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Georgia v. Randolph: A Jealously Guarded Exception—Consent and the Fourth Amendment

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Comment

GEORGIA v. RANDOLPH: A JEALOUSLY GUARDED EXCEPTION – CONSENT AND THE FOURTH AMENDMENT†

I. INTRODUCTION

The history of Fourth Amendment[1] jurisprudence traces the struggle of successive courts to define "reasonableness," and balance the competing needs of personal privacy and police efficiency.[2] Generally, the Fourth Amendment requires a warrant for all government searches and seizures.[3] However, the United States Supreme Court has held that a warrantless search is allowed if a pre-existing exemption applies.[4] For

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1 The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV.

2 *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999). Davies explains that Fourth Amendment jurisprudence has changed sharply over the past one hundred years due to an increase in the authority given to police officers since the time of the adoption of the Bill of Rights. *Id.* Specifically, Davies argues that the nineteenth century saw the rise of law enforcement officers' ex officio authority to arrest and search, a development that was not anticipated by the framers of the Constitution. *Id.* In the wake of this expansion of duties, officers gained discretionary search and seizure power that was not easily controlled by authority of the warrant system. *Id.* In contrast, Davies observes, at the time the Bill of Rights were adopted, the primary source of searching and seizing power came from the judicial warrant system, with officers on the street having only meager power. *Id.* Accordingly, the text of the Fourth Amendment deals with the possibility of judges issuing warrants too leniently, without probable cause. *Id.* Yet, due to the rise in police power, much of the current judicial debate surrounding the Fourth Amendment is concerned with the behavior of officers in their day to day activities. *Id.*

3 *See Thirty-Second Annual Review of Criminal Procedure: Overview of the Fourth Amendment*, 91 GEO. L.J. 5 (2003). This article describes the clauses of the Fourth Amendment, the first of which prohibits unreasonable searches and seizures, the second of which requires that a warrant issued to search or seize property must be supported by probable cause. *Id.* Although the two requirements in the Amendment are written as independent clauses, the Supreme Court has long interpreted the Fourth Amendment as requiring a warrant for searches and seizures. *Id. See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967) (stating that searches conducted outside the judicial warrant system, without the prior approval of a judge, are per se unreasonable under the Fourth Amendment).

4 *See Katz*, 389 U.S. at 357. Warrantless searches and seizures are valid when: (1) they are made incident to an arrest; (2) they are done while in hot pursuit of a criminal; or (3)

example, warrantless searches are allowed when an individual possessing authority has given the police consent to conduct a search.[5]

Yet numerous cases have illustrated the difficulty in determining who has legal authority over premises such that consent is valid under the Fourth Amendment.[6] In 2005, the Supreme Court granted certiorari in *Georgia v. Randolph* to determine whether third-party consent—ordinarily valid under the Fourth Amendment—remains valid in the presence of primary party refusal.[7] In a departure from numerous circuit court decisions, the Supreme Court held that primary party refusal renders third party consent irrelevant such that a warrantless search violates the Fourth Amendment.[8]

This Comment will first examine the facts present in *Georgia v. Randolph*. Second, this Comment will present the evolution of the Court's rulings on consent to warrantless searches and seizures, including rulings concerning third party consent. Finally, this Comment will analyze the Supreme Court's holding in *Randolph*, first arguing that the majority's social expectations test is a flawed method under which to analyze third party consent, and second, arguing that cases decided

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they are undertaken with the consent of an individual who owns the property being searched. *Id*.

5 *See* Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (holding that a warrantless search of a person's home is allowed when the police have the voluntary consent of the individual whose property is being searched, or the consent of a third party who has common authority over the property).

6 Most cases involving third party consent to warrantless searches and seizures include an assessment of whether or not the person who gave consent had the legal authority to do so according to prevailing notions of property rights. *See generally* United States v. Matlock, 415 U.S. 164 (1974) (holding that a third party who shares ownership of property with a non-present individual whose property is being searched can consent to a search under the Fourth Amendment because the third party's relationship to the property is such that they possess common authority over the premises). *See generally* Stoner v. California, 376 U.S. 483, 488 (1964) (holding that a hotel clerk cannot consent to a search of a guest's hotel room because a clerk lacks valid authority over the property).

7 Georgia v. Randolph, 126 S. Ct. 1515, 1520 (2006). In granting certiorari, the Court noted that its reason for doing so was to resolve a split of authority. *Id.* Specifically, the court stated that four courts of appeals and the majority (but not all) of state courts have considered the question at issue in *Randolph,* holding that consent remains effective even in the face of an express objection. *Id.* at 1520 n.1

8 *Id.* at 1523 (holding that the disputed invitation of one co-tenant over the objection of another present co-tenant constitutes an unreasonable search under the Fourth Amendment because a co-tenant has no recognized authority to prevail over a present and objecting co-tenant). *But see* United States v. Morning, 64 F.3d 531, 533 (9th Cir. 1995) (holding that third party consent remains effective in the face of express objection); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992) (same); United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977) (same).

subsequent to *Randolph* illustrate the weaknesses inherent in the social expectations test.

II. STATEMENT OF THE FACTS IN *GEORGIA V. RANDOLPH*

In July 2001, following a domestic dispute, Janet Randolph called the police to report that her husband, Scott Randolph, had taken their son away.[9] When the police arrived at the couple's Americus, Georgia home, Janet told the officers that her husband was a cocaine user and volunteered to show the police the drug paraphernalia she claimed Scott kept in the house.[10] Following Janet's consent to the search, the police asked Scott for permission to search the house, which he refused to give.[11] Janet then escorted the officer to an upstairs bedroom where they found a drinking straw covered in cocaine residue, which the officer confiscated.[12]

Scott Randolph was later indicted for possession of cocaine based on the evidence collected during the warrantless search.[13] Scott moved to suppress the evidence, claiming that his objection to the search nullified his wife's consent.[14] The trial court denied the motion, holding that Janet had common authority to consent to the search.[15] The Georgia Court of Appeals reversed, holding that, in the face of Scott's refusal, Janet's permission was invalid.[16] The Supreme Court of Georgia affirmed the decision and the United States Supreme Court granted certiorari in 2005.[17]

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

10 *Id.*

11 *Id. See also* Brief for the Respondent, Georgia v. Randolph, 126 S. Ct. 1515 (2006) (Sept. 1, 2005) (No. 04-1067) (stating that not only did Scott Randolph refuse to give police permission to search the house, but his parents—the actual owners of the house—also refused permission via the telephone).

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

13 *Id.* Although the officer later obtained a warrant to search the property, the evidence Scott Randolph sought to suppress was that which had been collected during the original warrantless search. *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id*. at 1520.

III. THE LEGAL BACKGROUND OF *GEORGIA V. RANDOLPH*

The Fourth Amendment of the United States Constitution[18] governs all government searches and seizures.[19] However it was not until 1967, in *Katz v. United States*, that the Supreme Court first enumerated the social expectations test, determining that a search has occurred under the Fourth Amendment when society recognizes that an individual should have a right to privacy under the circumstances present.[20] Nonetheless, despite the announcement of the social expectations test, judicial debate regarding the scope of the Fourth Amendment continued throughout the twentieth century.[21] In fact, numerous cases have examined the issue of

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[18] *See supra* note 1 (providing the text of the Fourth Amendment to the United States Constitution).

[19] *See supra* note 2 (discussing Davies' history of the Fourth Amendment, as it evolved from a measure preventing courts from issuing overly broad warrants to a mechanism that bars police officers from disregarding individual property rights by requiring that they seek a warrant prior to conducting a search).

[20] Katz v. United States, 389 U.S. 347, 361 (1967). In *Katz*, the defendant was prosecuted based on evidence that was collected by the government through an electronic listening device that had been installed in a public telephone booth without the defendant's knowledge. *Id.* at 348. The Court first determined that the listening device constituted a search despite the fact that there was no physical breach of the phone booth, because the defendant had an expectation that his conversation would be private. *Id.* Accordingly, the Supreme Court held that the search was unreasonable because the government had not first obtained a warrant. *Id.* at 359. Furthermore, Justice Harlan, writing in a dissenting opinion, established the social expectations test to determine when a search has taken place such that the Fourth Amendment is in play. *Id.* at 361 (Harlan, J., dissenging). First, an individual must have an "actual (subjective) expectation of privacy." *Id.* Second, society must recognize this expectation of privacy to be reasonable. *Id.* If both criteria are met, and police have invaded this right to privacy, then the Fourth Amendment is violated. *Id.*

[21] *See* Davies, *supra* note 2, at 551. Davies argues that the framers never anticipated that "unreasonable searches and seizures" language would be read as the standard for warrantless intrusions that it has become in modern interpretation, but instead the framers simply used the term "unreasonable" to describe any searches and seizures that might be made under a general warrant. *Id.* Davies identifies two sides to the warrant debate: the "warrant-preference" proponents, who see the need for a warrant as the primary tenant of the Fourth Amendment, and the "generalized-reasonableness" proponents, who assert that the Fourth Amendment merely assures that warrantless searches ought to be judged based on a standard of "reasonableness." *Id.* at 553. Furthermore, Davies argues that both interpretations ignore the original meaning of the term "unreasonable," which, he claims referred only to the inherent illegality of general warrants. *Id.* at 556. However, Davies also asserts that the original interpretation of the amendment ought not to govern modern Fourth Amendment jurisprudence. *Id.* Instead, Davies argues, the Fourth Amendment should be interpreted in light of the framers overall purpose—to curb the discretionary power of officers. *Id.*

when consent to a government search is proper, such that no warrant is necessary under the Fourth Amendment.[22]

For example, in 1973, in *Schneckloth v. Bustamonte*, the Court held that voluntary consent of the individual against whom incriminating evidence is sought is valid to allow a warrantless search.[23] However, the consent exception was soon complicated by the issue of third-party consent.[24] First, in *Coolidge v. New Hampshire*, the Court held that when a third party turns evidence over to the police, it does not constitute a search under the Fourth Amendment.[25] However a few years later, in *United States v. Matlock*, the Supreme Court examined third party consent when an actual warrantless search has taken place.[26] In *Matlock*, the

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[22] The exception of voluntary consent to government searches was already well established by the time *Katz* was decided. *See* Jones v. United States, 357 U.S. 493, 499 (1958) (Justice Harlan famously referred to the consent exception as being among the "jealously and carefully drawn" exceptions to the general rule that all searches require warrants).

[23] Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). In *Bustamonte,* the police were conducting a search of a car based upon consent when they discovered evidence that was later used to convict the driver of unlawfully possessing a check. *Id.* at 218. The Ninth Circuit had held that the prosecution had to prove that consent was not only voluntary, but was also given with the knowledge that it could be withheld. *Id.* However, the Supreme Court held that so long as the consent is voluntary—meaning that, given the totality of the circumstances, the individual was not coerced—officers need not inform individuals that they have the right to refuse consent. *Id.* at 222.

[24] *See, e.g.,* Elizabeth A. Wright, Note, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841, 1859-61 (2005). Wright provides numerous hypothetical examples of disputed third party consent in order to illustrate the nuances of the debate, including the veto model and the agency model of determining common authority.

[25] Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971). In *Coolidge* the defendant's wife retrieved his guns and clothing from the house and turned them over to the police. *Id.* at 485. The defendant later sought to suppress this evidence at trial, however the Court held that the wife's voluntary action did not constitute a search and seizure by the government. *Id.* at 488. The Court reasoned that the police had merely been questioning the defendant's wife and when she produced the clothing on her own volition, the police were not required to avert their eyes and could accept the evidence without regard to the Fourth Amendment rights of the defendant. *Id.*

[26] United States v. Matlock, 415 U.S. 164, 166 (1974). The defendant in *Matlock* had been arrested in the yard of the house in which he lived with several other people. *Id.* Once the defendant was detained in the police car, an officer sought the permission of one of the other occupants to search the house, which she granted. *Id.* The Court held that the occupant's permission to search the premises was valid because: (1) the defendant was not present to object to the search; and (2) the other occupant had common authority over the premises such that she could grant permission. *Id.* at 170. Further, the court reasoned that the other occupant's common authority was determined, not by any sort of property interest in the house, but instead by mutual use and control over the premises such that the defendant could reasonably be said to have assumed the risk that she might consent to a

Court held that a warrantless search is allowed even when a non-present co-occupant subsequently objects to the search, provided police have first obtained the voluntary consent of a third party who shares authority over the area.[27]

Subsequent to *Matlock*, in *Illinois v. Rodriguez*[28] the Court extended the *Matlock* holding to situations in which the third party who consents to a search does not have actual authority to do so.[29] The Court held that in the absence of actual authority, the third party must have apparent

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search of the common area. *Id.* at 171. Thus, the warrantless search was proper under the Fourth Amendment. *Id.*

[27] *Id. See also* Wright, *supra* note 24, at 1857-58. Wright discusses two possible rationales behind third party consent cases, both of which were mentioned in *Matlock*: (1) common authority, meaning that each co-tenant has an individual right to consent to a search and is consequently able to consent to a search of common areas; and (2) assumption of risk, meaning that by sharing common space, each co-tenant assumes the risk that the other will consent to a search. *Id.* at 1857. Wright states that third party cases are difficult to decide because the Supreme Court has never explicitly stated which of the two rationales controls. *Id.* at 1858. However, Wright ultimately concludes that the two theories mentioned in *Matlock* actually work together. *Id.* In other words, when two people share common authority over an area, they have assumed the risk. *Id.* Conversely, a primary party has assumed the risk of a third party consenting to a search because each joint occupant has common authority to consent to a search. *Id.* Thus, Wright concludes that the common authority and assumption of risk theories are part of the same analysis according to the reasoning in *Matlock*. *Id.*

[28] Additionally, there were two main cases prior to *Matlock* that addressed third party consent. In both cases the consent was held to be invalid because the primary party had no expectations that they shared control over the premises with the third party. *See* Stoner v. California, 376 U.S. 483, 488 (1964) (holding that a hotel clerk could not consent to the search of a guest's room because a hotel guest would have no reason to expect that a manager could admit persons into the room other than hotel staff); Chapman v. United States, 365 U.S. 610, 617 (1961) (holding that a landlord does not have the authority to consent to a search of the dwelling of a tenant because a tenant would not ordinarily expect that the landlord may let visitors into the dwelling).

[29] Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). In *Rodriguez* the police entered the apartment of the defendant, who was asleep at the time and never consented to the search, at the behest of the defendant's girlfriend, who had given consent and let the officers into the apartment with her key. *Id.* at 179. The defendant moved to suppress evidence that had been collected during the search, claiming that his girlfriend had no authority to consent to a search. *Id.* at 180. Although the Court agreed that the defendant's girlfriend had no authority over the apartment at the time of the search, it also found that the police reasonably believed that she possessed the authority to grant the search. *Id.* at 183. Accordingly, the Court held that the defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated because the search was reasonable based on all of the information the police had at the time. *Id.* at 188.

authority to consent to a search, which is determined by examining the totality of the circumstances.[30]

However, despite the Supreme Court's holdings in third party consent cases, until recently, the law was still unclear when it came to cases in which the police obtained third party consent for the search while the present primary party objected.[31] Although numerous cases at both the state and federal level had held that third party consent remained valid in the face of primary party objection, the Georgia Supreme Court found the opposite in *Randolph*, disallowing third party consent to override present primary party objection.[32] Thus, when it granted certiorari to *Georgia v. Randolph*, the Supreme Court sought to determine whether third party consent to a government search is valid under the Fourth Amendment when the primary party is present and objects to the search.[33]

IV. ANALYSIS OF THE DECISION IN *GEORGIA V. RANDOLPH*

A. The Randolph *Opinion*

When the Supreme Court granted certiorari in *Georgia v. Randolph*, commentators speculated that the Court would side with the majority of lower court cases and allow the permission of one co-tenant to trump the

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30 *Id.* at 186. *See also* Wright, *supra* note 24, at 1858. Wright discusses how *Rodriguez* complicates the analysis set forth by *Matlock*, which outlined the connection between assumption of risk and common authority. *Id.* Specifically, Wright argues that *Rodriguez* eliminated the concept of assumption of risk because a primary party could not possibly be said to have assumed the risk of a possible search when the third party has no actual authority. *Id.* Thus, Wright concludes that common authority, including a reasonable belief of common authority, is the only basis for third party consent in following *Rodriguez*. *Id.* For more discussion on assumption of risk and common authority, see *supra* note 27 and accompanying text (summarizing the theories of assumption of risk and primary authority outlined in *Matlock*).

31 For a summary of the circuit split on the subject of third party consent, see Wright, *supra* note 24, at 1862-72. Wright also classifies third party consent cases in which there is present primary party refusal into two categories: the veto model and the agency model. *Id.* First, under the veto model, one co-tenant can trump the consent of another co-tenant, such that a warrantless search will not be allowed under the Fourth Amendment. *Id.* However, under the agency model, a co-tenant is free to allow the police to search the premises, even if the other co-tenant objects. *Id.*

32 *See supra* note 8 (listing federal appellate court decisions from three different circuits—the First, Sixth, and Ninth Circuits—all of which held that third party consent was valid even when the primary party was present and objecting). *See also* Love v. State, 138 S.W.3d 676, 680 (Ark. 2003) (in which the Supreme Court of Arkansas held that one roommate's consent to a search was valid in the face of the defendant's refusal to give permission); Laramie v. Hysong, 808 P.2d 199, 203 (Wyo. 1991) (same).

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

objection of another.[34] Yet the decision that came down from the high court in 2006 did just the opposite—it declared that when a primary party is present and objects to a government search, third party consent does not give the police the right to search the premises without a warrant.[35]

Writing for the majority, Justice Souter began by briefly recounting the Supreme Court's Fourth Amendment jurisprudence on the consent exception to the Fourth Amendment.[36] Although Justice Souter acknowledged that no previous Supreme Court case had presented the specific question at issue in *Randolph*—where a co-tenant is present and objects to the search—he argued that the Court's previous holding in *Matlock*, specifically the social expectations test, framed the manner in which the Court should assess *Randolph*. [37] Specifically, Justice Souter argued that the Court must look to widely shared social expectations in order to assess whether or not third party consent is proper, meaning the Court must first ask whether it is expected by a particular co-tenant that the other co-tenant would be able to consent to a search.[38] Next the Court must examine whether, under the particular circumstances of the case, society would assume that each co-tenant could reasonably object to a search.[39]

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[34] *See, e.g.*, Steve Chapman, *Upholding Our Right To Say No*, BALTIMORE SUN, Mar. 29, 2006, at 13A. Chapman responded with surprise to the *Randolph* holding, arguing that although common sense supports the Court's decision, it is counter to the recent Supreme Court trend of siding with the police on Fourth Amendment issues. *Id.* For example, Chapman argues that by allowing the police to request a search without first informing an individual that they have the right to refuse, the Court placed law enforcement convenience above the privacy of individual citizens. *Id. See also supra* note 23 (providing an overview of the Court's holding in *Schneckloth v. Bustamonte*).

[35] *Randolph*, 126 S. Ct. at 1519.

[36] The majority in *Randolph* consisted of Justice Souter, the opinion's author, joined by Justices Stevens, Kennedy, Ginsburg, and Breyer. Additionally, Justices Stevens and Breyer each filed concurring opinions. However, dissenting opinions were filed by Chief Justice Roberts, and Justices Scalia and Thomas. Justice Alito took no part in deciding the case.

[37] *Randolph*, 126 S. Ct. at 1521. The *Matlock* holding is based on the dual analysis of the social expectations test. United States v. Matlock, 415 U.S. 164, 172 (1979). Thus, the reasoning behind the *Matlock* holding is clearly the underpinning of Justice Souter's opinion. However, Justice Souter does not address how the Court's holding in *Rodriquez* fits within this analysis. Clearly, the second prong of *Matlock* is satisfied in cases where apparent authority exists. Yet, if protecting the expectations of the primary party is one aim of Fourth Amendment jurisprudence, then *Rodriguez* seems to fail on the first prong of the *Matlock* analysis. Justice Souter only addressed *Rodriquez* when he factually distinguished the case from *Randolph*. *See infra* note 50.

[38] *Randolph*, 126 S. Ct. at 1521.

[39] *Id.*

Accordingly, Justice Souter analyzed several other Fourth Amendment cases in light of the social expectations test.[40] In particular, Justice Souter identified several instances where neither society nor individuals would recognize the existence of a common understanding that would allow third parties to admit guests or the police.[41] For example, Justice Souter pointed out that as established in *Chapman* and *Stoner*, neither hotel managers nor landlords have the authority to consent to a police search because both society and tenants/hotel guests would not expect that such authority existed.[42] Following this analysis, Justice Souter stated that the major question in *Randolph* was whether society and the particular co-tenants would recognize one co-tenant's right to refuse the invited guest of another, and he concluded that the answer was an unequivocal "yes."[43] Thus, a co-tenant has no legally or socially recognizable authority to prevail over another present and objecting co-tenant.[44]

Furthermore, although Justice Souter admitted that a co-tenant has an interest in not being held legally liable for another co-tenant's illegal activities, he stated that this interest is not enough to overcome the Fourth Amendment's protections.[45] Additionally, Justice Souter

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40 *Id.* at 1522. Note that although they bear the same name, the social expectations test outlined in *Katz* differs from the social expectations test announced in *Randolph*. Specifically, in the *Katz* dissent, Justice Harlan developed the social expectations test to determine when a search has occurred under the Fourth Amendment. *See supra* note 20 and accompanying text (describing the *Katz* social expectations test in detail). In contrast, in *Randolph*, Justice Souter used the test to determine when consent to a search is proper. *Randolph*, 126 S. Ct. at 1522. Thus, although the social expectations test is not new to Fourth Amendment jurisprudence as a whole, its application in determining consent to warrantless searches under the Fourth Amendment is unprecedented.

41 *Randolph*, 126 S. Ct. at 1522.

42 *Id.* at 1522.

43 *Id.* at 1523. Pursuant to the social expectations test, Justice Souter based this assessment on his observation that a visitor to a dwelling with two co-tenants would not enter if one co-tenant objected. *Id. But see id.* at 1532 (Roberts, J., dissenting) (in which Chief Justice Roberts questioned this assumption, noting that there could be limitless variables, leading to situations in which the guest would stay). *See also* Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOW. L.J. 239 (1993) (arguing that the reasonable person test in the context of Fourth Amendment jurisprudence is skewed because it assumes a generic experience with police when, in reality, many inner city minority communities have deep suspicions of the law enforcement community, and are thus highly likely to feel threatened by police requesting a search); Bruce Fein, *A Supreme Stumble*, WASH. TIMES, Mar. 28, 2006, at A21 (questioning the logic of the Justice Souter's seemingly straightforward application of the social expectations test).

44 *Randolph*, 126 S. Ct. at 1523.

45 *Id.* Justice Souter argued that there are several ways in which criminals can be apprehended and innocent parties can be protected against the illegal activities of their co-

discussed exigent circumstances, claiming that there was no risk that Scott Randolph might destroy the evidence of his cocaine use.[46] However, it would stand to reason that in most cases—especially those in which the defendant would face a lengthy jail sentence if convicted—there is always a strong possibility that evidence may be destroyed before the police have time to obtain a warrant.[47] Nonetheless, neither the petitioner nor the dissent brought up the possibility of the existence of any exigent circumstance, other than consent, that would make a warrantless search proper.[48] Additionally, Justice Souter dismissed the claim made in Chief Justice Roberts's dissent that the majority's holding would protect spousal abusers.[49]

Finally, Justice Souter distinguished the facts in *Randolph* from those in *Matlock* and *Rodriguez*, where the added detail of a physically present inhabitant's express refusal of consent to a government search serves to

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tenant, including: (1) the innocent co-tenant turning the evidence over to the police without a search; (2) the innocent co-tenant simply telling the police what he or she knows about a co-tenant's criminal activities; (3) the police banning the tenant from the dwelling until a warrant is acquired; or (4) the police undertaking a warrantless search when they suspect that the tenant could destroy the evidence. *Id.* Yet, the majority concluded that none of the above circumstances was present in *Randolph*. *Id.* Because there were no exigent circumstances and Janet Randolph's consent was invalid in the face of her husband's objection, the warrantless search was improper under the Fourth Amendment. *Id.*

46 *Id.* Indeed, nowhere in the Petitioner's Brief is there any mention of police suspicion that Scott would destroy the evidence such that a warrantless search was necessary. *Id.*

47 *Id. See also* Adina Schwartz, *Homes as Folding Umbrellas: Two Recent Supreme Court Decisions on "Knock and Announce,"* 25 AM. J. CRIM. L. 545, 555 (1998) (stating that several lower courts automatically recognize the exigent circumstance of the risk of destroyed evidence in all drug cases because drugs are easily destroyed). *But see* United States v. Bonner, 874 F.2d 822 (D.C. Cir. 1989). In *Bonner*, the defendants challenged convictions for drug offenses, arguing that police officers failed to comply with the federal "knock and announce" statute. In its reasoning, the court stated that the risks of evidence destruction and violence constitute exigent circumstances to the requirements of the knock and announce statute. *Id.* at 827. However, the court also stated that exigent circumstances in warrantless search cases are different from exigent circumstances in knock and announce cases, with the latter being a much looser standard. *Id.*

48 *Randolph*, 126 S. Ct. at 1523.

49 *Id.* at 1524. The issue of spousal abuse runs throughout the *Randolph* opinion. For example, Justice Souter stated that the issue in *Randolph*—whether spousal consent to a search is proper—is different from the issues at play in domestic abuse cases because when the police enter a home in response to a domestic abuse call, they are protected from being accused of committing a trespass. *Id.* However, this protection does not, and the majority concluded, should not, have any bearing on the police when they enter a dwelling for the purposes of searching for evidence. *Id.* Justice Souter did, however, note that if the police enter to protect a spouse, they can then collect any evidence they may find while in the house. *Id.*

trumps the consent of a fellow co-tenant.[50] Accordingly, because Scott Randolph refused to allow the police to search his home, the majority held that the search was unreasonable under the Fourth Amendment even though his wife consented to the search.[51]

Additionally, in a concurring opinion, Justice Stevens recounted the evolution of Fourth Amendment jurisprudence, observing that at the time the Fourth Amendment was ratified, a woman would not have had legal standing to refute her husband's consent to a search.[52] In a separate concurring opinion, Justice Breyer focused on the flexibility of the majority opinion, noting that there was no need for a bright line rule, either allowing one co-tenant to always consent to a search or prohibiting them from doing so across the board. [53] Instead, Justice Breyer argued that a court must look to the "totality of the circumstances," under which the presence of domestic abuse or the threat of evidence destruction would both constitute special reasons for a police search, taking a case outside of *Randolph*'s narrow holding.[54]

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[50] *Id.* at 1527. Justice Souter distinguished the facts in *Randolph* from those in *Matlock* and *Rodriguez* by stating that the rules in the latter two cases controlled only cases in which the objecting party had not been present to object to the search, whereas the case in *Randolph* involves a present and objecting co-tenant. *Id.* Accordingly, although Justice Souter used the social expectation test from *Matlock* in arriving at the holding in *Randolph*, he found that neither the *Matlock* holding, nor the *Rodriguez* holding, controlled the present case. *Id.*

[51] *Id.* at 1528.

[52] *Id.* at 1529 (Stevens, J., concurring). Justice Stevens used this observation to underscore the majority's point that, today, neither husband nor wife has the power to override the consent of the other when both are present for a police search. *Id.* Specifically, he stated that neither can override the other's constitutional right to enter their castle. *Id.* Here, Justice Stevens appeared to be arguing that the majority opinion is evidence of progress for women because modern law would now recognize a wife's right to veto her husband's consent to a search, although in *Randolph* the situation was reversed, with the husband's refusal vetoing the wife's consent to a search. *See also* Mary E. Becker, *Interdisciplinary Approach, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 508 (1992) (noting that the Fourth Amendment may have made women worse off by providing a foundation for the notion that a man's home is his castle, thus allowing private property rights to trump the need for police protection for abused women). *But see infra* text accompanying notes 59-61 (discussing how Justice Scalia refutes Justice Stevens's concurrence).

[53] *Randolph*, 126 S. Ct. at 1530 (Breyer, J., concurring). Whereas Justice Stevens's concurrence focuses on refuting the idea that the majority opinion furthers women's rights, Justice Breyer's concurrence seems to emphasize the case specific nature of the holding in order to refute the idea that it would result in a frustration of police purposes, ongoing crime, or increased domestic abuse. *Id.*

[54] *Id.*

Writing in a dissenting opinion, Chief Justice Roberts attacked the principle rationale behind the majority's holding: the social expectations test.[55] First, Chief Justice Roberts stated that the majority was wrong in concluding that no one would enter over the objection of one protesting co-occupant.[56] Moreover, Chief Justice Roberts argued that the majority rule is random in its application and predicted that it would lead to a subjective application by the police.[57] Finally, Chief Justice Roberts argued that the social expectations test should be supplanted in cases such as *Randolph* when privacy has been waived because property is shared with another person.[58]

Justice Scalia, also dissenting, refuted Justice Stevens's concurrence, claiming that his analysis was both flawed and irrelevant.[59] Justice Scalia asserted that Justice Stevens confused the Constitution, which does not change, with the bodies of law to which it refers, which do change.[60] Specifically, he argued that the violation of the Fourth Amendment referred to prevailing notions of property rights, under which both sexes are equal partners. *Id.* Yet, Justice Scalia argued that the majority decision does not further women's rights and will have the practical effect of allowing men to keep women from permitting police to enter

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55 *Supra* text accompanying notes 37-42 (providing an overview of the social expectations test, as described by the majority in *Randolph*).

56 *Randolph*, 126 S. Ct. at 1532 (Roberts, C.J., dissenting). Specifically, Chief Justice Roberts stated that the majority opinion rested upon an assumption that an invited guest who is turned away by a co-occupant would simply go away. *Id.* Instead, Chief Justice Roberts imagined several scenarios in which an invited houseguest would not go away. *Id.* In addition to questioning this assumption, Chief Justice Roberts argued that the social expectations test had been used in the past only to determine when a search had taken place, not to determine questions of consent under the Fourth Amendment. *Id. See also* Wright, *supra* note 24. Wright, in her exhaustive summary of third party consent searches does not even mention the social expectations test, which the majority in *Randolph* uses as its rationale for the holding. *Id.*

57 *Randolph*, 126 S. Ct. at 1532 (Roberts, C.J., dissenting) (noting that the *Randolph* holding does not extend veto power to co-tenants who are present but asleep, or present but in another room, and is thus arbitrary). *But see id.* at 1527 (majority opinion) (in which the majority noted that the added detail of a present and objecting co-tenant required the Court to draw a formalistic line, separating cases where the co-tenant is present from those where he or she, for whatever reason, is not).

58 *Id.* at 1532 (Roberts, C.J., dissenting). Instead of the social expectations test that the majority depends upon, the Chief Justice would use the assumption of risk theory, reasoning that the Fourth Amendment protects privacy and people give up some of that privacy when they share property with others. *Id.* In other words, Justice Roberts argued that Scott Randolph assumed the risk that his wife might consent to a search, thus waiving his Fourth Amendment rights. *Id.*

59 *Id.* (Scalia, J., dissenting).

60 *Id.*

the home in order to stop domestic violence.[61] Justice Thomas, in a final lone dissent, asserted that the search in *Randolph* was not a search at all under the Fourth Amendment and accordingly, *Coolidge* should control.[62]

B. Appraisal of the Social Expectations Test

Throughout the various opinions in *Randolph*, an array of topics was discussed, including domestic abuse, police efficiency, and original intent, but the majority relied primarily on the social expectations test.[63] The *Randolph* holding is a strong reassertion of a citizen's right to refuse a police search, however this fact is underemphasized in a majority opinion that treats assumptions as established facts.[64] Instead, by relying on the social expectations test, and its accompanying hypothetical illustrations, the majority paved the way for pointed dissent that appears

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61 *Id.*

62 *Id.* at 1541 (Thomas, J., dissenting) (noting that *Coolidge* should control *Randolph* because Janet Randolph showed the police to the bedroom where the evidence was found, thus the officer did not conduct a general search under the Fourth Amendment). *See also supra* note 25 (discussing *Coolidge*).

63 *See supra* note 37 (providing an overview of the social expectations test, as described by the majority in *Randolph*).

64 *See supra* text accompanying notes 37-39 (providing a summary of the assumptions regarding co-tenant behavior put forth by Justice Souter in the majority opinion). *See also* Janice Nadler, *No Need To Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153 (2002). Nadler argues that the Supreme Court's holdings in consent search cases runs counter to scientific knowledge regarding how citizens comply with police. *Id.* at 156. Specifically, Nadler argues that the assumption, inherent in Fourth Amendment jurisprudence, that citizens are aware they can refuse a search, is a fallacy. *Id.* Moreover, Nadler argues that such assumptions regarding human behavior are merely a device for the Court to reach its desired holding. *Id.*

legally and factually sound,[65] even while urging a holding that would limit the very rights that the Fourth Amendment seeks to protect.[66]

In contrast, the majority was at its strongest when discussing the formalistic line that must be drawn in *Randolph* due to the presence of an objecting co-tenant because this reasoning places *Randolph* squarely within a continuum of Fourth Amendment cases that seek to protect property interests without requiring officers to go beyond reasonable measures in doing so.[67] Indeed, the confusion inherent in the majority

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[65] *Randolph,* 126 S. Ct. at 1532 (Roberts, J., dissenting). In his dissent, Chief Justice Roberts questioned the social expectations test, emphasizing that by relying on the test, the majority in *Randolph* has incorporated an "assumption" into the Constitution. *Id.* Chief Justice Roberts then illustrated the flaws in this assumption by listing situations in which the social expectations test would allow a visitor into a dwelling over the express objections of a third party, postulating: (1) that in situations where the persons sharing a dwelling are feuding roommates, a friend of the first roommate may very well enter the apartment despite the express objection of the second; (2) that visitors who traveled a great distance or came for a special occasion would not necessarily turn away upon one roommate's objection; (3) that a visitor would not be expected to stay out of an apartment in which there is a common area and a room to which the objecting roommate could retreat; and (4) when one roommate objects to a visitor and two or three roommate consent to the visitor it is possible the visitor would still enter the apartment. *Id.* Such hypothetical situations serve to illuminate the flaws in the social expectations test by illustrating that social expectations are too complex and varied to allow uniform results.

[66] *Id.* at 1531. Chief Justice Roberts's dissent would have held that even in situations where the co-tenant who opposes the search is present and objecting, valid third party consent can override the objecting co-tenant's Fourth Amendment rights. *Id*. Thus, under Chief Justice Roberts's analysis, the constitutional rights of the objecting party, though clearly and vehemently asserted to an officer at the time of the search, could be waived by another individual. This forfeiture of Constitutional rights would occur despite a lack of warrant and a lack of probable cause, the two requirements that the court had previously required for Fourth Amendment searches under the *Katz* analysis. *See supra* note 3 (discussing the two clauses of the Fourth Amendment and the Court's interpretation of the Fourth Amendment under *Katz*). Some would argue that Chief Justice Roberts's dissent could be seen as increasing the efficiency of the police to conduct searched. *See, e.g.,* Fein, *supra* note 43 (criticizing the majority opinion in *Randolph* as hindering the ability of police to conduct efficient and effective searches). However, as the Court previously held, the state's desire for police efficiency is not, on its own, enough to overcome Fourth Amendment protection. *See* Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) ("The warrant requirement . . . is not an inconvenience to somehow be 'weighed' against the claims of police efficiency."). Furthermore, when exigent circumstances exist, the Court has held that the need for police efficiency may then allow a warrantless search. *See supra* note 45 (detailing Justice Souter's list of exigent circumstances that would justify immediate action on the part of the police in conducting a search). Thus, Chief Justice Roberts's dissent in *Randolph* would allow a forfeiture of the Fourth Amendment rights of individuals, while only nominally increasing police efficiency because measures are already in place to secure the latter concern.

[67] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973) (rejecting the necessity of the police informing individuals that they have the right to refuse to consent to a search). *See also* Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of*

opinion's social expectations test is illustrated by several subsequent search and seizure cases. For example, one court has used the social expectations test to determine not only whether the police had the right to search a dwelling, but also whether the police could search for a particular item within a house.[68] Thus, it seems that in the wake of *Randolph*, the social expectations test has the potential to extend beyond the scope of *Randolph*'s narrow holding.[69]

Similarly, only a few months after its publication, *Randolph* has already been cited in several lower court cases in which the defendant has tried to invoke the *Randolph* social expectations test in order to argue that evidence be declared inadmissible.[70] In such situations, courts must distinguish cases from *Randolph* based on the facts of the case in order to

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the Consent Doctrine, 119 HARV. L. REV. 2187 (2006) (arguing that, despite rampant criticism of the Supreme Court's use of the consent doctrine in Fourth Amendment cases, consent has actually allowed the Court to continue to emphasize the government's interest in maintaining order, while returning to individuals the autonomy to stand up for their own rights).

[68] *See also* Glenn v. Commonwealth, 633 S.E.2d 205, 209 (Va. App. 2006). In *Glenn*, the police had reason to believe that Glenn had robbed a pedestrian. *Id.* Days later, the police arrived at the home of Glenn's grandfather, arrested Glenn, and asked his grandfather for consent to search the house, which was given. *Id.* Although Glenn was present and was not asked for permission, he also did not object to the search. *Id.* Within the house the police found a backpack containing evidence that linked Glenn to the robbery. *Id.* Glenn later filed a motion to suppress the evidence that had been found in the backpack in the house, arguing that no consent had been given to search the backpack. *Id.* at 210.

[69] *Id.* at 225. The court used the *Randolph* social expectations test in determining that the consent Glenn's grandfather gave to search the house extended to consent to search the backpack therein. *Id.* The court reasoned that according to pervading notions of property rights, home ownership, and social expectations, any consent to search a house includes consent to search the property therein. *Id.* However, the *Randolph* holding clearly concerned only the question of third party consent, not the question of consent as it applies to various portions of a dwelling. *See Randolph,* 126 S. Ct. at 1528 (stating that the case required a straightforward application of the question of third part consent).

[70] *See, e.g.*, United States v. Young, No. 5:05CR63-01-02, 2006 WL 1302667, at *7 (N.D. W. Va. May 9, 2006) (memorandum opinion and order affirming and adopting report and recommendation of Magistrate Judge). In *Young*, Young had shared an apartment with Grose. *Id.* at *2. Subsequently, Grose moved out of the apartment, although she still had a key and several of her personal items, as well as items she shared with Young left at the apartment. *Id.* A month after moving out, Grose signed a form giving consent to a detective to search the apartment she had shared with Young. *Id.* The search garnered heroin and firearms in violation of Young's parole agreement, and cash, all of which were seized. *Id.* Young later filed a motion to suppress the evidence, arguing in part that the case should be analyzed under *Randolph*, on the understanding that no reasonable person would hold that Grose retained a right to permit entry into the premises that she had vacated. *Id.* at *7.

keep the social expectations test from allowing outcomes that would be inconsistent with other Fourth Amendment cases.[71]

Accordingly, as subsequent cases illustrate, the danger of the *Randolph* majority's reliance on the social expectations test is that it will result in courts attempting to make sense of the test rather than focusing on the true purpose behind the Fourth Amendment. Instead, what ought to be at issue in subsequent search and seizure cases is the need to strike the proper balance between property rights and police efficiency.

Still, notwithstanding its emphasis on the social expectations test, the *Randolph* holding serves as a testament to the protection of privacy and property rights that is at the heart of the Fourth Amendment by preventing the consent of one co-tenant to override the express refusal of a fellow co-tenant who is present and objects to a government search.

V. CONCLUSION

The reaction to the *Randolph* holding has been mixed, with some hailing the decision as a protection of individual rights and others lamenting it as an assault on police protection.[72] Yet even if the majority's reliance on the social expectations test is flawed, the outcome in *Randolph* is not. Moreover, if the majority reasoned its way to a conclusion in *Randolph*, they at least reasoned to the right conclusion, such that the Fourth Amendment is preserved. Thus, after the *Randolph* holding, the rights of a present and objecting co-tenant is enough to override the consent of a fellow co-tenant but, above all, the consent

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[71] *Id.* Young asserted that the case should be analyzed on the understanding that no reasonable person would hold that Grose retained a right to permit entry into the premises that she had vacated. *Id.* Regardless of whether or not Grose's permission passed the social expectations test, the court held that *Randolph*'s social expectations test did not apply to Young's situation because unlike Randolph, who was present and objected to the search, Young was not present when the police searched his apartment. *Id.* This underscores one of the difficulties with the social expectations test—although it may have justified the *Randolph* holding, the test also has the potential to justify other search and seizure holdings that are well outside the scope of *Randolph*. In *Young*, the court had to steer the line of reasoning away from *Randolph's* social expectations test, which would have led to an illogical holding, and toward the *Rodriguez* test, arguing that regardless of whether Grose had the authority to consent to a search, the police in *Young* reasonably believed that she had the authority to do so. *Id.* at *8. *See also* Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (holding that that the defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated because the search was reasonable based on all of the information the police had at the time).

[72] *Compare* Fein, *supra* note 43 (criticizing *Randolph* for preventing the police from conducting adequate searches), *with* Chapman, *supra* note 34 (supporting *Randolph* for upholding the individual's right to refuse to allow the police to search one's home).

exception to the Fourth Amendment's warrant requirement for government searches remains jealously guarded.

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