy. In addition, it provides an overview of the consent search doctrine, focusing on the Supreme Court’s decisions in third-party consent search cases.

A. *Original Intent and Current Application of the Fourth Amendment*

The Fourth Amendment of the U.S. Constitution provides that “[t]he 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.”³⁵ The meaning of the amendment has long been debated by scholars and judges, and the Supreme Court’s decisions in this area have been anything but clarifying, leading one scholar to comment that “[a]lmost no one has a kind word to say about fourth amendment jurisprudence.”³⁶ Another commentator described the Supreme Court’s Fourth Amendment decisions as “a mass of contradictions and obscurities that has ensnared the ‘Brethren’ in such a way that every effort to extract themselves only finds them more profoundly stuck.”³⁷

1. Original Intent

The debate begins with the question of what protections the Framers intended the Fourth Amendment to provide. The Supreme Court has

34. *Georgia v. Randolph*, 126 S. Ct. 1515, 1521 (2006).

35. U.S. CONST. amend. IV.

36. Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 19 (1988). The authors further note that “there is virtual unanimity, transcending normal ideological dispute, that the Court simply has made a mess of search and seizure law.” *Id.* at 20.

37. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

recently begun mandating that the Framers' intent should guide any Fourth Amendment analysis, suggesting that courts look to the laws of the founding era in order to determine whether a particular search or seizure would have been considered illegal.³⁸ However, Professor Thomas Davies conducted a comprehensive review of the historical basis for the Fourth Amendment and determined that its entire purpose was to abolish general warrants.³⁹ A general warrant is one that "lacks a sufficiently particularized description of the . . . thing to be seized or the place to be searched."⁴⁰ According to Davies, the Framers' primary concern was not the warrantless searches and seizures that tend to be the subject of modern Fourth Amendment jurisprudence, but was instead searches of homes under the color of a general warrant.⁴¹ In the late eighteenth century, "[p]roactive criminal law enforcement had not yet developed," and officers of the law had extremely limited discretionary authority.⁴² Further, beyond the limited police powers of state officers, "the common law already specified that many sorts of arrests or searches could only be justified by a valid warrant—especially when 'houses, papers, and effects' were involved."⁴³ The modern understanding of the Fourth Amendment, that it "generally prohibits the warrantless entry of a person's home,"⁴⁴ is in fact an adaptation of the text of the Constitution required "to meet the needs of a

38. See, e.g., *Virginia v. Moore*, 128 S. Ct. 1598, 1602 (2008) ("In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."); *Florida v. White*, 526 U.S. 559, 563 (1999) ("In deciding whether a challenged governmental action violates the Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed."); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) ("In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."). But see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1743–44 (2000) ("[This] new understanding [of the Fourth Amendment] has little to recommend it Neither the text nor the background of the Fourth Amendment suggests it aims merely to codify eighteenth-century rules of search and seizure.").

39. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 649–50 (1999) (asserting that the Framers "perceived the task for the constitutional text solely as banning the legalization of general warrants"). For another view on the original purpose of the Fourth Amendment, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801 (1994) (arguing that "[t]he core of the Fourth Amendment . . . is neither a warrant nor probable cause, but reasonableness").

40. BLACK'S LAW DICTIONARY 1616 (8th ed. 2004); see also Davies, *supra* note 39, at 558 (suggesting that "general warrant" is "a framing-era term for an unparticularized warrant (for example, ordering a search of 'suspected places'), which was also commonly applied to a warrant lacking a complaint under oath or an adequate showing of cause").

41. Davies, *supra* note 39, at 601 (noting that, although "[m]odern search and seizure law has become preoccupied with warrantless arrests and searches[,] . . . the Framers focused their concerns and complaints rather precisely on searches of houses under general warrants").

42. *Id.* at 620 ("[T]he common law did not provide officers with discretionary search and seizure authority.").

43. *Id.* at 649.

44. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (citing *Payton v. New York*, 445 U.S. 573 (1980); *Johnson v. United States*, 333 U.S. 10 (1948)).

more populous, heterogeneous, and urbanized society"⁴⁵ that is policed by officers with greater discretionary authority.⁴⁶ Further, the generalized principle of reasonableness, often invoked to determine whether a particular search violates the Fourth Amendment,⁴⁷ also is not supported by an historical understanding of the Framers' use of the word "unreasonable" in the text, which was intended to be synonymous with "general warrant."⁴⁸

2. The Modern Conception of the Fourth Amendment's Primary Protection: Property, Privacy, or Security?

Clearly, the Fourth Amendment has come to mean significantly more than simply a protection against general warrants. While the precise target or scope of its protections are not always clear, three potential candidates can be identified: property, privacy, and security.⁴⁹

In 1928, the Supreme Court declared that the Fourth Amendment is only violated when the state unlawfully searches or seizes tangible, real property.⁵⁰ In a famous dissent, Justice Louis Brandeis strongly disputed the notion that the Fourth Amendment could only be invoked to protect intrusions against property, instead arguing that "every unjustifiable intrusion by the Government upon the privacy of the individual . . . must be deemed a violation of the Fourth Amendment."⁵¹

45. Davies, *supra* note 39, at 747.

46. *Id.* The view that the Fourth Amendment should be adaptable to modern needs was championed by Justice Louis Brandeis in his famous dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). Justice Brandeis argued that "[c]lauses guaranteeing to the individual protection against specific abuses of power[] must have a similar capacity of adaptation to a changing world." *Id.* at 472.

47. See, e.g., *Whren v. United States*, 517 U.S. 806, 810 (1996) (noting that "[a]n automobile stop is . . . subject to the constitutional imperative that it not be 'unreasonable' under the circumstances"); *Rodriguez*, 497 U.S. at 183 (a defendant is "assured . . . that no . . . search will occur that is 'unreasonable'" (citing U.S. CONST. amend. IV)); *Payton v. New York*, 445 U.S. 573, 586 (1980) (asserting that "it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable" (quoting *Coolidge v. New Hampshire* 403 U.S. 443, 477 (1971))); *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (noting the purpose of the Fourth Amendment is to "safeguard citizens from rash and unreasonable interferences with privacy").

48. Davies, *supra* note 39, at 693 (noting that the term "unreasonable" was used in the legal context as a "pejorative synonym for gross illegality or unconstitutionality," that is, "searches . . . made under that most illegal pretense of authority—general warrants").

49. Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security*, 33 WAKE FOREST L. REV. 307, 308 (1998) (asserting that "there are three possible candidates for defining the scope of the amendment's protections: property, privacy, and security").

50. *Olmstead*, 277 U.S. at 466 (holding that there must be "an official search and seizure of . . . tangible material effects, or an actual physical invasion of [the defendant's] house"); see also Clancy, *supra* note 49, at 312 (noting that, "beginning with *Olmstead v. United States*, the Court used property law to define constitutionally protected areas and limited the Fourth Amendment inquiry to the protection of tangible items from physical invasions of real property").

51. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

The Court adopted Justice Brandeis's interpretation of the Fourth Amendment in the landmark 1967 case *Katz v. United States*,⁵² which overruled *Olmstead v. United States*.⁵³ Charles Katz was convicted of illegal gambling after the Federal Bureau of Investigation placed a listening device on the outside of a public phone booth and recorded a telephone call he made to place bets.⁵⁴ The Court held that Katz was reasonably justified in expecting this call to remain private.⁵⁵

Thus, despite the fact that the word "privacy" is nowhere to be found in the text of the amendment, the Court now understands "reasonable expectation[s] of privacy" to be implicitly protected.⁵⁶ The problem inherent in this style of analysis is obvious: if the Court is the arbiter of what is a reasonable expectation of privacy, then "someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area would be unreasonable."⁵⁷ Nevertheless, the *Katz* decision "placed privacy at the heart of the fourth amendment," dispelling the notion that the amendment governed only the seizure of tangible property.⁵⁸ As seen in *Georgia v. Randolph*,⁵⁹ however, property interests did not become irrelevant to Fourth Amendment law but are instead one factor that could contribute to an individual's expectation of privacy.⁶⁰

In fact, scholars debate whether *Katz* actually signaled a change in Fourth Amendment analysis, or if it was actually more of a "revolution on paper than in practice."⁶¹ Professor Orin Kerr argues that, although courts continue to refer to "reasonable expectation[s] of privacy," those expectations are only considered "reasonable" and therefore protected by the Fourth Amendment, when "backed by a right to exclude borrowed from real property law."⁶² The real change signaled by *Katz*, Kerr argues, was a shift from reliance on the strict common law of property and trespass to a

52. 389 U.S. 347 (1967).

53. 277 U.S. 438; *see also* *Katz*, 389 U.S. at 353 ("We conclude that the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").

54. *Id.* at 348.

55. *Id.* at 352.

56. *Id.* at 360 (Harlan, J., concurring); *see also* *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (reinforcing the *Katz* formulation: the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place").

57. Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 61 (2001).

58. Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1593 (1987).

59. *See infra* Part I.C.3.

60. *Georgia v. Randolph*, 126 S. Ct. 1515, 1517 (2006) (noting that "widely shared social expectations . . . are influenced by property law but not controlled by its rules").

61. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 807 (2004).

62. *Id.* at 809–10.

"looser property-based approach,"⁶³ which "tracks property principles but doesn't embrace common law property technicalities."⁶⁴ Even *Katz* can easily be understood as a protection of property rights, rather than privacy, because the Court notes that *Katz* "pa[id] the toll that permit[ted] him to place a call,"⁶⁵ thus obtaining a property interest in the phone booth by renting it out "much like a hotel guest rents out a . . . room for the night."⁶⁶

Professor Sherry Colb disputes the premise of Kerr's argument, finding it "peculiar that the Court would pursue a property-based approach to the Fourth Amendment . . . and simultaneously pay lip service to a privacy-based approach."⁶⁷ Initially, Colb does not find the lack of textual support for a protection of privacy in the Fourth Amendment troubling because "[t]he right to be secure against unreasonable searches and seizures, in historical context . . . necessarily encompassed privacy."⁶⁸ Suggesting that "[t]here has long been significant overlap between property rights and reasonable expectations of privacy," Professor Colb argues that, at the time of the framing, it would have been possible to protect privacy effectively by guaranteeing the people a right of security in their houses, papers, and effects: "[s]uch an amendment would automatically cover privacy interests as well."⁶⁹ In other words, it would have been redundant to explicitly protect privacy rights in the Fourth Amendment.⁷⁰ Those cases that Kerr sees as neglecting privacy rights that are not associated with property rights,⁷¹ Colb understands as implicating both privacy and property interests, which the Court failed to protect because it applied an "assumption of the risk" approach that erroneously equates "risk of exposure with actual exposure."⁷² Fundamentally, Colb argues that "Fourth Amendment doctrine does not purport to protect privacy merely when it is

63. *Id.* at 816. Orin Kerr suggests that Justice John Marshall Harlan's reasonable expectation of privacy test, instead of being a "'watershed in fourth amendment jurisprudence,'" was merely an articulation of a "legal standard that the Court had been tacitly applying in past cases." *Id.* at 820 (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382 (1974)).

64. Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1131496047.shtml> (Nov. 8, 2005, 18:27 EST).

65. *Katz v. United States*, 389 U.S. 347, 352 (1967).

66. Kerr, *supra* note 61, at 822.

67. Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 893 (2004).

68. *Id.* at 895.

69. *Id.* at 894-95.

70. *Id.* (noting that "it would not have seemed necessary to the framers and ratifiers of the Fourth Amendment to craft a separate amendment to protect the privacy that did not arise from a property right").

71. See Kerr, *supra* note 61, at 824 (citing several cases decided post-*Katz* that are "hard to square" with the notion that *Katz* fundamentally changed the framework for Fourth Amendment analysis, such as *California v. Hodari D.*, 499 U.S. 621 (1991); *Oliver v. United States*, 466 U.S. 170 (1984); *Rakas v. Illinois*, 439 U.S. 128 (1978); and *United States v. White*, 401 U.S. 745, 750 (1971)).

72. See Colb, *supra* note 67, at 898 (arguing that the issues raised in the cases cited by Kerr "directly implicat[e] interests in property as well as privacy").

tied to property, but actually, and appropriately (if imperfectly), protects privacy.”⁷³

Some commentators, while acknowledging the role privacy has come to play in the Court’s analysis, nevertheless insist that this focus is misplaced and neglects the core protection of the Fourth Amendment: security.⁷⁴ Professor Thomas Clancy argues that the security protected by the Fourth Amendment ensures the right of the “individual to exclude the government from unreasonably intruding”⁷⁵ into the specific objects listed in the text: “persons, houses, papers, and effects.”⁷⁶ In Clancy’s view, the Court has “used privacy analysis not to expand protected individual interests, but to reduce the scope of the amendment’s protections.”⁷⁷ Because the privacy analysis has no basis in the text of the amendment, it is subject “to the vagaries of shifting Court majorities, which are able to manipulate the concept to either expand or contract the meaning of the word at will.”⁷⁸ Most importantly, “the privacy theory . . . fail[s] to grasp the essence of the interest protected.”⁷⁹ Clancy argues that an individual might invoke the Fourth Amendment in order to protect his or her own privacy, but “the individual’s motivation is not the right protected”; instead, the “right protected” is the right to exclude.⁸⁰ This right is inextricably linked to an individual’s property interest in whatever is being intruded upon, be it his home, papers, or person. The proper analysis, therefore, is to ask initially “whether the papers or personal property are mine, whether the house is mine, whether the body is mine? If the answer is yes, then one has the right to exclude the government from searching or seizing.”⁸¹

Professor Jed Rubenfeld similarly argues that courts should look more carefully at the text of the Fourth Amendment and consider what the Framers intended with the phrase “[t]he right of the people to be secure.”⁸²

73. *Id.* at 903.

74. See Clancy, *supra* note 49, at 308; Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008).

75. Clancy, *supra* note 49, at 308.

76. U.S. CONST. amend. IV.

77. Clancy, *supra* note 49, at 331.

78. *Id.* at 339.

79. *Id.* at 367.

80. *Id.* at 354. “The meaning of security will vary somewhat in relation to the protected interest specified by the amendment However, the core concept remains the right to exclude.” *Id.* at 356–57. Illustrating this point, Thomas Clancy asks the reader to imagine a glass house. *Id.* at 360. Because the interior of the house is completely visible from the outside, a privacy analysis might conclude that “the owner does not have a reasonable expectation of privacy in the contents of the house or in the conduct of his activities in the house.” *Id.* at 360. However, “[i]f the protected interest is defined as the right to exclude,” the owner retains the right to exclude a physical invasion. *Id.* at 360–61; see also *Monroe v. Pape*, 365 U.S. 167, 209 (1961) (“The essence of the liberty protected by the common law and by the American constitutions was ‘the right to shut the door on officials of the state unless their entry is under proper authority of law’; particularly, ‘the right to resist unauthorized entry.’” (quoting *Frank v. Maryland*, 359 U.S. 360, 365 (1959))).

81. Clancy, *supra* note 49, at 368–69.

82. Rubenfeld, *supra* note 74, at 119 (quoting U.S. CONST. amend. IV) (internal quotation marks omitted).

However, Rubenfeld rejects Clancy's definition of security as the right to exclude, offering a different interpretation.⁸³

Rubenfeld argues that the central function of the amendment is "to navigate the minefield between too much and too little police power."⁸⁴ By focusing on privacy, courts have emphasized "an individual's comfort, dignity, tranquility, respectability, and fear of embarrassment,"⁸⁵ instead of the "distinctive needs, responsibilities, and dangers of the government's awesome law enforcement power."⁸⁶ The most dangerous harm that a government unencumbered by the Fourth Amendment might inflict is not an individual detention or invasion of privacy;⁸⁷ it is instead the collective effect of these intrusions on our society as a whole.⁸⁸ Rubenfeld notes that the Fourth Amendment differs significantly from the criminal procedure guarantees of the Fifth and Sixth Amendments, in that it is directed toward "the people," rather than an individual rightsholder.⁸⁹ This choice of wording was not an example of the Framers' "grammatical excess,"⁹⁰ but instead was a clear indication of their concern with the effect of warrantless intrusions on American citizens' collective ability to live in freedom without a "pervasive, cringing fear of the state."⁹¹

In order to enforce this right, Rubenfeld proposes a "test of generalizability" that looks to how a particular warrantless government search or seizure, if left unchecked, would affect society collectively.⁹² Each search or seizure upheld by the Supreme Court "confer[s] on the state a general license to search or seize" in similar circumstances in the future, clearly affecting society in general.⁹³ Those searches or seizures that, when generalized to the society as a whole, would destroy "the security of law-abiding people," should be subject to probable cause and the warrant requirement.⁹⁴

The debate among commentators over the original intent of the Framers and the Supreme Court's interpretations of the Fourth Amendment is, of course, ongoing. The broad issues of privacy, property, and security run through all aspects of Fourth Amendment analysis, including discussions of so-called "consent searches," which are often considered an exception to the Fourth Amendment warrant requirement. The next section reviews the development of the Supreme Court's consent search jurisprudence.

83. *Id.* at 105 n.16.

84. *Id.* at 119.

85. *Id.* at 117.

86. *Id.* at 119.

87. *Id.* at 126-27.

88. *Id.* at 127 ("The fundamental constitutional harm created by systematic suspicion-based arrests and searches is the pervasive and profound *insecurity* such measures inflict on the people as a whole.").

89. *Id.* at 120.

90. *Id.* at 121.

91. *Id.* at 127.

92. *Id.* at 131.

93. *Id.*

94. *Id.*

B. *A Fourth Amendment Exception: Warrantless Consent Searches*

The Supreme Court has long recognized the importance of privacy within the home.⁹⁵ In fact, the home is the most clearly defined “zone of privacy” protected by the Fourth Amendment, which “unequivocally establishes . . . ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’ . . . Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”⁹⁶ The Court’s use of the phrase “absent exigent circumstances” makes clear that there are recognized exceptions to the rule that a warrantless search is “*per se* unreasonable.”⁹⁷ The exceptions are described as “specifically established and well-delineated”⁹⁸ and “jealously and carefully drawn,”⁹⁹ but they nevertheless allow the government to circumvent the warrant requirement and enter a home without the involvement of an “impartial magistrate.”¹⁰⁰ *Randolph*, and the current conflict under discussion, is the product of one of these exceptions: voluntary consent.

1. Consent Searches: Voluntary Waiver or Reasonable Police Conduct?

The Supreme Court recognizes that “a search pursuant to consent . . . is a constitutionally permissible and wholly legitimate aspect of effective police activity.”¹⁰¹ In fact, the police probably rely on voluntary consent more than any other method of executing a search without a warrant.¹⁰² Nevertheless, the precise basis for consent searches is somewhat murky,¹⁰³ and Professor Tracey Maclin identifies three separate doctrinal foundations for consent searches: (1) that consent creates an exception to the

95. See *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (noting that “it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people”); Davies, *supra* note 39, at 642 (suggesting that “modern courts . . . acknowledge that the house was meant to receive special protection” by the Fourth Amendment); Stephanie M. Godfrey & Kay Levine, *Much Ado About Randolph: The Supreme Court Revisits Third Party Consent*, 42 TULSA L. REV. 731, 732 (2007) (“Of particular importance to the framers was preservation of the home as a place of refuge and safety.”).

96. *Payton v. New York*, 445 U.S. 573, 589–90 (1980) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

97. *Katz v. United States*, 389 U.S. 347, 357 (1967).

98. *Id.*

99. *Jones v. United States*, 357 U.S. 493, 499 (1958).

100. *Id.* at 498.

101. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

102. See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 214 (2001) (claiming that “there is no dispute that [consent] searches affect tens of thousands, if not hundreds of thousands, of people every year”); Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 69 (2007) (asserting that consent searches are “the most common type of warrantless searches law enforcement officers conduct”).

103. Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 29 (2008) (noting that “[a]nother bewildering aspect of the law of consent searches is exactly where such searches belong in the Court’s Fourth Amendment framework”).

requirements of the Fourth Amendment;¹⁰⁴ (2) that no exception is required, because consent searches are not in fact "searches" protected by the Fourth Amendment, as the individual has chosen not to exercise his or her constitutional rights;¹⁰⁵ and (3) that consent is not a per se exception to the warrant requirement because the Fourth Amendment requires only that a warrantless search be "reasonable,"¹⁰⁶ which it must be if permission is granted.¹⁰⁷

In early consent cases, "[a] citizen's consent to a police intrusion was understood to waive . . . the privacy interest of the citizen that otherwise would be protected under the Fourth Amendment."¹⁰⁸ However, because the Supreme Court eventually determined that a valid waiver must be both knowing and intelligent,¹⁰⁹ this conception of consent could not survive the Court's decision in *Schneckloth v. Bustamonte*,¹¹⁰ which held that, although an individual's consent to a search must be voluntary, it need not be made with the knowledge that consent may be refused.¹¹¹ In *Schneckloth*, the Court decided that "[t]here is a vast difference between those rights that protect a fair criminal trial," to which waiver protections apply, "and the rights guaranteed under the Fourth Amendment."¹¹² Thus, the Court determined that there was no reason to extend the "'knowing' and 'intelligent'" requirement to consent searches.¹¹³

By removing "waiver" from the consent search doctrine vocabulary,¹¹⁴ the *Schneckloth* Court began the trend toward focusing on the "reasonableness" of the circumstances surrounding the search and the actions of the police officers, rather than a waiver of rights as the basis for

104. See, e.g., *Schneckloth*, 412 U.S. at 219 ("It is . . . 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.").

105. See 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, 27 (1991) (arguing that "the Court viewed consent as taking a police intrusion outside the scope of the Fourth Amendment").

106. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 183-84 (1990) ("What . . . is assured by the Fourth Amendment itself . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'" (internal citations omitted)).

107. See Maclin, *supra* note 103, at 29.

108. Davies, *supra* note 105, at 26-27.

109. See *Miranda v. Arizona*, 384 U.S. 436, 492-93 (1966) (citing *Haynes v. Washington*, 373 U.S. 503, 512-13 (1963); *Haley v. Ohio*, 332 U.S. 596, 601 (1948)).

110. 412 U.S. 218 (1973).

111. *Id.* at 234 ("[N]either this Court's prior cases, nor the traditional definition of 'voluntariness' requires proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search.").

112. *Id.* at 241.

113. *Id.*; see also Davies, *supra* note 105, at 31 ("*Schneckloth* edited 'waiver' out of the Court's vocabulary of synonyms for consent to avoid any suggestion that consent required a warning of the right to withhold consent.").

114. See Davies, *supra* note 105, at 32 (noting that, in *United States v. Matlock*, 415 U.S. 164 (1974), "the leading decision regarding third-party consent," the Court pointedly refrained from using the word "waiver").

consent searches.¹¹⁵ *Illinois v. Rodriguez* represented a significant hardening of that theory.¹¹⁶

2. Consent and Coercion

Several scholars strongly criticize the Supreme Court's refusal to mandate knowing and intelligent consent. Professor Marcy Strauss argues that "many people, if not most, will always feel coerced by police 'requests' to search. To most people, the request to search will be considered an uncontrovertible demand to search."¹¹⁷ Strauss suggests that people regularly consent to searches of their homes or cars, despite full knowledge that incriminating evidence will almost certainly be found, because a request made by a law enforcement officer is received as a demand that must be obeyed.¹¹⁸ Strauss argues that this is particularly true among African American and other minority communities, where "a court's nimble assertion that a person can 'just say no' to a police request to search is a sorry, empty slogan" because of a history of unpleasant and coercive interactions with police officers.¹¹⁹

The "totality of . . . the . . . circumstances"¹²⁰ test that the Supreme Court passed down to determine whether consent is truly voluntary exacerbates the problem by essentially making the question of voluntariness a "swearing contest" between the defendant and police.¹²¹ A judge is left to weigh the credibility of a defendant who claims his consent was coerced against that of a police officer who testifies that the consent was wholly voluntary. Strauss argues that, in these situations, judges are more "inclined to accept the testimony of a police officer," rather than the defendant.¹²²

Ultimately, Strauss concludes that "stop gap measures" to improve the consent search process, such as requiring that individuals be informed that they may refuse to consent or requiring judges to consider individual subjective factors more fully when determining whether consent was truly voluntary, are not adequate.¹²³ Professor Strauss argues for the "drastic solution"¹²⁴ of eliminating consent searches entirely, arguing that there is

115. Coombs, *supra* note 58, at 1640 (noting that "the Court determined that the consent made the search reasonable and therefore valid"); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 785–86 (2005) ("[U]nder the rationale of *Schneckloth* . . . the Court's actual inquiry in evaluating consent searches is into the reasonableness of the police officer's actions.").

116. *Illinois v. Rodriguez*, 497 U.S. 177, 183–84 (1990) (holding that "[t]here are various elements . . . that can make a search of a person's house 'reasonable'—one of which is the consent of the person or his cotenant").

117. See Strauss, *supra* note 102, at 221.

118. *Id.* at 240–41.

119. *Id.* at 244.

120. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

121. See Strauss, *supra* note 102, at 245.

122. *Id.* at 246–47.

123. *Id.* at 271.

124. *Id.*

very little empirical evidence to support the assertion that consent searches enhance law enforcement and crime fighting.¹²⁵ Strauss instead asserts that police officers gain only “a minimal efficiency advantage from consent searches,” because in many cases they already have probable cause to search and simply “don’t want to go to the ‘trouble’ of getting a warrant.”¹²⁶

Professor George Thomas also points to the absurdity of suggesting that a suspect would truly give voluntary consent to a search of his person, car, or home with full knowledge that contraband will be found.¹²⁷ As an example of this phenomenon, Thomas points to *United States v. Drayton*,¹²⁸ where police boarded a bus and informed passengers that they were conducting a routine drug and weapons investigation.¹²⁹ They asked Christopher Drayton and Clifton Brown, who were sitting next to each other, about their luggage and asked for their permission to search it.¹³⁰ They both consented, but no drugs were found.¹³¹ Next, the officers asked Brown for permission to search his person.¹³² He again consented, and police found drug packages concealed in his pants; Brown was arrested and removed from the bus.¹³³ The officers then turned to Drayton who, despite just seeing his companion arrested for the drugs on his person, consented to a search.¹³⁴ Again, drugs were found, and Drayton was arrested.¹³⁵ The district court concluded that there was nothing coercive in the confrontation, and the Supreme Court agreed.¹³⁶ Thomas argues that “[i]t borders on ludicrous to say that Drayton consented” to the search.¹³⁷ It seems clear that Drayton would only consent if he felt he had no choice.¹³⁸ Arguing that “[d]efining ‘consent’ as the lack of overt coercion is a pretty impoverished notion when one is facing armed police,”¹³⁹ Thomas suggests a solution that would require police to have probable cause before requesting consent to search.¹⁴⁰ Although this requirement would lead “to

125. *Id.* at 260 (“Although police officers undoubtedly gain at least a minimal efficiency advantage from consent searches, the magnitude of these interests are unclear. Nowhere have any of these arguments been empirically validated.”).

126. *Id.* at 260–61.

127. George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1505–13 (2005).

128. 536 U.S. 194 (2002).

129. *Id.* at 197–98.

130. *Id.* at 198–99.

131. *Id.* at 199.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 200, 207–08.

137. Thomas, *supra* note 127, at 1509.

138. *Id.*

139. *Id.* at 1510.

140. *Id.* at 1512.

the abolition of consent as a freestanding justification for a search,"¹⁴¹ he argues that requiring individualized suspicion for a consent request is consistent with the original intent of the Framers, who expressed concern that state agents would use their office, backed by the federal government, to force searches upon citizens.¹⁴² Although the authors of the Constitution did not speak to consent-based searches specifically, Thomas suggests that this silence should not be construed as approval. Instead, it is evidence that relinquishing property at the request of a "lowly constable" was so unreasonable that it never crossed their minds.¹⁴³

Professor Tracey Maclin, while acknowledging that "there are strong arguments supporting banning consent searches completely," puts forth a different solution,¹⁴⁴ which goes directly to the issue raised in *Randolph*, *Hudspeth*, *Murphy*, and *Henderson*. Maclin suggests that "whenever a person objects or refuses to provide consent . . . that refusal should bar further attempts by the police to seek consent."¹⁴⁵ There are parallels between this proposal and the rule that already applies to police interrogations: police cannot continue to question a suspect after he asks for counsel.¹⁴⁶ Maclin suggests that the rationales for the right-to-counsel rule—"[to] end police badgering, provide guidance to police, and . . . help suspects who feel uncomfortable dealing with police interrogation by themselves"—are also applicable in the consent search context.¹⁴⁷ A per se rule requiring police to respect a refusal of consent would "discourage police badgering of persons, provide guidance to lower courts and police officers . . . and, most importantly, protect the Fourth Amendment rights of persons who are uncomfortable dealing with police-citizen encounters and who believe that police officers will not honor their refusal to allow consent searches."¹⁴⁸ Ultimately, police should not be encouraged to engage in tactics that are "designed to undermine the person's initial assertion of his rights"¹⁴⁹ by continuing to attempt to gain the consent that they were explicitly denied.

Despite these suggestions from scholars, the Supreme Court has shown no sign of revising the rule announced in *Schneckloth*. In fact, as the cases discussed below suggest, the consent search doctrine has expanded, rather than narrowed, since that decision.

141. *Id.* at 1518.

142. *Id.* at 1477; see also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 634 (1995) (arguing that individualized suspicion was of "central importance" to the Framers and that "[e]xceptions to the requirement of individualized suspicion should only be justified by a showing of necessity, which is to say that exceptions to that requirement should be few").

143. Thomas, *supra* note 127, at 1518.

144. See Maclin, *supra* note 103, at 78–79.

145. *Id.* at 80.

146. *Id.* at 80–81.

147. *Id.* at 81.

148. *Id.*

149. *Id.*

C. Consent from a Third Party

Initially, the consent exception to the warrant requirement applied only to situations where “a property owner . . . voluntarily acquiesced directly to law enforcement officers, in their presence, to a warrantless search.”¹⁵⁰ In *Chapman v. United States*,¹⁵¹ the Supreme Court ruled that a landlord cannot consent to a search of his tenant’s home because holding otherwise “‘would reduce the [Fourth] Amendment to a nullity and leave [tenants’] homes secure only in the discretion of [landlords].’”¹⁵² In *Stoner v. California*,¹⁵³ the Supreme Court similarly held that a hotel clerk could not consent to the search of one of his guest’s rooms.¹⁵⁴ Importantly, the Court stated that “it was the petitioner’s constitutional right which was at stake . . . and not the night clerk’s nor the hotel’s. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.”¹⁵⁵ Requiring that consent come directly from the defendant or from an agent appeared to severely limit, or even essentially abolish, third-party consent as an exception to the warrant requirement.¹⁵⁶

However, several rulings by the Supreme Court gradually expanded the doctrine to include consent obtained from nonagent third parties.¹⁵⁷ Beginning with *Frazier v. Cupp*,¹⁵⁸ the Court identified the justification for third-party consent that would pave the way for the *Randolph* holding and the current split between the Seventh, Eighth, and Ninth Circuits: individuals who share their property or possessions with another person “assume[] the risk” that this individual will allow police, or anyone else, to enter and seize incriminating evidence.¹⁵⁹ In *Frazier*, the defendant, who shared a room with his cousin, was arrested for murder.¹⁶⁰ Martin Frazier’s cousin gave police permission to search a duffel bag that he shared with Frazier and that contained evidence that was used to convict Frazier of

150. Jason M. Ferguson, *Randolph v. Georgia: The Beginning of a New Era in Third-Party Consent Cases*, 31 NOVA L. REV. 605, 609 (2007).

151. 365 U.S. 610 (1961).

152. *Id.* at 617 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948) (alterations in original)).

153. 376 U.S. 483 (1964).

154. *Id.* at 487–88.

155. *Id.* at 489; see also *supra* notes 108–16 and accompanying text (discussing waiver principles).

156. See 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 145 (4th ed. 2004) (arguing that “‘the *Stoner* ruling . . . could have sounded the death knell for almost all third party consent searches” (quoting Judith E. Diamond, *Relevance of the Absent Party’s Whereabouts in Third Party Consent Searches*, 53 B.U. L. REV. 1087, 1104 (1973))).

157. See Ferguson, *supra* note 150, at 609–17 (summarizing development of third-party consent law); Godfrey & Levine, *supra* note 95, at 735–41 (same); Nathan A. Wood, *Georgia v. Randolph: What to Do With a Yes from One but Not from Two?*, 58 MERCER L. REV. 1429, 1432–36 (2007) (same).

158. 394 U.S. 731 (1969).

159. *Id.* at 740.

160. *State v. Frazier*, 418 P.2d 841, 842 (Or. 1966).

murder.¹⁶¹ The Supreme Court, in determining that the search did not violate the Fourth Amendment, held that Frazier, “in allowing [his cousin] to use the bag and in leaving it in his house, must be taken to have assumed the risk that [his cousin] would allow someone else to look inside.”¹⁶² It remained to be seen, however, whether the Court would apply this same logic to searches of a home that the owner or tenant has chosen to share with another individual. The Supreme Court initially delved into this area in two cases: *United States v. Matlock*¹⁶³ and *Illinois v. Rodriguez*.¹⁶⁴

1. *United States v. Matlock*

In *Matlock*, the Supreme Court confronted the question of “whether . . . the voluntary consent of a third party to search the living quarters of the respondent was legally sufficient to render the seized materials admissible in evidence at the respondent’s criminal trial,” where the third party was respondent’s co-tenant.¹⁶⁵ William Matlock was arrested in the front yard of his home and placed in a police car;¹⁶⁶ at no time did the police request his consent to search the house, although they were fully aware that he lived there.¹⁶⁷ Instead, the officers left Matlock confined in the police car and obtained consent to search the premises from Gayle Graff,¹⁶⁸ who also lived at the house and shared a bedroom with Matlock, although they were not married.¹⁶⁹ The Court initially found that “the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.”¹⁷⁰ The Court went on to elaborate on the idea of “[c]ommon authority,” stating that it is “not to be implied from the mere property interest a third party has in the property,” instead it

rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.¹⁷¹

The Court thus confirmed that the basis for third-party consent searches is not agency relationships or property interests, and it does not depend in any way on the third party somehow waiving the defendant’s rights; it is instead

161. *Id.* at 842–43.

162. *Frazier*, 394 U.S. at 740.

163. *See infra* Part I.C.1.

164. *See infra* Part I.C.2.

165. *United States v. Matlock*, 415 U.S. 164, 166 (1974).

166. *Id.* at 179 (Douglas, J., dissenting).

167. *Id.* at 166 (majority opinion).

168. *Id.* at 179 (Douglas, J., dissenting).

169. *Id.* at 175–76 (majority opinion).

170. *Id.* at 170.

171. *Id.* at 171 n.7.

a personal, independent right to consent that a co-tenant possesses.¹⁷² Further, the Court asserted that by choosing to share their home, defendants assume the risk that their co-occupants will exercise this right.¹⁷³ The basis for valid third-party consent therefore originates in the defendant's own actions: his choice to cohabitate.¹⁷⁴ The decision also planted the seeds for the *Randolph* dispute by limiting the power of a third party to situations where the nonconsenting co-occupant is absent.¹⁷⁵

The *Matlock* Court did not reach the question of whether "a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so."¹⁷⁶ The Court confronted that issue in the case discussed below, *Illinois v. Rodriguez*.

2. *Illinois v. Rodriguez*

In *Illinois v. Rodriguez* the Court found that a third party need not have actual authority over the property to validly consent to a search.¹⁷⁷ In *Rodriguez*, the police gained access to Edward Rodriguez's apartment through Gail Fischer, who had a key and referred to the apartment as "our[s]."¹⁷⁸ At the time the police entered the apartment, with Fischer's permission, Rodriguez was asleep in the bedroom.¹⁷⁹ The trial court found, and the Supreme Court agreed, that Fischer did not have common authority over the apartment and that in fact she was merely an "infrequent visitor."¹⁸⁰ *Matlock* had suggested that the Court would insist that "consent can only arise from the conduct of a person whose privacy right is actually at stake."¹⁸¹ This is because *Matlock* was premised on the theories of common authority and assumption of risk, which require that there be a third party with actual authority over the home.¹⁸²

Nonetheless, Justice Antonin Scalia, writing for the *Rodriguez* majority, rejected the contention that "permitting a reasonable belief of common

172. See 4 LAFAVE, *supra* note 156, at 149 (summarizing the "two bases for the 'common authority' rule"); Ferguson, *supra* note 150, at 612 ("[T]he Court defined 'common authority' to consent based upon two factors: first, based upon the inherent right of the co-occupant granting the consent to do so; and second, the actions or inactions of the defendant against whom evidence is being used in 'assuming the risk' that his/her co-occupant will grant consent.").

173. *Matlock*, 415 U.S. at 171 n.7.

174. See Davies, *supra* note 105, at 33 (noting that "[t]his assumption of risk language indicates the Court's view that a release of a person's right under the Fourth Amendment can be located only in an aspect of that person's own conduct, such as the person's acceptance of another person as a co-inhabitant").

175. See *Matlock*, 415 U.S. at 170.

176. *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990).

177. *Id.* at 183.

178. *Id.* at 179.

179. *Id.* at 180.

180. *Id.* at 180-83.

181. See Davies, *supra* note 105, at 34.

182. See *United States v. Matlock*, 415 U.S. 164, 170-71 (1974).

authority to validate an entry would cause a defendant's Fourth Amendment rights to be 'vicariously waived'”¹⁸³ and instead held that, “in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”¹⁸⁴ The Court thus found that the Fourth Amendment does not require that police officers determine with absolute certainty whether a third party has actual authority to consent to a search, but instead that they form an objective belief, based on the “surrounding circumstances,” that the “consenting party had authority over the premises.”¹⁸⁵ In other words, the Court recognized that a third party with apparent, rather than actual, authority may grant consent to search a property.¹⁸⁶

The majority's analysis represents a significant change in focus: from the individual whose privacy interest is at risk to an objective reasonableness test that considers the conduct of the police officers involved in making the warrantless intrusion.¹⁸⁷ In *Stoner v. California*, the Court noted that “[i]t is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the [third party's]. It was a right, therefore, which only the petitioner could waive.”¹⁸⁸ *Matlock* remained true to this fundamental idea that the focus in consent disputes must be on the defendant and the individual granting consent—the reason why Gayle Graff was able to consent was because she had “[c]ommon authority” over the premises and *Matlock* himself had “assumed the risk” that she would allow others access to the premises.¹⁸⁹ *Matlock* did not discuss the reasonableness of the police officer's actions; the analysis focused entirely on *Matlock's* and *Graff's* actions.

Justice Scalia instead approached the problem from the perspective of the police, and found that officers, when applying for a search warrant, need not be “factually correct in [their] assessment [of] what a search will produce,” and that a warrant itself need not be entirely free from error to remain effective.¹⁹⁰ He therefore concluded that the determination of the “common authority” required by *Matlock* is, as with the determination of probable cause, a “factual question” that must only be answered reasonably, rather than correctly.¹⁹¹ Professor Mary Coombs has argued that, even if

183. *Rodriguez*, 497 U.S. at 183.

184. *Id.* at 185–86.

185. *Id.* at 188; see also Ferguson, *supra* note 150, at 614 (“[A]ll that is required in justifying a warrantless search based upon third-party consent is that the police officers make reasonable conclusions from the facts.”).

186. *Rodriguez*, 497 U.S. at 187–88.

187. See Davies, *supra* note 105, at 36 (the majority asserts that “consent is to be assessed from the *ex ante* viewpoint of the police officer”).

188. *Stoner v. California*, 376 U.S. 483, 489 (1964).

189. See *United States v. Matlock*, 415 U.S. 164, 171 n.7, 175–77 (1974).

190. *Rodriguez*, 497 U.S. at 184.

191. See *id.* at 179, 186. But see Davies, *supra* note 105, at 73–97 (expressing the opposing view). Thomas Davies explains that “[t]he question the police were required to

one were to accept Justice Scalia's rule that police officers must only act reasonably, the risk of error should fall on the police, because, if they truly behave reasonably (i.e., "inquire sufficiently into the basis of the third party's authority"), then cases of apparent authority should only arise when the third party lies.¹⁹² In these cases, Professor Coombs suggests that, because "the police are trained to spot a lie," their failure to do so should not be allowed to benefit the government's case.¹⁹³

As the *Rodriguez* dissent pointed out, Justice Scalia's focus on "reasonableness" came at the expense of much of the rationale for *Matlock*.¹⁹⁴ The majority agreed that the lower court's "determination of no common authority over the apartment was obviously correct," but did not follow this conclusion to its seemingly logical next step: that Rodriguez therefore had not assumed the risk that his home would be shared with the police or anyone else.¹⁹⁵

In *Rodriguez*, as with *Matlock*, the Court was not faced with disputed consent, where two occupants disagree over whether the police should be allowed to enter. In fact, the Court did not confront this particular issue until *Georgia v. Randolph*, sixteen years later. It remained to be seen whether the Court would look to the reasonableness of the police officers' conduct when confronted with this situation, or instead focus on the assumption of risk inherent in shared living arrangements. Scott Randolph's arrest in 2001 provided the Court with an opportunity to address this issue in the case discussed below.

3. *Georgia v. Randolph*

Although it would be reasonable to assume that William Matlock, given the opportunity, would have objected to the search of his home, his silence on the topic allowed the Supreme Court to avoid an explicit holding on how

answer in assessing Fischer's authority to consent did not consist only of a 'factual determination' about where she resided." *Id.* at 76. Davies argues that there is evidence that the police were ignorant of the *Matlock* standard and that therefore "the police misassessment of Fischer's authority to consent was [not solely] factual in nature" and that there is "no doctrinal basis . . . for excusing police ignorance of legal standards." *Id.* at 76. Davies also suggests that even if the error was factual in nature, the Supreme Court has only excused such errors when they "involved factual aspects of the assessment of probable cause." *Id.* at 80.

192. Coombs, *supra* note 58, at 1662.

193. *Id.*

194. *Rodriguez*, 497 U.S. at 194 (Marshall, J., dissenting) ("Even if the officers reasonably believed that Fischer had authority to consent, she did not, and Rodriguez's expectation of privacy was therefore undiminished."); see also Godfrey & Levine, *supra* note 95, at 738 ("[A]pparent authority permits the 'trampling [of] the rights of a person who has not . . . relinquished any of his privacy expectation.'" (quoting *Rodriguez*, 497 U.S. at 198 (Marshall, J., dissenting))).

195. See *Rodriguez*, 497 U.S. at 182; see also Coombs, *supra* note 58, at 1662 (suggesting that in these situations "there is no genuine third-party autonomy to balance against the invasion of the defendant's private (and actually unshared) place").

his objection would have affected Gayle Graff's consent.¹⁹⁶ The Court granted a writ of certiorari in *Randolph* in order to resolve a split of authority on this issue.¹⁹⁷ All courts of appeals to consider the issue had "concluded that consent remains effective in the face of an express objection," and a majority of state courts agreed.¹⁹⁸ In holding that "a physically present co-occupant's stated refusal to permit entry prevails" over the consent of a present fellow occupant,¹⁹⁹ the Supreme Court disagreed with what appeared to be a growing consensus.

a. *The Importance of Social Expectations*

In developing the basis for its holding, the majority focused heavily on the "great significance [of] widely shared social expectations."²⁰⁰ A large part of the holding rests on the contention that

it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions.²⁰¹

The Court found that, because co-occupants exercise equal authority over the premises, "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."²⁰² Therefore, a police officer must treat the situation as if he had received no consent at all, because in normal social situations this type of disagreement would be resolved "through voluntary accommodation," rather than through forced resolution.²⁰³

This was not the first time the Court had used "social customs and norms" in order to determine the reasonableness of police entry and search.²⁰⁴ In *Katz v. United States*,²⁰⁵ Justice John M. Harlan suggested that, in order for a defendant to claim the protection of the Fourth Amendment, he must show that he had a subjective expectation of privacy, and also "that the expectation [is] one that society is prepared to recognize

196. *United States v. Matlock*, 415 U.S. 164, 166 (1974) ("Although the officers were aware at the time of the arrest that respondent lived in the house, they did not ask him which room he occupied or whether he would consent to a search.").

197. *Georgia v. Randolph*, 126 S. Ct. 1515, 1520 (2006).

198. *Id.* at 1520 n.1 (citing *United States v. Morning*, 64 F.3d 531, 533-36 (9th Cir. 1995); *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979) (per curiam); *United States v. Sumlin*, 567 F.2d 684, 687-88 (6th Cir. 1977)).

199. *Randolph*, 126 S. Ct. at 1519.

200. *Id.* at 1521.

201. *Id.* at 1522-23.

202. *Id.* at 1523.

203. *Id.*

204. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 510 (2007).

205. See *supra* Part I.A.2.

as 'reasonable.'"²⁰⁶ Later, in *Rakas v. Illinois*,²⁰⁷ the Court again suggested that legitimate expectations of privacy could be determined by looking to "understandings that are recognized and permitted by society."²⁰⁸ The Court looked more explicitly to social customs in *Minnesota v. Olson*,²⁰⁹ in which the police searched an apartment where Robert Olson was staying as a guest.²¹⁰ The Court first recognized that "[s]taying overnight in another's home is a longstanding social custom,"²¹¹ and then went on to determine that "it is unlikely that [a host] will admit someone who wants to see or meet with the guest over the objection of the guest."²¹² On this basis, the Court found that Olson had a reasonable expectation of privacy in his friend's home.²¹³

The primary criticism of Justice David H. Souter's "social expectations" analysis in *Randolph* is that it "is entirely subjective and probably impossible to confirm."²¹⁴ The *Randolph* majority provided no citation to any authority upon which it based its conclusion that a visitor would choose not to enter when faced with conflicting responses from occupants, and in fact there is some evidence that courts have a tendency to get this type of analysis wrong.²¹⁵ Professors Christopher Slobogin and Joseph Schumacher conducted an empirical analysis aimed at determining how people react to police investigations;²¹⁶ their results suggest that "some of the Court's decisions regarding the threshold of the Fourth Amendment and the warrant and probable cause requirement do not reflect societal understandings."²¹⁷ In *Randolph*, the Court's analysis focused on how individuals react when visitors—not police—attempt to enter a home, but the results of Slobogin and Schumacher's study indicate that the Court may

206. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also Rubinfeld, *supra* note 74, at 106 (noting that, "[n]ot long after *Katz*, the full Court adopted Justice Harlan's formulation" and that "Fourth Amendment law has sought to protect 'reasonable expectations of privacy' ever since" (citations omitted)).

207. 439 U.S. 128 (1978).

208. *Id.* at 144 n.12.

209. 495 U.S. 91 (1990).

210. *Id.* at 94.

211. *Id.* at 98.

212. *Id.* at 99.

213. See *id.* at 100. But see *Minnesota v. Carter*, 525 U.S. 83, 89–90 (1998) (narrowing the *Olson* holding by suggesting that, while society recognizes an overnight guest's expectation of privacy, the same protection does not extend to "one who is merely present with the consent of the householder").

214. Lesley McCall, Georgia v. Randolph: *Whose Castle Is It, Anyway?*, 41 U. RICH. L. REV. 589, 600 (2007). Lesley McCall argues that, instead of focusing on the "weak 'social expectation' theory," Justice David Souter should have clearly asserted that "the Fourth Amendment's protection of privacy in one's home should be paramount to police expediency." *Id.* at 601–02.

215. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727, 732 (1993).

216. *Id.* at 733 ("[W]e were interested in how society perceives the 'intrusiveness' of government investigative methods.").

217. *Id.* at 732.

not be proficient in determining societal expectations in the Fourth Amendment context.

Chief Justice John G. Roberts, in his dissent, rejected the “fundamental predicate to the majority’s analysis,” arguing that “[t]he majority’s assumption about voluntary accommodation simply leads to the common stalemate of two gentlemen insisting that the other enter . . . first.”²¹⁸ Chief Justice Roberts suggested that there are a “wide variety of differing social situations,” and that “slight variations in the fact pattern yield vastly different expectations about whether the invitee might be expected to enter or to go away.”²¹⁹ Justice Antonin Scalia had previously commented on the Court’s assumptions about societal expectations.²²⁰ Calling the Court’s social expectations test “self-indulgent,” Justice Scalia noted that the “‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable,”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”²²¹

In *Randolph*, Chief Justice Roberts also fundamentally disagreed with the majority’s contention that “social expectations” should be considered in the context of a consent search, arguing that “the social expectations concept has not been applied to all questions arising under the Fourth Amendment, least of all issues of consent.”²²² Roberts essentially argued that the majority applied a “social expectations” standard when the Court’s precedent suggested that the relevant issue was whether the individual had a “legitimate expectation of *privacy*.”²²³ The social expectations test, according to Roberts, should only be used to “determine when a search has occurred and whether a particular person has standing to object to a search.”²²⁴ Roberts contended that the Court’s earlier decisions in *Matlock* and *Rodriguez* clearly held that, “[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.”²²⁵ In other words, *Randolph*’s objection was irrelevant in the face of his wife’s consent; once he agreed to share authority over the premises, he assumed the risk that that she would allow others to enter—including the police: “The Constitution . . . protects . . . privacy, and once

218. *Georgia v. Randolph*, 126 S. Ct. 1515, 1532 (2006) (Roberts, C.J., dissenting).

219. *Id.*; see also Godfrey & Levine, *supra* note 95, at 747 (noting the “uncertainty inherent in the social expectations test”); Wood, *supra* note 157, at 1446 (“[T]his holding is unstable because it is based on social expectations that are unique to each factual scenario. . . . Since these social expectations change so easily in different circumstances, the holding lends little certainty to police-work or notice to citizens.”).

220. *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

221. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 360–61 (1967)).

222. *Randolph*, 126 S. Ct. at 1532 (Roberts, C.J., dissenting).

223. *Id.* at 1533 (citing *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)).

224. *Id.* at 1538.

225. *Id.* at 1531. *But see* McCall, *supra* note 214, at 607 (“*Matlock* is only ‘clear’ if one misconstrues it to apply to present defendants as well as absent defendants at whom the ruling was originally aimed, as the Chief Justice did here.”).

privacy has been shared, the shared . . . places remain private only at the discretion of the confidant.”²²⁶

Professor Jed Rubenfeld also criticizes the Court’s use of a social expectations analysis in Fourth Amendment cases.²²⁷ Rubenfeld argues that “the invocation of widely shared social expectations,” to the *Randolph* fact pattern is only feasible if we assume that the unspecified caller at the door in Justice Souter’s hypothetical is in fact “a quite specific kind of visitor”: a stranger.²²⁸ It is necessary to assume the visitor is a stranger because otherwise 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.”²²⁹ In all likelihood, “the consenting resident’s boyfriend” would be expected to enter, despite another resident objecting, as would family members of the consenting individual.²³⁰ Of course, an individual with a lesser connection to the consenting individual is probably less likely to ignore the objecting resident. The visitor certainly cannot be a police officer, because he or she would be trained to ignore the potential dangers that might prevent an ordinary citizen from entering.²³¹ However, “if we picture a perfect stranger at the door in *Randolph*, the Court’s reasoning begins to sound plausible.”²³² It would be awkward for such a stranger to enter despite conflicting responses from the residents, and therefore he or she would probably choose to stay out.

Rubenfeld argues that the Supreme Court has been applying this “stranger principle” broadly across Fourth Amendment case law.²³³ Essentially, “[a]ccording to the [s]tranger [p]rinciple, to the extent we have opened something otherwise private to a perfect stranger, the police may intrude into it as well.”²³⁴ Rubenfeld suggests that under this stranger principle *Randolph* was correctly decided because the average stranger

226. *Randolph*, 126 S. Ct. at 1533 (Roberts, C.J., dissenting).

227. See Rubenfeld, *supra* note 74, at 107–09.

228. *Id.* at 108–09.

229. *Id.* at 108.

230. *Id.*

231. See *id.* at 110.

232. *Id.* at 109.

233. *Id.* at 110–12. Jed Rubenfeld argues that the “stranger principle” explains the plain-view doctrine, “which allows a patrolman to look anywhere, even inside a home, provided that he does no more than what a stranger could have done.” *Id.* at 110–11; see also *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Miller*, 425 U.S. 435 (1976). According to Rubenfeld, in *United States v. Miller*, “the Supreme Court upheld the government’s acquisition of financial data from a bank because that data had been shared with strangers.” Rubenfeld, *supra* note 74, at 111. Likewise, in *Smith v. Maryland*, the Court allowed the government to monitor phone numbers the defendant had dialed because he had “voluntarily conveyed” and “exposed” the information to the telephone company. *Smith*, 442 U.S. at 744 (internal quotation marks omitted). Rubenfeld also notes that the stranger principle “support[s] the executive branch’s recent efforts to force Google and other telecommunications service providers to turn over individuals’ search histories and calling data.” Rubenfeld, *supra* note 74, at 112.

234. Rubenfeld, *supra* note 74, at 110.

would not enter, and therefore Randolph had not exposed his home to a stranger and thus “retained a legitimate expectation of privacy.”²³⁵ However, Rubenfeld argues that the “widely shared social expectations” framework for analyzing and deciding Fourth Amendment cases, which leads to the stranger principle, is ultimately “untenable.”²³⁶ Following the principle to its logical conclusion leads to a situation whereby “a person who exposes information to third parties has surrendered his privacy in that information altogether, rendering it subject to police acquisition with or without the third party’s assistance.”²³⁷ This path would result in the overruling of *Katz*, the very case that provided that the Fourth Amendment protects reasonable expectations of privacy.²³⁸ The reasonable expectations of privacy methodology is particularly dangerous in our “increasingly digitized, networked world with ever-expanding privacy-invading technologies,” where huge swathes of information are exposed to third parties, and thus unprotected by the Fourth Amendment.²³⁹ Ultimately, Rubenfeld argues for “cut[ting] anchor with the expectations-of-privacy apparatus,” because it neglects to provide the protection intended by the Framers.²⁴⁰

Instead, Rubenfeld suggests that under his “test of generalizability”²⁴¹ *Randolph* was incorrectly decided.²⁴² Under his analysis, the controlling issue in the case is not whether the police may enter a home when faced with disputed consent, but instead whether the police may enter when one occupant calls for their help and asks them to enter.²⁴³ The question, under the test of generalizability, is “whether the power asserted by the police in *Randolph*, if generalized, posed a threat to the conditions, existence, or health of personal life.”²⁴⁴ When viewed from the perspective of the person who requested the police presence, rather than from the perspective of the person who objected to their entry, it becomes apparent that there was no threat to the security protected by the Fourth Amendment, even if

235. *Id.* at 112.

236. *Id.* at 109, 113–15.

237. *Id.* at 114.

238. *See id.* *Katz v. United States* held that “[o]ne who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.” 389 U.S. 347, 352 (1967). However, according to Rubenfeld’s stranger principle, Charles Katz shared his conversation with a third party, and therefore lost his privacy interest in it: “Thus modern Fourth Amendment ‘expectations of privacy’ analysis cannot even sustain its inaugural case.” Rubenfeld, *supra* note 74, at 115.

239. *See* Rubenfeld, *supra* note 74, at 115.

240. *Id.* Rubenfeld offers a new paradigm for approaching Fourth Amendment issues, focusing on security rather than privacy. For a further discussion, see *supra* notes 82–91 and accompanying text.

241. Rubenfeld, *supra* note 74, at 131–38; *see also supra* notes 92–94 and accompanying text.

242. Rubenfeld, *supra* note 74, at 108.

243. *See id.* at 136 (noting that “[t]he fact that the police in *Randolph* were responding to a voluntary call made by one of the residents deserves emphasis”).

244. *Id.*

Randolph's "reasonable expectations of privacy . . . may have been defeated."²⁴⁵ The police were acting entirely in response to a request by a resident of the home they entered—the circumstances of the search and seizure were not instigated by the police.²⁴⁶ The Court, by focusing its analysis on when the disputed consent occurred, rather than when Janet Randolph initially contacted the police, lost sight of the critical fact that Mrs. Randolph had not merely consented to their request to enter, she was in fact the entire impetus for their presence.

b. The Effect on Third-Party Consent Precedent

The *Randolph* Court acknowledged that in order to avoid undercutting *Matlock* and *Rodriguez* it was "drawing a fine line"²⁴⁷ between *Randolph* and those precedents. The distinction the Court made between the cases was to focus on whether or not the dissenting occupant was present and objecting at the time that the consenting occupants granted permission to enter: "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."²⁴⁸

It has been argued that the true distinction between the cases is not so much physical presence and objection, but instead whether the police must admit awareness of an objection.²⁴⁹ It strains credulity to believe that the police were unaware that *Matlock* and *Rodriguez* would have preferred them not to enter their homes. Thus, the police in *Matlock* and *Rodriguez* essentially remained willfully blind to what was obvious. The danger in advocating this distinction is that it implicitly encourages police to avoid finding out what they most likely already know, perhaps leading to "an unspoken 'Don't Ask So the Suspect Won't Tell' training policy in order to direct officers to the safe side of the Court's fine line."²⁵⁰

Further, by refusing to tamper with the holdings in *Matlock* and *Rodriguez*, the *Randolph* Court may have rendered a "reasonable conclusion . . . toothless."²⁵¹ The decision forces an individual to

245. *Id.* at 137.

246. *Id.* at 136 (stressing that "we deal here with a rupture in personal life instigated by an inhabitant of personal life, not by the police or by a state actor").

247. *Georgia v. Randolph*, 126 S. Ct. 1515, 1527 (2006).

248. *Id.*

249. See 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, 79 (2007) ("The clear difference, of course, is that *Randolph* actually explicitly refused the government intrusion while these other defendants did not. Is there any real question, however, that, given notice and opportunity, they too would have rejected the government intrusion? The practical difference therefore comes down to knowledge—Scott Randolph was lucky enough to have learned in time that his privacy was being threatened so he could assert his rights.").

250. *Id.* at 82.

251. Madeline E. McNeeley, *Validity of Consent to Warrantless Search of Residence When Co-occupant Expressly Objects*, 74 TENN. L. REV. 259, 271 (2007) (arguing that,

“literally stand in the doorway and forbid the officers to enter” in order to “safeguard her constitutional rights.”²⁵² This requirement appears to protect, as Chief Justice Roberts argues, good luck rather than privacy.²⁵³

In addition, notwithstanding the Court’s claims, the *Randolph* opinion is not wholly consistent with *Rodriguez*.²⁵⁴ In *Rodriguez*, Justice Scalia expanded the exception to the warrant requirement in third-party consent searches by allowing that police need not be correct in their determination that an individual has authority to consent to a search, they need only be reasonable.²⁵⁵ Applying this rationale to *Randolph*, it is easy to conclude that the officers’ “conduct was entirely reasonable under an objective standard.”²⁵⁶ Professor Jason Ferguson argues that “prior to *Randolph*, the Court seemed consistently reluctant to engage in after-the-fact, Monday morning quarterbacking of decisions by police,” whereas now, courts, when faced with a disputed consent situation, must apply a bright-line rule that “does not acknowledge the reasonableness of the officer’s conduct.”²⁵⁷

c. “*The Circumstances Here at Issue*”

In presenting the holding of the *Randolph* Court, Justice Souter explicitly limited it to “the circumstances here at issue.”²⁵⁸ The Court suggested that, “if the objecting tenant cannot be incapacitated from destroying easily disposable evidence during the time required to get a warrant,” officers may be justified in entering despite the occupant’s objection.²⁵⁹ The narrowness of the holding was confirmed by Justice Stephen G. Breyer’s concurrence, in which he stated that “were the circumstances to change significantly, so should the result. The Court’s opinion does not apply where the objector is not present and object[ing].”²⁶⁰ The “circumstances” to which Justice Breyer referred were that (1) “[t]he objecting party was present and made his objection known clearly and directly to the officers seeking to enter the house”; (2) “[t]he officers did not justify their search on grounds of possible evidence destruction”; and (3) “the officers might easily have secured the premises and sought a warrant permitting them to enter.”²⁶¹ The Court’s desire to limit its holding, in combination with the pains they went to ensure that the *Matlock* and *Rodriguez* decisions remained on the books, sowed the seeds for the current conflict over how to handle situations that differ from

“once an individual has invoked the Fourth Amendment, only certain extreme circumstances may override that right”).

252. *Id.*

253. See *Randolph*, 126 S. Ct. at 1536 (Roberts, C.J., dissenting).

254. Ferguson, *supra* note 150, at 638.

255. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990).

256. Ferguson, *supra* note 150, at 638.

257. *Id.*

258. *Randolph*, 126 S. Ct. at 1519.

259. *Id.* at 1524 n.6.

260. *Id.* at 1530 (Breyer, J., concurring) (internal quotation marks omitted).

261. *Id.*

the circumstances described by Justice Breyer.²⁶² In fact, some argued that the case would soon be essentially irrelevant to Fourth Amendment law because its narrowness renders it inapplicable to even marginally different circumstances.²⁶³

d. *Police Removal*

The *Randolph* Court seemed to envision the conflict under discussion when it suggested that police cannot “remove[] the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.”²⁶⁴ This caveat raises the issue of how courts will determine the intent of officers in removing tenants from the scene.²⁶⁵ Professor George Dery and Deputy District Attorney Michael Hernandez argue that courts will be unable to comply with this aspect of the decision without violating the rule asserted in *Whren v. United States*.²⁶⁶ The *Whren* Court “explicitly repudiated” the idea that a court should “attempt to divine the underlying motivation” for an officer’s conduct.²⁶⁷ Further, the Supreme Court has “repeatedly held and asserted” that an officer’s motive does not invalidate objectively justifiable behavior under the Fourth Amendment.²⁶⁸ Courts determining why police removed an occupant from the scene before obtaining consent from another must somehow do so without attempting to ascertain the officers’ subjective intent, which would appear to be an impossible task.

In sum, when faced with third-party consent search issues, courts must not only contend with the fundamental issues of whether the Fourth Amendment is dedicated to the protection of property, privacy, security, or some combination thereof, they must also consider whether the controlling issue is the defendant’s assumption of the risk as outlined in *Matlock*,²⁶⁹ or the reasonableness of the police officers’ actions, as suggested by *Rodriguez*.²⁷⁰ Further, post-*Randolph*, courts are now asked to conclusively

262. For further discussion of Justice Stephen Breyer’s concurrence, and an argument that this Justice might change his position in future cases because of his disapproval of a “bright-line” rather than a “fact-intensive” approach, see Ferguson, *supra* note 150, at 638–43.

263. See Godfrey & Levine, *supra* note 95, at 744–45 (“[D]ifficulty may arise when the time comes to apply [*Randolph*] to future third party consent cases.”); 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, 285 (“[A] holding so narrow as to make the case of almost no precedential value.”); Wood, *supra* note 157, at 1445 (“[S]ince this holding seems to render a third-party consent-based search unreasonable only when the defendant is physically present and objecting, the cases that will be affected will be relatively few.”).

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

265. See Godfrey & Levine, *supra* note 95, at 748 (questioning how courts will determine whether an individual was removed “for the purpose of keeping him quiet”).

266. 517 U.S. 806 (1996); Dery & Hernandez, *supra* note 249, at 82–83.

267. Dery & Hernandez, *supra* note 249, at 82.

268. *Whren*, 517 U.S. at 812.

269. See *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974); see also *supra* notes 170–74 and accompanying text.

270. See *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990); see also *supra* notes 183–86 and accompanying text.

determine society's "widely shared social expectations."²⁷¹ Part II examines how courts are applying *Randolph* to cases with similar facts.

II. APPLYING *RANDOLPH*: THE CURRENT CIRCUIT SPLIT

As outlined in Part I, courts addressing Fourth Amendment claims must consider a huge variety of issues and principles before concluding a particular search is constitutional. The Supreme Court's Fourth Amendment third-party consent search jurisprudence has thus far culminated in *Randolph*. Part II presents an overview of three recently decided cases, *United States v. Murphy*,²⁷² *United States v. Hudspeth*,²⁷³ and *United States v. Henderson*,²⁷⁴ which feature U.S. courts of appeals coming to significantly different conclusions regarding *Randolph*'s intent and scope. In each case, the defendant expressly refused to consent to a search of his property, but the police were nevertheless able to effect a search by arresting the defendant and obtaining consent from another individual.

In the wake of *Matlock*, courts and commentators struggled with how to apply its holding to situations in which "police arrest a suspect, ask for but fail to obtain his consent to search his premises, and then go to those premises and obtain consent from another occupant."²⁷⁵ The consensus among commentators²⁷⁶ was that "the prior refusal of the absent occupant to give consent would not present a bar to the police seeking consent from a co-occupant."²⁷⁷ Unless the objecting individual possessed a greater interest in the property to be searched, the personal, nonderivative right to consent to a search continues to exist regardless of another tenant's objection.²⁷⁸

However, courts were not entirely in agreement with this interpretation. The Supreme Court of New York, Appellate Division, held that, "if the Fourth Amendment means anything, it means that the police may not undertake a warrantless search of [the] defendant's property after he has expressly denied his consent to such a search."²⁷⁹ The court seemed to find that the simple fact that the defendant objected should control the police's actions, so as to avoid a situation where "[c]onstitutional rights [are] defeated by the expedient of soliciting several persons successively until the sought-after consent is obtained."²⁸⁰

271. *Georgia v. Randolph*, 126 S. Ct. 1515, 1531 (2006); see also *supra* notes 200–46 and accompanying text.

272. See *infra* Part II.A.

273. See *infra* Part II.B.

274. See *infra* Part II.C.

275. 4 LAFAVE, *supra* note 156, at 155.

276. *Id.* at 156 n.45.

277. *Id.* at 156.

278. *Id.*

279. *People v. Mortimer*, 361 N.Y.S.2d 955, 958 (App. Div. 1974).

280. *Id.*

The *Randolph* holding provided fuel to proponents of both sides of this argument, and certainly did not conclusively resolve the issue. Professor Tracey Maclin hypothesizes that “*Randolph*’s protection will probably extend only to the few individuals lucky enough to be present when the police arrive at their homes,” and suggested that the police would most likely “remove or arrest a suspect before seeking the co-occupant’s consent.”²⁸¹ Professor Orin Kerr, writing before *Randolph* was decided, suggested that the rule eventually adopted by the Court would be difficult “to administer for practical reasons” because it raises as many questions as it answers, including whether the police could “wait until the nonconsenting party leaves, and then ask again.”²⁸² Stephanie Godfrey and Professor Kay Levine argue that “the majority’s failure to be clear on subjects like removal . . . promises to generate much future litigation.”²⁸³ As the cases below suggest, Godfrey and Levine are correct.

A. *The Ninth Circuit: United States v. Murphy*

On August 4, 2004, police officers knocked on the door of Stephen Wayne Murphy’s storage unit.²⁸⁴ Prior investigation had led the police to believe that the storage facility was being used to manufacture methamphetamine, and when Murphy opened the door to his unit he was holding a metal pipe.²⁸⁵ The officer was able to see a methamphetamine lab in the unit, which led him to place Murphy under arrest.²⁸⁶ Murphy refused to consent to a search of the unit and was thereafter taken to jail.²⁸⁷ The arresting officer then left to begin the process of obtaining a search warrant.²⁸⁸

Murphy’s storage unit was actually rented to Dennis Roper, who arrived at the storage facility later that afternoon and was promptly arrested based on outstanding warrants.²⁸⁹ He told the police that he had given Murphy permission to live in the storage unit and also consented to a search.²⁹⁰ The police seized the methamphetamine lab.²⁹¹

At trial in 2005, before *Randolph* was decided, Murphy moved to suppress the seized evidence on the grounds that “Roper’s consent [could not] trump his objection to the search.”²⁹² In denying Murphy’s motion, the

281. Maclin, *supra* note 103, at 75–76.

282. Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1131323472.shtml> (Nov. 6, 2005, 18:31 EST).

283. Godfrey & Levine, *supra* note 95, at 749.

284. *United States v. Murphy*, 516 F.3d 1117, 1119 (9th Cir. 2008).

285. *Id.*

286. *Id.*

287. *Id.* at 1119–20.

288. *Id.* at 1120.

289. *Id.*

290. *Id.*

291. *Id.*

292. *United States v. Murphy*, No. 04-30057-AA, 2005 WL 2416828, at *4 (D. Or. Sept. 30, 2005).

district court relied on *United States v. Morning*,²⁹³ a Ninth Circuit case that held that “consent to search given by a co-occupant is valid as against the defendant when both are on the scene but the defendant has refused to consent.”²⁹⁴ In the wake of *Randolph*, Murphy requested that the district court reconsider its decision, but his request was denied.²⁹⁵

On appeal, the government initially made clear that Dennis Roper’s consent was voluntary.²⁹⁶ Although acknowledging that Roper was in custody at the time of his consent, the government listed several factors suggesting that the consent was voluntary, such as the fact that the arresting officers read Roper his *Miranda* warnings, the officers’ weapons remained holstered, and Roper subsequently testified that his consent was voluntary.²⁹⁷ Murphy did not dispute that Roper’s consent was voluntary, and the Ninth Circuit did not discuss the issue.

Turning to *Randolph*, the government focused on attempting to distinguish Murphy’s circumstances from those of *Randolph*.²⁹⁸ First, the disputed consent at issue in *Randolph* was over a home, whereas Murphy was seeking to protect only a storage unit, which the government argued entailed a lower expectation of privacy.²⁹⁹ Second, unlike in *Randolph*, Murphy and Roper were not simultaneously present—Murphy was no longer on the scene when Roper provided consent.³⁰⁰ The court, however, found these distinctions to be “legally meaning[less]” and saw “no reason . . . why Murphy’s arrest should vitiate the objection he had already registered to the search.”³⁰¹ The court did not discuss *Randolph*’s reliance on social expectations, nor did it address the issue of the parties’ legitimate expectations of privacy. Instead, the court based its decision primarily on *Randolph*’s suggestion that a third party’s consent to a search would be held invalid if there was evidence that the police removed one of the tenants from the scene to ensure that he had no opportunity to object.³⁰² The court reasoned that, “[i]f the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made.”³⁰³ In fact, in dicta, the court

293. 64 F.3d 531 (9th Cir. 1995).

294. *Id.* at 536. In *United States v. Morning*, the Court anticipated the argument that Chief Justice John Roberts would later assert in his *Georgia v. Randolph* dissent:

[T]he primary factor is the defendant’s reasonable expectations under the circumstances. Those expectations must include the risk that a co-occupant will allow someone to enter, even if the defendant does not approve of the entry. . . . A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence.

Id.

295. *Murphy*, 516 F.3d at 1120.

296. Brief of the Plaintiff-Appellee at 13–15, *Murphy*, 516 F.3d 1117 (No. 06-3-582).

297. *Id.* at 14–15.

298. *Id.* at 17–19.

299. *Id.* at 17.

300. *Id.* at 18–19.

301. *Murphy*, 516 F.3d at 1122, 1124.

302. *Id.* at 1124.

303. *Id.* at 1124–25.

suggested that whether the objecting tenant left the scene voluntarily or in the custody of the police would not be relevant: "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."³⁰⁴ The court placed no time limit on the objection, which presumably would last indefinitely in the absence of a clear showing of consent.

B. *The Eighth Circuit: United States v. Hudspeth*

On July 25, 2002, police obtained a search warrant for Roy Hudspeth's company, Handi-Rak Services, Inc.³⁰⁵ The officers were looking for evidence of sales of pseudoephedrine-based cold tablets.³⁰⁶ The search included Hudspeth's computer and some CDs that were on his desk.³⁰⁷ While browsing the files on the discs, the officers discovered child pornography.³⁰⁸ The officers suspected that they might find additional child pornography on Hudspeth's home computer and therefore asked for his permission to seize it.³⁰⁹ Hudspeth refused and was arrested and transported to jail.³¹⁰

The officers then proceeded to Hudspeth's home, where they informed his wife that Hudspeth had been arrested and asked for her consent to seize the computers in the home.³¹¹ Initially, Mrs. Hudspeth refused, but she changed her mind after police explained that they would leave an armed officer in the house while they applied for a search warrant.³¹² With Mrs. Hudspeth's consent, the officers seized a home computer and additional CDs, which contained child pornography.³¹³

At trial, Hudspeth moved to suppress the warrantless search of his home computer.³¹⁴ The district court denied the motion, and Hudspeth entered a conditional guilty plea, reserving the right to appeal the denial of his motion to suppress.³¹⁵ On appeal, Hudspeth argued both that the consent obtained from Mrs. Hudspeth was coerced³¹⁶ and that *Randolph* required evidence obtained from the search and seizure of the home computer to be suppressed.³¹⁷ The appeal was initially heard by an Eighth Circuit panel that first briefly addressed the issue of Georgia Hudspeth's voluntary

304. *Id.* at 1125.

305. *United States v. Hudspeth*, 459 F.3d 922, 924 (8th Cir. 2006), *rev'd in part, aff'd in part en banc*, 518 F.3d 954 (8th Cir. 2008).

306. *Id.*

307. *Id.* at 925.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 926.

315. *Id.*

316. Appellant's Opening Brief, *supra* note 18, at 5.

317. Letter Brief of Petitioner-Appellant, *supra* note 16, at 4-5.

consent, concluding that “there was nothing coercive about the officers’ conduct.”³¹⁸ The court acknowledged that the police arrived at night, while Mrs. Hudspeth was alone with her two young children, that the officers did not tell Mrs. Hudspeth that her husband had previously refused permission to search,³¹⁹ and that she became upset when told that her husband had been arrested.³²⁰ Nevertheless, under the totality of the circumstances the consent was voluntary.³²¹

Ultimately, however, the court determined that “the consent to the seizure of the home computer was not valid because her consent cannot ‘overrule’ Mr. Hudspeth’s denial of consent.”³²² Rather than holding that *Randolph*’s requirement that the defendant be “physically present”³²³ controlled Hudspeth’s case, the panel instead focused on the broader holding that “there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another.”³²⁴ The panel acknowledged that *Randolph* was not directly on point, but found that “the same constitutional principles . . . apply regardless of whether the non-consenting co-tenant is physically present at the residence, outside the residence in a car, or, as in [this] case, off-site at his place of employment.”³²⁵ The panel dismissed the idea that *Matlock* controlled their decision because, unlike that case, “Hudspeth was invited to participate and expressly denied his consent to search.”³²⁶ Recall that in *Matlock*, the defendant, although present, was never asked to consent to the search and therefore never had the opportunity to object.³²⁷ The *Hudspeth* panel thus held that the disputed consent was the most important and controlling issue, rather than where the objection took place or where the objecting tenant was located at the time consent was given.³²⁸

The government petitioned for rehearing en banc, and the full court overturned the panel opinion with respect to the search of Hudspeth’s home computer.³²⁹ The court noted that, “[t]hroughout the *Randolph* opinion, the majority consistently repeated it was *Randolph*’s physical presence and immediate objection to Mrs. *Randolph*’s consent that distinguished *Randolph* from prior case law.”³³⁰ Further, the entire premise of the *Randolph* Court’s social expectations theory was the assertion that “‘it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant’s invitation was a sufficiently good reason

318. *Hudspeth*, 459 F.3d at 929.

319. *Id.* at 925.

320. *Id.* at 929.

321. *Id.* at 930.

322. *Id.*

323. *Georgia v. Randolph*, 126 S. Ct. 1515, 1519 (2006).

324. *Hudspeth*, 459 F.3d at 930 (quoting *Randolph*, 126 S. Ct. at 1523).

325. *Id.* at 930–31.

326. *Id.* at 931.

327. *United States v. Matlock*, 415 U.S. 164, 166–67 (1974).

328. *Hudspeth*, 459 F.3d at 931.

329. *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008).

330. *Id.* at 959.

to enter *when a fellow tenant stood there saying, "stay out."*³³¹ Thus, the court reasoned, the holding cannot apply to the *Hudspeth* circumstances.³³² Finally, the court recognized that *Matlock* and *Rodriguez* had explicitly not been overruled on the basis that they involved defendants that were not present with the opportunity to object.³³³

Thus, finding that *Randolph* did not apply to Hudspeth's circumstances, the court looked back to *Matlock*, which it found to support the proposition that "the absent, expressly objecting co-inhabitant [had] 'assumed the risk' that another co-inhabitant 'might permit the common area to be searched.'" ³³⁴

In his dissent, Judge Michael Melloy, who also wrote the *Hudspeth* panel opinion, drew attention to the fact that "[t]he majority glosse[d] over the difference between lack of consent and express objection, and instead focuse[d] on geography, concluding that the location of a defendant, not whether he expressly objects, is determinative."³³⁵ The dissent's point was that the *Matlock* Court did not have anything to say about "expressly objecting" tenants because *Matlock* himself did not consent nor object to the search; he was a silent party.³³⁶ Judge Melloy therefore took issue with the suggestion that an "*absent, nonconsenting person*" can be equated with one who expressly objects.³³⁷ He noted that, "in differentiating between *Matlock* and *Randolph*, the Supreme Court highlighted the *lack of objection*, not the *lack of consent* by the defendant."³³⁸ Further, the *Randolph* Court specifically noted that the police need not "take affirmative steps to find a *potentially objecting co-tenant before acting on the permission they had already received*."³³⁹ The Court was concerned with unnecessarily infringing on police officers' ability to act in the field by forcing them to actually seek out all tenants to ensure that consent was universal. Judge Melloy pointed out that there was no such concern in Hudspeth's case because his denial of consent was already on the record by the time they arrived at his front door.³⁴⁰

Judge Melloy did not ignore the *Randolph* Court's focus on the physical presence of the objecting tenant, but dismissed it as an effort to deal with the facts of that case, rather than a controlling factor.³⁴¹ The dissent concluded by asserting that "[i]t seems inconceivable . . . that a core value of the Fourth Amendment, the expectation of privacy in one's own home,

331. *Id.* at 959 n.4 (quoting *Georgia v. Randolph*, 126 S. Ct. 1515, 1522–23 (2006)).

332. *Id.* at 960 (noting that the "rationale for the narrow holding of *Randolph*, which repeatedly referenced the defendant's physical presence *and* immediate objection, is inapplicable here").

333. *See id.* at 959.

334. *Id.* at 961 (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)).

335. *Hudspeth*, 518 F.3d at 962.

336. *See supra* note 167 and accompanying text.

337. *Hudspeth*, 518 F.3d at 962 (quoting *Matlock*, 415 U.S. at 170).

338. *Id.*

339. *Id.* at 964 (quoting *Georgia v. Randolph*, 126 S. Ct. 1515, 1527 (2006)).

340. *Id.*

341. *Id.* at 963.

would be dependent upon a tape measure.”³⁴² Thus, the primary disagreement between the majority and the dissent was over whether the controlling factor in this type of case should be the fact that a consent has been made or, instead, the circumstances surrounding that objection. For Judge Melloy (as well as the Ninth Circuit in *Murphy*) the analysis ends when an objection is made. In contrast, the Eighth Circuit in *Hudspeth* took the position that the objection is merely the first step in the analysis; a court must then look to where and when the objection was made to determine if it is valid against a co-occupant’s consent.

C. *The Seventh Circuit: United States v. Henderson*

The police did not arrive at Kevin Henderson’s home on November 26, 2003, as a result of an investigation into criminal activities. Instead, Henderson’s wife, Patricia, dialed 911 to report that her husband had choked her.³⁴³ Soon after she made the call, Kevin Henderson “threw her out of the house and locked the door.”³⁴⁴ When police arrived at the scene, Mrs. Henderson gave the officers the keys and allowed them to enter.³⁴⁵ In no uncertain terms, Kevin Henderson ordered the police out of his house.³⁴⁶ Nevertheless, he was arrested for domestic battery and removed to the police station.³⁴⁷ Soon thereafter, Mrs. Henderson signed a written consent to search the home.³⁴⁸ The police recovered crack cocaine, handguns, rifles, a crossbow, and a machete, among other things.³⁴⁹ Henderson was eventually charged with possession with intent to distribute narcotics and being a felon in possession of weapons—both federal charges.³⁵⁰

At trial, Henderson filed a motion to suppress the evidence seized from his home, arguing that *Randolph* controlled because he was physically present at the home when he objected to the officers’ presence.³⁵¹ The district court found the argument by the *Hudspeth* panel³⁵² to be convincing, holding that “under the teaching of *Randolph* and *Hudspeth* the police acted unreasonably by conducting a search based upon the later consent of the co-tenant . . . after [the] defendant had been removed from the premises.”³⁵³

342. *Id.* at 964.

343. *United States v. Henderson*, No. 04 CR 697, 2006 WL 3469538, at *1 (N.D. Ill. Nov. 29, 2006), *rev’d*, 536 F.3d 776 (7th Cir. 2008).

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. Kevin Henderson’s Motion to Suppress Evidence, *Henderson*, 2006 WL 3469538 (No. 04 CR 697), 2006 WL 4734175.

352. The district court decision was made before the U.S. Court of Appeals for the Eighth Circuit reversed its *United States v. Hudspeth* panel decision en banc.

353. *Henderson*, 2006 WL 3469538, at *2.

The Seventh Circuit disagreed, holding that *Randolph* “applies only when the defendant is both present and objects to the search of his home,” and refusing to “read *Randolph* as permanently disabling [a co-occupant’s] shared authority to consent to an evidentiary search of her home.”³⁵⁴ The court was in a position to consider the final decisions in both *Hudspeth* and *Murphy* and found them to be factually “indistinguishable from each other and from this case.”³⁵⁵ The court strongly disagreed with the conclusions of the Ninth Circuit in *Murphy*, which it argued allowed a “one-time objection by one [occupant] . . . to permanently disable the other from ever validly consenting to a search of their shared premises.”³⁵⁶ Further, it found that the *Murphy* court “essentially read[] the presence requirement out of *Randolph*, expanding its holding beyond its express terms.”³⁵⁷

The court held that the social expectations theory used by the *Randolph* Court was absolutely integral to that opinion and rendered the *Murphy* court’s decision unsupportable. The social expectations foundation of *Randolph* was built around a situation where a visitor would not enter a residence if he was met with an objection from one of the home’s occupants. The Supreme Court determined this conclusion was essentially common sense—any “sensible person” would decline to enter.³⁵⁸ The Seventh Circuit determined that there is “no social convention that requires the visitor to abstain from entering once the objector is no longer on the premises; stated differently, social custom does not vest the objection with perpetual effectiveness.”³⁵⁹ The *Randolph* rationale and holding, therefore, is inapplicable: the *Henderson* court determined, as a matter of law, that a sensible person would cease to heed the wishes of an objecting occupant once that occupant was no longer on the premises. Overall, the Seventh Circuit determined that it was required to observe the express limitations of the *Randolph* decision and refused to apply its holding to a situation where both occupants were not present at the time of objection/consent.³⁶⁰

In her dissent, Judge Ilana Rovner pointed out what the majority had perhaps skirted around: “There is one and only one reason that this case is not on all fours with *Georgia v. Randolph*: When Kevin Henderson told the police to ‘get the fuck out’ of his house, the officers arrested and removed him instead.”³⁶¹ Although Judge Rovner disagreed with the majority’s conclusion, he did not go quite as far as the holding in *Murphy*, which suggested that once an objection is voiced, it remains in effect until it is

354. *United States v. Henderson*, 536 F.3d 776, 777 (7th Cir. 2008).

355. *Id.* at 783.

356. *Id.*

357. *Id.* at 784.

358. *Georgia v. Randolph*, 126 S. Ct. 1515, 1523 (2006).

359. *Henderson*, 536 F.3d at 785.

360. *Id.* (“[T]he Court 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. . . . Both presence and objection by the tenant are required to render a consent search unreasonable as to him.”).

361. *Id.* at 785–86.

voluntarily reversed, regardless of the physical location of the objector.³⁶² Judge Rovner argued that “Henderson’s objection survived his involuntary removal from the home” and explicitly stated that if Henderson had voluntarily left the residence the police would have been well within their rights to return and obtain consent from another tenant.³⁶³ The *Matlock* holding drew significant attention to the “assumption of risk” that a tenant must acknowledge when he chooses to share his residence. The tenant assumes the risk that, when he walks out the front door of his apartment, his co-tenant might allow an unwanted guest to enter. This is the price that is paid for the benefits of sharing a home. Rovner noted that “if he finds the risk to his privacy unacceptable, he is free to make alternate arrangements—to opt for a solitary abode, to choose a roommate more attuned to his own interests, or to secure any items that he does not wish a stranger to see.”³⁶⁴ However, when an individual is forcibly removed from his residence against his will, he no longer has this freedom to make alternate arrangements. As Rovner argued, “[h]e has already done all that he can do to protect his privacy interest—he has told the visitor to leave.”³⁶⁵

In addition, Judge Rovner disputed the majority’s analysis of “social expectations” in this type of situation, arguing that “[o]nly in a Hobbesian world would one person’s social obligations to another be limited to what the other is present and able to enforce.”³⁶⁶ Instead, Rovner envisioned a scenario whereby a visitor, knowing that the occupants disputed his entry, would not defy convention and enter without complete permission, even if the objecting tenant left.³⁶⁷

In sum, courts have struggled to apply the rationale and tenets of *Randolph* to somewhat distinguishable fact patterns. The Ninth Circuit read *Randolph* broadly, suggesting that the precise location of the objecting individual is not legally relevant and that once an objection is made a later search is not valid. The Seventh and Eighth Circuits would confine *Randolph* to its own factual circumstances and require that any objection be made concurrently, both temporally and geographically, with a fellow occupant’s consent. Further, even if the objection is made at the right time and from the right location, it is valid for only as long as the objector remains on the scene. Where a defendant objects and is then validly arrested, these courts suggest that *Matlock* controls, allowing police to search if they obtain consent from an authorized individual, regardless of the prior objection.

362. *United States v. Murphy*, 516 F.3d 1117, 1125 (9th Cir. 2008).

363. *Henderson*, 536 F.3d at 786–87; *see also* *United States v. Groves*, 530 F.3d 506 (7th Cir. 2008) (holding a search valid where defendant Groves refused consent to a search of his home but police returned several weeks later when they knew he would not be present and obtained consent from his girlfriend).

364. *Henderson*, 536 F.3d at 787.

365. *Id.*

366. *Id.*

367. *Id.*

Neither of these solutions can be said to be a definitive interpretation of Supreme Court precedent. The Ninth Circuit's broad reading of *Randolph* is at odds with the Supreme Court's clear attempt to limit its holding to the circumstances at issue.³⁶⁸ The Seventh and Eighth Circuits abided by *Randolph*'s mandate that it only apply to the facts there at issue, but then chose to apply *Matlock*, glossing over a clear and relevant difference between that case and *Hudspeth* and *Henderson*: William Matlock did not voice an objection to the search of his home.³⁶⁹

The circuit courts were confined by the third-party consent doctrine developed by the Supreme Court, primarily in *Matlock*, *Rodriguez*, and *Randolph*. Even though none of these cases provided a simple solution to the issues, the courts could not—regardless of whether they had any desire to do so—stray from the foundations of consent search jurisprudence. While the relevant precedents are in some ways distinguishable from the cases at issue, they could not be ignored, as they provide the basis for any discussion of third-party consent. In short, the problem is not flawed analysis done by one or more of the circuit courts that created the current split, it is instead the tools the courts were required to use. Part III of this Note advocates a break from current third-party consent search doctrine and a reformulation of the way courts analyze these types of cases. Specifically, Part III argues that courts should recognize a distinction between those cases where a consent search request was made as part of an ongoing police investigation and those where a citizen in need of assistance requested police presence.

III. REDEFINING "CONSENT" SEARCHES AND REQUIRING PROBABLE CAUSE

This part argues for a rejection of the rationale that formed the basis of the *Randolph* decision and a reformulation of the third-party consent search doctrine. As shown in Part II, the doctrine currently allows courts to resort to legal theories so malleable that they can rationally come to directly opposing decisions when faced with similar problems. Instead, courts should apply the "test of generalizability" and begin by determining whether police arrived at the scene as a result of their own investigations or at the request of the third party who provided consent. Where police are playing an adversarial, investigative role, they should be held to a higher standard and be required to obtain a warrant based on probable cause, rather than requesting consent from an individual who may not be aware of his right to refuse. Alternatively, where police become involved due to an explicit request for help from a third party with authority to consent to a search, that individual's invitation to enter should suffice in the absence of a warrant.

368. See *supra* Part I.C.3.c.

369. See *supra* Part I.C.1.

A. *Rejection of Randolph's Widely Held Social Expectations Analysis*

The Seventh, Eighth, and Ninth Circuits all considered *Randolph* in deciding the cases discussed above but were unable to come to a consensus. In fact, the very nature of the *Randolph* decision was a significant cause of the current conflict. First, the *Randolph* majority made clear that it intended the holding to be narrow and limited to the circumstances before it.³⁷⁰ The Court left essentially no guidance for lower courts dealing with circumstances such as those in *Murphy*, *Hudspeth*, and *Henderson*. A court taking *Randolph* at its word might reason as the Eighth Circuit did and fall back to the Supreme Court's holding in *Matlock*,³⁷¹ where an occupant has assumed the risk that his fellow co-occupant will allow any common area to be searched in his absence.³⁷² In order to do this, however, the court would have to ignore the fact that William Matlock did not object to the search of his home.³⁷³ If *Randolph* stands for anything, surely it would be recognition that an occupant's express objection is at least relevant to a third-party consent analysis.

In fact, the Eighth Circuit panel, reviewing the same facts and precedent, recognized that *Matlock* could not control where there was an express objection, but went on to read a constitutional principle into *Randolph* that is not necessarily supported by the text of the opinion.³⁷⁴ In finding that the most important aspect of *Randolph* was the legitimate dispute over consent,³⁷⁵ the panel seemed to ignore that the Supreme Court had repeatedly stressed the importance of Scott Randolph's physical presence, as well as his objection.³⁷⁶ However, following this rationale to its logical conclusion, the Supreme Court has created a rule that protects an individual's privacy interest when it is asserted from the entryway to his home, but only for as long as that individual remains in that entryway. If he were to wander off to the back of the house, one reading of the Court's precedent is that a co-tenant could usurp his privacy interest, just as if no objection to entry had ever been made.

Finding this result somewhat absurd, courts might look to bolster their opinion with *Randolph*'s widely held social expectations analysis, as the Seventh Circuit did.³⁷⁷ Just as *Randolph* explained that social expectations would require that a visitor refrain from entering a home where its two occupants did not consent to entry, the Seventh Circuit determined that, once the objecting occupant left the scene, a visitor would certainly feel free to enter.³⁷⁸ Neither court offered any explanation of the basis for their

370. See *supra* notes 258–63 and accompanying text.

371. See *supra* Part II.B.

372. See *supra* note 334 and accompanying text.

373. See *supra* notes 335–38 and accompanying text.

374. See *supra* note 325 and accompanying text.

375. See *supra* notes 322–25 and accompanying text.

376. See *supra* notes 260–62 and accompanying text.

377. See *supra* notes 358–60 and accompanying text.

378. See *supra* notes 359–60 and accompanying text.

determination. A widely held social expectation is thus whatever the court that happens to be hearing the case determines it to be. Presumably a court in another circuit could come to the exact opposite conclusion based on the judge's own personal understanding of society's widely held social expectations. The reason for this seems obvious: there is no reason to think that people will respond to this type of situation in a uniform way. Whether a person chooses to ignore the objections of a resident is likely to depend on a wide variety of factors; the same person might choose to enter one day and leave the next, depending on the circumstances of the confrontation. A sociological analysis of individuals' reactions to these situations might be interesting, but it is unlikely to result in a workable legal rule.³⁷⁹

The Ninth Circuit offered yet another method of applying *Randolph*.³⁸⁰ The court essentially ignored both the Supreme Court's suggestion that its holding be confined to the facts of *Randolph* and the majority's widely held social expectations analysis. Instead of focusing on the facts that distinguished Stephen Murphy's situation from that of Scott Randolph,³⁸¹ the Ninth Circuit found support for its holding in the Supreme Court's discussion of police removing suspects to ensure they had no opportunity to object.³⁸² It seems clear, however, that the officers had legitimate cause to arrest Murphy and did not do so in order to seek consent from someone else.³⁸³ After the arrest, the police continued their investigation, which included beginning the process of applying for a search warrant and questioning the person who had rented the storage units.³⁸⁴ The Supreme Court's warning about removing suspects was intended to prevent officers from inventing reasons to remove suspects from the scene for the sole purpose of avoiding the *Randolph* rule—it surely was not intended to prevent valid arrests and the continuation of investigations after a consent refusal.

In sum, the circuit courts of appeals have applied *Randolph* selectively, isolating aspects of the opinion that support their holding, while downplaying or ignoring aspects that do not. This is unsurprising, given that *Randolph* was intended to be applicable only to factually identical circumstances, and therefore provided no guidance for courts dealing with the circumstances in cases such as *Murphy*, *Henderson*, and *Hudspeth*.³⁸⁵ Because no other Supreme Court precedent speaks directly to the issue of disputed consent, courts are left to apply an amalgamation of several different legal theories, such as *Matlock*'s assumption of the risk,³⁸⁶

379. See Slobogin & Schumacher, *supra* note 215, for an example of a Fourth Amendment empirical study that sought to determine how individuals react to various police investigatory methods.

380. See *supra* Part II.A.

381. See *supra* notes 298–300 and accompanying text.

382. See *supra* notes 302–03 and accompanying text.

383. See *supra* notes 284–86 and accompanying text.

384. See *supra* notes 288–91 and accompanying text.

385. See *supra* Part I.C.3.c.

386. See *supra* Part I.C.1.

Rodriguez's focus on the reasonability of police behavior,³⁸⁷ and *Randolph's* invitation to determine widely held social expectations.³⁸⁸ What is needed, however, is to step away from these precedents and consider the issue from a different perspective.

B. *Separating the Cases: Factually Indistinguishable?*

The first step in developing a new understanding of third-party consent searches is recognizing that not all such cases can be grouped under a single rule. Although the Seventh Circuit found *Henderson*, *Murphy*, and *Hudspeth* to be factually indistinguishable,³⁸⁹ there are a number of important differences among the cases. There is no doubt they are similar: all involve a defendant whose refusal to consent to a search was rendered irrelevant when the police maneuvered around it by arresting the objector and obtaining consent from someone else. However, this broad outline neglects distinguishing features related to how the police contact with the defendants began and how the consent was obtained from the individual who granted permission to search. In *Hudspeth* and *Murphy*, the police instigated the contact with the defendants as a result of an independent investigation. In *Henderson*, however, the defendant's wife called the police to the scene to resolve a volatile and dangerous situation. Further, the police obtained consent in *Hudspeth* and *Murphy* only after placing the third party in a vulnerable position. Dennis Roper was placed under arrest before he granted consent to search the storage unit, and Georgia Hudspeth was told that an armed guard would remain in her home overnight if she refused consent. The below sections consider these distinguishing features in greater detail.

1. Whether the Consent Was Voluntary

As noted above, there is significant debate among scholars over the issue of voluntary consent.³⁹⁰ The Supreme Court requires that courts look to the totality of the circumstances to determine whether consent was coerced.³⁹¹ Whether or not the individual being questioned is aware that he can refuse consent is relevant to this analysis, but not required.³⁹² This standard has become so malleable that courts regularly find consent to be voluntary even where a suspect inexplicably grants police permission to search where he knows contraband will be found.³⁹³ It is perhaps not a surprise, therefore, that the courts found Georgia Hudspeth and Dennis Roper to have given voluntary consent, but it is nevertheless worth taking a detailed look at the

387. See *supra* Part I.C.2.

388. See *supra* Part I.C.3.a.

389. See *supra* note 355 and accompanying text.

390. See *supra* notes 117–49 and accompanying text.

391. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

392. *Id.*

393. See *supra* notes 118, 127–38 and accompanying text.

circumstances surrounding Hudspeth's and Roper's consent in light of arguments made by Professors Thomas, Maclin, and Strauss.³⁹⁴

Although Georgia Hudspeth initially refused to consent to a search of her home, and only changed her mind after being told an armed officer would spend the night in her home if she continued to refuse, the Eighth Circuit determined her consent to be voluntary and valid.³⁹⁵ Hudspeth's brief to the court paints a vivid picture of the type of interaction between the police and citizens that can be determined to be noncoercive.³⁹⁶ Initially, Hudspeth notes that four plain-clothed police officers arrived at the Hudspeth home after dark and that Mrs. Hudspeth had no previous experience dealing with police officers.³⁹⁷ Mrs. Hudspeth repeatedly stated that she did not know whether her husband would want her to consent to a search, and the police were aware that she had been unable to contact an attorney for advice.³⁹⁸ Of course, the officers were also fully aware that Roy Hudspeth did not want them to search the house, but they chose instead to inform Mrs. Hudspeth that an officer would be stationed in her living room until they returned the next day with a warrant if she refused.³⁹⁹ Although the officers explained that they did not want her to feel coerced, Mrs. Hudspeth replied that she did not believe she could feel more coerced than she felt at that moment.⁴⁰⁰

This testimony was discounted by the Eighth Circuit because it was uncorroborated and disputed by the officers present.⁴⁰¹ Thus, the court engaged in exactly the type of "swearing contest" envisioned by Professor Strauss⁴⁰² and, perhaps unsurprisingly, found the testimony of the police to be more reliable than that of Mrs. Hudspeth. The court's complaint that Mrs. Hudspeth's claims were uncorroborated is somewhat surprising, as there was no one present to offer corroboration, other than the police officers that obviously had no motivation to do so. This is also an example of police continuing to request consent after they have received a clear objection. Professor Maclin's proposed rule would have prevented this situation.⁴⁰³ Maclin argues that, once police have received a rejection to a request for consent, they should be required to refrain from repeating their request or otherwise attempting to undermine an individual's assertion of his or her right. Clearly, this would proscribe the use of threats to encourage someone to change his or her mind.

394. See *supra* notes 117–49 and accompanying text.

395. See *supra* notes 318–21 and accompanying text.

396. Appellant's Opening Brief, *supra* note 18, at 10–13.

397. *Id.* at 10–11.

398. *Id.* at 11.

399. *Id.* at 11–12. The officers testified that they did not think it was necessary to tell Georgia Hudspeth about her husband's refusal to consent, nor did they think it would matter. *Id.* at 12–13.

400. *Id.* at 12.

401. *United States v. Hudspeth*, 459 F.3d 922, 929–30 (8th Cir. 2006), *rev'd in part, aff'd in part en banc*, 518 F.3d 954 (8th Cir. 2008).

402. See *supra* notes 120–22 and accompanying text.

403. See *supra* notes 145–49 and accompanying text.

Mrs. Hudspeth was not physically coerced, nor can it fairly be said that her will was overborne, but she nevertheless seems to have been in a position where she consented because she felt she had no other choice. She was in an extremely stressful situation, with four police officers in her home and having just learned of her husband's arrest. She was unable to contact a lawyer for advice, and she was faced with the prospect of explaining to her young children why an armed police officer needed to spend the night in their living room. It is difficult to describe her consent as completely uncoerced or voluntary.

The Ninth Circuit did not discuss in detail the circumstances surrounding Dennis Roper's consent to search the storage unit that he had allowed Stephen Murphy to use. The court noted only that Roper arrived on the scene and was arrested on outstanding warrants before he gave written consent to search.⁴⁰⁴ There is no indication that the police coerced Roper into granting consent, but it is worth considering—as it is in any case where a third party grants consent to search—his circumstances and his possible motivations. When Dennis Roper granted consent, he was in police custody. He claimed to have no knowledge of Murphy's activities inside the storage facility, although he acknowledged that he had given him permission to reside there.⁴⁰⁵ Professor Strauss has argued that any encounter with police where the officers make a request to search is inherently coercive because of the imbalance of power between the parties involved.⁴⁰⁶ That imbalance of power must be considered to be greater in a situation where the individual being questioned is under arrest and potentially implicated in a drug-manufacturing operation. Roper's personal motivations for cooperation are not clear from the record, but a person in his position would most likely be considering how best to extricate himself from a difficult situation, which might involve acceding to as many police demands as possible. The question therefore is not whether Roper was in fact coerced, but whether police should be allowed to seek consent from a third party in such a predicament.

To be clear, there is little doubt that, under current Supreme Court precedent, both courts of appeals correctly determined that the consent given by Georgia Hudspeth and Dennis Roper was valid and voluntary. The issue is whether the Supreme Court's formulation for determining voluntary consent is in itself valid.

2. *Henderson* and *Randolph*: Consent vs. Invitation

Professors Strauss, Thomas, and Maclin raise significant questions about the validity of the consent search doctrine as a whole. However, their concerns cannot be said to apply to the circumstances at issue in *Henderson*. In order to understand how this case differs from *Hudspeth* and

404. *United States v. Murphy*, 516 F.3d 1117, 1120 (9th Cir. 2008).

405. *Id.*

406. *See supra* notes 117–18 and accompanying text.

Murphy, it is important to begin the analysis at the point where the contact between the police and the Hendersons began. In both *Hudspeth* and *Murphy*, the police were conducting ongoing investigations when they requested permission to search the respective premises. The police arrived unannounced, expecting in both cases to find evidence of crimes.⁴⁰⁷ In *Henderson*, however, there was no ongoing investigation. Police arrived at Kevin Henderson's home because he had thrown his wife out of the house and she had walked to a neighbor's home and called the police.⁴⁰⁸ Immediately after the police arrived, Patricia Henderson agreed to sign a complaint against her husband and asked the police to place him under arrest and search the home for weapons and drugs.⁴⁰⁹ Therefore, the police did not request consent from Patricia Henderson, they were instead asked to provide assistance. This distinction becomes important when considered in light of Professor Rubinfeld's test of generalizability.⁴¹⁰

C. Applying the Test of Generalizability

Professor Rubinfeld's test of generalizability offers a valuable tool for courts grappling with third-party consent cases.⁴¹¹ The question under this test is whether the power asserted by the police, if generalized, poses a threat to society as a whole. Once a court declares a search in a particular case to be legal, it licenses law enforcement officers to conduct future searches in that same manner. Fourth Amendment analysis is therefore not conducted from the perspective of people like *Hudspeth* and *Murphy*, who clearly broke the law and had obvious reasons for wanting to keep the police out; instead, "[the] Fourth Amendment is . . . violated by searches and seizures that rob the *law-abiding* of their security."⁴¹² The focus, therefore, should be on how the state's actions, generalized to society as a whole, would affect innocent citizens. Through application of this test, it initially becomes clear that there are at least two distinct types of third-party consent searches: (1) searches by invitation, and (2) investigative searches.

First, there are consent searches that result from a citizen requesting police presence to handle an emergency situation, as in *Randolph*⁴¹³ and *Henderson*.⁴¹⁴ The searches that occurred in these cases can technically be considered "consent searches," because in both police requested and

407. *Murphy*, 516 F.3d at 1119 (noting that the police officer's presence was the result of observations made during routine police business); *United States v. Hudspeth*, 459 F.3d 922, 924 (8th Cir. 2006), *rev'd in part, aff'd in part en banc*, 518 F.3d 954 (8th Cir. 2008) (noting that police arrived at *Hudspeth*'s business after "an investigation into the sale of large quantities of pseudoephedrine-based cold tablets").

408. Brief and Appendix for Defendant-Appellee Henderson at 6, *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008) (No. 07-1014).

409. *Id.*

410. See Rubinfeld, *supra* note 74, at 131-32.

411. See *supra* notes 92-94, 241-46 and accompanying text.

412. Rubinfeld, *supra* note 74, at 129.

413. See *supra* notes 1-6 and accompanying text.

414. See *supra* notes 343-50 and accompanying text.

received permission to search. In reality, however, they were “searches by invitation,” because the consenters did not merely submit to a request (or demand) from the police to search. Instead, they actively and voluntarily sought help from law enforcement officers, resulting in a search for, and seizure of, dangerous contraband from their homes. Janet Randolph called the police to her home because a domestic dispute had escalated beyond her control.⁴¹⁵ Immediately after they arrived, she told the officers that her husband was using cocaine and had taken their son away from the home, which led the officers to request permission to search the home.⁴¹⁶ The police response was not the result of an in depth investigation, but was instead in the interest of providing the protection and safety that Janet Randolph had taken the initiative to request.⁴¹⁷ Likewise, Patricia Henderson called police for help after her husband choked her and threw her out of the house.⁴¹⁸ Again, the police responded to a request for help from a citizen and removed both a violent individual and dangerous weapons from the home, thus providing at least temporary safety.⁴¹⁹

These “searches by invitation” are beneficial to society as a whole and thus pass Professor Rubinfeld’s test of generalizability, neatly sidestepping the issues surrounding consent raised by Professors Strauss, Thomas, and Maclin.⁴²⁰ Janet Randolph’s and Patricia Henderson’s consent are relevant but secondary issues: the more important factors are that they voluntarily made the initial contact with the police and that they provided them with information concerning the criminal activity within the house.⁴²¹ Whether there was any underlying coercion in obtaining consent at the scene is significantly undercut by the fact that there can be no question that the initial requests to the police, which set everything in motion, were wholly voluntary. As a society, we rely on police assistance in situations that are too dangerous to be handled through self-help. In these situations, the police are playing a protective, rather than adversarial, role in relation to the individual granting consent. Under the test of generalizability, a good faith request for police assistance that results in a search would be per se reasonable in terms of the Fourth Amendment. This would be true even, or perhaps especially, when it is conducted in the face of an objection from the very person who caused the emergency requiring police presence.

In contrast, there are police investigatory consent searches, such as those seen in *Hudspeth* and *Murphy*, where there is clearly a “rupture in personal life instigated”⁴²² by the police, and the evidence that led to the officers’ presence at Hudspeth’s office and Murphy’s storage unit was gathered entirely by state actors (i.e., none of the occupants of the searched premises

415. See *supra* notes 1–6 and accompanying text.

416. See *supra* notes 1–6 and accompanying text.

417. See *supra* notes 1–6 and accompanying text.

418. See *supra* notes 343–50 and accompanying text.

419. See *supra* notes 343–50 and accompanying text.

420. See *supra* notes 117–49 and accompanying text.

421. Rubinfeld, *supra* note 74, at 136–37.

422. *Id.* at 136.

informed the police that criminal activity was taking place within).⁴²³ If generalized, the power asserted by the police in *Hudspeth* and *Murphy* would appear to "undermine the possibility or flourishing of personal life"⁴²⁴ in a way that it did not in either *Randolph* or *Henderson*. Further, as Rubenfeld points out, the primary aspect of personal life that the Fourth Amendment protects is an individual's "houses, papers, and effects."⁴²⁵ The intrusion at issue in *Hudspeth* and *Murphy* therefore goes to the very heart of the security protected by the amendment.⁴²⁶ Inherent in the right of security that the Fourth Amendment seeks to protect is the right of the people to exclude police, acting without a warrant based on probable cause, from their homes.⁴²⁷

In these circumstances, the police are adversaries of the individuals they confront with consent requests, even if only indirectly. Although neither Roy Hudspeth's wife, Georgia, nor Stephen Murphy's "landlord," Dennis Roper, were the direct targets of the police investigations at issue in the respective cases, they were hardly uninvolved bystanders. The police investigation and arrest of Roy Hudspeth would have obvious effects on his wife and family, and Dennis Roper was surely aware of his own potential criminal liability when the police confronted him. In these circumstances, all of the concerns raised by Professors Strauss, Thomas, and Maclin come into play and therefore courts must treat requests for consent differently than when a police intervention is invited.⁴²⁸

Further, granting police the systematic power to enter a home without a warrant based on probable cause, over the objection of an occupant, and based on evidence gathered entirely by and for state actors, infringes upon the security protected by the Fourth Amendment, regardless of whether a co-occupant provides consent. Generalizing this assertion of power by the police leads to situations where the police, acting entirely without probable cause, are able to intrude upon an innocent citizen's personal life, despite his or her explicit objection.

Where the police are in an adversarial, investigative relationship with the subject of their consent request, a more demanding Fourth Amendment standard should be applied. The police are not on the scene to provide requested protection and assistance; they are instead in exactly the investigatory, and therefore intimidating, role that Professors Strauss and

423. See *supra* note 407 and accompanying text.

424. Rubenfeld, *supra* note 74, at 136.

425. *Id.* at 130 (quoting U.S. CONST. amend. IV).

426. See *supra* note 95 and accompanying text.

427. See Rubenfeld, *supra* note 74, at 123–25. Rubenfeld summarizes the original purpose of the Fourth Amendment as forbidding "unparticularized, unsworn search warrants, unsupported by probable cause." *Id.* at 123. The general warrants that the Fourth Amendment was intended to abolish essentially gave the government the right to enter any home or business based solely on some undefined suspicion. The probable cause standard eliminated general warrants because, in order to obtain a warrant, police must have "evidence sufficient to make a reasonable person believe . . . that a particular place contains objects pertaining to a crime." *Id.* at 124.

428. See *supra* notes 117–49 and accompanying text.

Thomas argue prevents individuals from objecting to a request to search.⁴²⁹ *Hudspeth* is a perfect example of the type of situation that concerned Professor Maclin, where an individual actually does muster the strength to refuse to consent, only to relent eventually when police refuse to accept this answer.⁴³⁰ In these situations, police officers should be required to obtain a warrant based on probable cause in order to search.

D. Requiring Probable Cause for Investigatory Consent Requests

Although the Framers of the Fourth Amendment were unfamiliar with modern police forces, they nevertheless designed the Fourth Amendment to protect against an abuse of power, the general warrant, which is arguably analogous to present-day searches conducted without probable cause.⁴³¹ The Fourth Amendment thus required that any warrant issued be based on probable cause, and that the officer seeking the warrant describe with particularity exactly what he intended to seize.⁴³² The overarching concern that led to the Fourth Amendment was a suspicion and fear of agents of the state with unlimited discretionary authority.⁴³³ Currently, when police officers request permission to search a person or a home without a warrant, the subject of their request may refuse, but he may not know of this right, and the police have no obligation to inform him of it.⁴³⁴ Further, refusing permission once may not be enough; there is nothing to stop police from continuing to ask for permission in the face of one or more denials.⁴³⁵ This interaction takes place in an inherently threatening environment,⁴³⁶ whether it be a surprise encounter at night involving four police officers in a homeowner's living room⁴³⁷ or a request made immediately after the subject was placed in police custody.⁴³⁸ In these circumstances, consent leading to self-incriminating evidence is often inexplicably granted.⁴³⁹ In the face of this, courts determine whether consent was voluntarily given by looking at the totality of the circumstances, which often comes down to a question of whether the defendant or the police officers are more credible witnesses.⁴⁴⁰ In sum, the entire process is weighted against the citizen and in favor of the state.

The answer to this inequality is to require police to articulate probable cause and obtain a warrant prior to an investigatory search.⁴⁴¹ In this

429. See *supra* notes 117–43 and accompanying text.

430. See *supra* notes 144–49, 312 and accompanying text.

431. See *supra* Part I.A.1.

432. See U.S. CONST. amend. IV.

433. See *supra* Part I.A.1.

434. See *supra* notes 110–13 and accompanying text.

435. See *supra* notes 144–49 and accompanying text.

436. See *supra* notes 117–19 and accompanying text.

437. See *supra* notes 311–13 and accompanying text.

438. See *supra* notes 289–90 and accompanying text.

439. See *supra* notes 118, 127–38 and accompanying text.

440. See *supra* notes 120–22 and accompanying text.

441. See *supra* notes 140–43 and accompanying text.

context, consent would no longer serve to legitimize an investigatory search under the Fourth Amendment. Before police may put a citizen in a position to relinquish “voluntarily” his right to prevent unauthorized intrusion by the state, the officers must have developed enough of a case to convince a magistrate to issue a search warrant.

Consent searches are well-known to be the most common warrantless searches conducted by law enforcement, so there can be no doubt that such a drastic rule would have an effect on police work.⁴⁴² The question, however, is whether this effect would be significant and whether it would be negative. There is support for the contention that consent requests are primarily a method of convenience, rather than necessity, and that in most cases officers would be fully capable of obtaining a search warrant and avoiding the issue of consent entirely.⁴⁴³ This contention is borne out in the limited context of the cases under discussion. The officers in both *Murphy* and *Hudspeth* had probable cause to conduct their search,⁴⁴⁴ and in fact in *Murphy* the police were in the process of obtaining warrants that would have allowed them to search without consent.⁴⁴⁵ The situations therefore could have been entirely avoided by obtaining a warrant, the probable cause for which the police had already earned through a legitimate investigation.

CONCLUSION

Randolph is of limited value because its “widely held social expectations” foundation does not provide consistent, logical solutions to third-party consent search issues. Individual responses to disputes over consent to enter will naturally vary depending on the individuals and circumstances involved. Further, *Randolph* adds very little to the consent search doctrine, as it was intended only to apply to the facts at issue in that case. However, because it is the only disputed consent case decided by the Supreme Court, lower courts attempting to resolve third-party disputed consent issues in cases distinguishable from *Randolph* are left with very little guidance. Consequently, the current circuit split was inevitable.

The solution to this problem is to abandon the *Randolph* framework and instead begin the analysis with a determination of how the interaction between police and citizen is instigated. If the police are called to the scene to play a protective role, a subsequent search invited by the individual in distress should be considered per se reasonable and valid under the Fourth Amendment. However, consent obtained from a citizen in an adversarial position to the police, whether directly or indirectly, should be considered

442. See *supra* note 102.

443. See *supra* notes 125–26 and accompanying text.

444. *United States v. Hudspeth*, 518 F.3d 954, 959 (8th Cir. 2008) (noting that the evidence the police collected at Hudspeth’s business provided them with probable cause to search his home); *United States v. Murphy*, 516 F.3d 1117, 1119 (9th Cir. 2008) (noting that the police were able to see an operating methamphetamine lab in plain view).

445. *Murphy*, 516 F.3d at 1120 (“Murphy was transported to jail and [the arresting officer] left the scene to prepare an affidavit for a search warrant.”).

per se unreasonable unless officers obtain a search warrant based on probable cause.

Notes & Observations