PROTECTING PRIVACY IN A SHARED CASTLE: THE IMPLICATIONS OF *GEORGIA V. RANDOLPH* FOR THE THIRD-PARTY CONSENT DOCTRINE

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Judicial treatment of third-party consent searches has been especially convoluted. In Georgia v. Randolph *the United States Supreme Court rejected the rule that consent to the warrantless search of jointly occupied property by a cotenant or common resident renders the search valid against another present cotenant or common resident who refuses to consent. In the wake of this decision, lower courts have struggled to reconcile the Court's revision of third-party consent doctrine with established principles of Fourth Amendment jurisprudence. The Court's analysis in* Randolph *turned upon the Court's view of widely shared social expectations. The Court's view, however, contravenes traditional property law concepts that protect the right of cotenants to include, as well as exclude, third parties. The author's analysis of* Randolph*'s effect upon the role of third-party consent in search procedures begins with an examination of how the Court's "social expectations" analysis comports with Fourth Amendment jurisprudence. Next, the author explains lower courts' struggle with the question of whether* Randolph*'s holding applies to consent to enter or consent to search. Finally, the author anticipates potential consequences of* Randolph *for households with more than two cotenants and for domestic violence cases. To resolve the tension created by* Randolph *between the third-party consent doctrine and established Fourth Amendment principles, the author recommends that the Court abandon its "social expectations" analysis with respect to third-party consent searches in favor of the "totality of the circumstances" approach outlined in Justice Breyer's concurrence. In addition, to protect residents without undermining their privacy interests in personal effects, the author suggests that courts apply* Randolph *only in connection with police requests for consent to search.*

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I. INTRODUCTION

Imagine the typical student, recent college graduate, or unmarried working individual. Now imagine that person's living situation. Much of this population will be living with a roommate.[1] Some roommates will never meet prior to the initial apartment viewing, signing a lease to live with a complete stranger. Similar to most relationships, roommate arrangements can be risky: personalities may clash and living habits may not mesh. Each tenant must make some concessions for the other. It is usually accepted that neither roommate will invade the other's personal areas, and at the same time it is understood that common areas are for common use without restriction. Furthermore, it is implied that the cost of shared living arrangements is a diminished level of privacy, particularly in the areas of mutual use. However, neither tenant expects that in addition to the costs of diminished privacy, she will also have to relinquish her interests in personal safety or agree to allow the home to be used for illegal activity.

In *Georgia v. Randolph*,[2] the Supreme Court requires cotenants to lower their expectations of control over their premises. The decision reviews and considerably changes the role of third-party consent in Fourth Amendment search procedures.[3] The Court's decision allows the refusal of one physically present cotenant to prevail over the consent to search given by a second cotenant.[4] This attempt to establish a bright-line rule for law enforcement has significant implications for the rights of cotenants to allow the police to enter and search for evidence in their homes, implying that one tenant's interest in privacy is considerably more important than another tenant's interest in maintaining the safety and integrity of self and property.

In practice, the *Randolph* Court's weakly expounded holding has resulted in an ambiguous, far from bright-line rule for lower courts. The *Randolph* decision is based on a "social expectations" analysis which is unsupported by evidence and departs from previous Fourth Amendment jurisprudence. Further, *Randolph*'s holding depends largely on the pres-

1. Shared housing between two or more unmarried people is a growing trend in urban areas. This growth can be attributed to several factors including, but not limited to, increased living costs, lower housing supply, convenience, and increases of same-sex domestic partnerships. *See also* Press Release, Am. Ass'n for Single People, 2000 Census Report Shows a Continuing Decline in the Percent of Married-Couple Households in California (May 23, 2001), http://www.unmarriedamerica.org/CensusHouseholds/States/CApress.htm (noting that the 5.6 million unmarried households in California include unmarried couples, unmarried adult blood relatives, and roommates); *cf.* Lisa Arthur, *Squeezed by the High Cost of Living, South Florida Singles Turn to Housemates*, MIAMI HERALD, Oct. 12, 2006, at 1A (citing to census data between 2000 and 2005 showing a sharp rise in the population of people living in unrelated households of thirty-six percent in one Florida county and twenty-four percent in another).

2. 547 U.S. 103 (2006).

3. *Id.*

4. *Id.* at 106 ("We hold that . . . a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.").

ence of the objecting cotenant and the timing of the objection. As a result of these limitations, the Court's inadequate rationale fails to provide adequate guidelines for lower courts in their application of *Randolph*, allowing courts to constrain *Randolph* to its facts and minimize any additional Fourth Amendment protection the decision may have provided.

This note focuses on problems created for lower courts as they apply *Randolph*'s ambiguous holding. Part II provides the facts and procedural history of *Randolph* along with the Supreme Court's reasoning in its decision. Part II then discusses the development of Fourth Amendment search and seizure jurisprudence, particularly the consent and third-party consent doctrines. Part III investigates the murky consequences of the *Randolph* decision by first examining why the Court's bifurcation of privacy and property rights in articulating the social expectations rationale was mistaken and how the inclusion of a property rights analysis would lead to a result that undermines the Court's conclusions. Part III next analyzes two ambiguities of the Court's holding that are currently pending in lower courts: (1) whether the holding applies to consent to enter or consent to search requests and (2) how lower courts should determine what is a valid refusal, specifically examining the impact of the varying factors of timing, presence, manner, and scope. Part III also considers the consequences of the *Randolph* holding for households with more than two cotenants as well as for situations involving domestic violence, particularly between same-sex couples. This analysis shows that the "social expectations" test employed by the Court does not support its conclusion when scrutinized from a property law perspective. This analysis also suggests that *Randolph* should have been decided under a totality-of-the-circumstances approach that would apply only to requests to enter—a solution that would settle the numerous ambiguities the decision has presented.

Part IV recommends that, in order to prevent confusion among law enforcement officials and the courts and to prevent further complication of Fourth Amendment jurisprudence, the Court's social expectations analysis should not be extended to assess the validity of third-party consent. Further, *Randolph* should be limited to determining the validity of consent to search and not consent to enter. Finally, *Randolph* should be abandoned as a bright-line rule and, instead, the Court should apply a totality-of-the-circumstances approach.

II. BACKGROUND

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no warrants shall issue, but upon probable

cause."[5] The Supreme Court has interpreted the search and seizure provision of the Fourth Amendment as a constitutional protection of individual privacy interests against some governmental intrusion.[6] Before the Warren Court, Fourth Amendment privacy interests were closely tied to property rights.[7] During the Warren era, these privacy interests were expanded and divorced from the boundaries of property.[8] In order for an individual to bring a claim that her Fourth Amendment right to privacy has been violated, she must show that a search occurred and that the search was unreasonable under the Fourth Amendment.[9] Generally a warrant is necessary before police can conduct a search.[10] A search conducted without a warrant is presumably unreasonable.[11] However, the Supreme Court has recognized that a warrantless search is reasonable under several carefully drawn exceptions: (1) search incident to arrest,[12] (2) under exigent circumstances,[13] and (3) pursuant to consent.[14]

Third-party consent places a particular tension on the separation between privacy and property rights because it calls into question the disposition of a third party over the property being searched. The distancing of property and privacy rights has led to an unstable Fourth Amendment jurisprudence, evident from the inconsistent application of principles propounded in *Georgia v. Randolph*. This Part will briefly discuss the history of *Randolph* and outline the reasoning that led to the Court's decision. It will also explore the development of privacy rights under the Fourth Amendment, the consent doctrine, and the third-party consent doctrine, in order to understand how *Randolph* departs from previous Fourth Amendment consent jurisprudence.

5. U.S. CONST. amend. IV.

6. *See* Katz v. United States, 389 U.S. 347, 350 (1967).

7. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1433 (2004) (noting that the property-based approach to privacy was already declining when the Warren Court decidedly severed the relationship in *Katz v. United States*).

8. *See id.*

9. *See* Andrew Fiske, Comment, *Disputed-Consent Searches: An Uncharacteristic Step Toward Reinforcing Defendants' Privacy Rights*, 84 DENV. U. L. REV. 721, 721 (2006).

10. *See* Payton v. New York, 445 U.S. 573, 586 (1980) (citing Coolidge v. New Hampshire, 403 U.S. 443, 474–75 (1971)). The constitutionality of searches and seizures are typically determined by the concept of "reasonableness" and the warrant clause. *See* Elizabeth A. Wright, Note, *Third-Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841, 1846–47 (2005). The modern reasonableness clause standard can be characterized as whether police conduct was reasonable under the totality of the circumstances. *Id.* at 1847. In general, the warrant clause was the main factor in determining whether a search or seizure was reasonable, although the Supreme Court has recently used the reasonableness standard "as an independent test for valid searches, bypassing the warrant requirement altogether." *Id.*

11. *See Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by any judge or magistrate, are per se unreasonable under the Fourth Amendment . . . . ").

12. Chimel v. California, 395 U.S. 752, 763 (1969).

13. Cupp v. Murphy, 412 U.S. 291, 295–96 (1973).

14. Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973) (holding that a warrantless search is reasonable when consent is given); *see also* United States v. Matlock, 415 U.S. 164, 169–71 (1974) (holding that consent is valid when given by a third party with apparent authority over the premises or effects being inspected).

A. Georgia v. Randolph

In July 2001, law enforcement officials conducted a warrantless search of the residence of Scott Fitz Randolph, relying on the consent of his wife, Janet Randolph.[15] Although Randolph and his wife had a history of marital problems and were currently separated, Randolph continued to live in the home.[16] On the day of the incident, the wife had returned and was staying, at least temporarily, in the home.[17] When the officers arrived in response to her domestic disturbance call, they found the wife upset, saying that her husband had taken their child and left.[18] She also informed officers about her husband's cocaine use.[19] Shortly after the police arrived, Randolph returned home, explaining that he had left the child with neighbors to prevent his wife from taking the child away.[20] Police then asked Randolph for consent to search the residence and Randolph refused, at which time permission was asked from and granted by his wife.[21] Acting on her consent, the officers entered and discovered a straw containing cocaine residue in an upstairs bedroom.[22] That piece of evidence provided the necessary probable cause for a search warrant, through which police discovered other drug paraphernalia that led to Randolph's indictment for possession.[23] Randolph moved to suppress the evidence on the basis that his refusal to consent to the search rendered the search unreasonable.[24]

Randolph's claim posed the question of whether a cotenant's consent is valid when another cotenant is present but refuses to consent.[25] The trial court relied on previous Supreme Court decisions[26] to deny Randolph's motion to suppress on the basis that a search conducted after a third party with apparent authority has given consent is constitutional.[27] The Georgia Appellate Court reversed the trial court's decision[28] and the Georgia Supreme Court affirmed the appellate court.[29] The appellate and supreme courts framed the right involved as "the right to be free

15. Georgia v. Randolph, 547 U.S. 103, 107 (2006).
16. *Id.* at 106–07.
17. *Id.* at 107.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 108.
26. *See* Illinois v. Rodriguez, 497 U.S. 177, 181–82 (1990) (holding that consent by a person who police reasonably believe to have common authority over the premises is a valid basis for a warrantless search); United States v. Matlock, 415 U.S. 164, 169–70 (1974) (holding that consent by a person "who possesses common authority over premises . . . is valid as against the absent, nonconsenting person with whom that authority is shared").
27. *Randolph*, 547 U.S. at 107–08.
28. Randolph v. State, 590 S.E.2d 834 (Ga. Ct. App. 2004).
29. State v. Randolph, 604 S.E.2d 835 (Ga. 2004).

from police intrusion, not the right to invite the police into one's home."[30] Both courts observed that cotenants take a risk that a third party will allow police to search only when the cotenant is absent and not when they are present to grant or refuse consent.[31] The courts relied on the idea that it was reasonable to believe that one cotenant's objection would be honored by other cotenants.[32]

The United States Supreme Court affirmed the Georgia Supreme Court and established a bright-line rule stating that when both parties are present and able to give consent, a refusal by one party renders the search unreasonable.[33] The Court based its decision on a "social expectations" analysis, which determined the validity of a third party's consent by looking at widely shared social expectations, and concluded from those expectations that a cotenant's right to refuse consent should prevail over a third party's consent.[34] In addition to the bright-line rule, the Court carved out exceptions under which its holding would not prohibit police intrusion.[35] A fine line was drawn, turning on the presence of the objecting cotenant and the timing of the objection, in order to distinguish the *Randolph* holding from previous Supreme Court decisions.[36] The Court also preserved the exigent circumstances exception, allowing police officers to enter if they have "good reason" to believe that there is a threat of violence.[37]

B. Fourth Amendment Protections of Privacy Interests

Before the Warren era, privacy rights were firmly bounded by property law and determinations of Fourth Amendment violations were made by first showing a violation of a particular property interest.[38] In *Olmstead v. United States*,[39] the definitive case articulating the protection of privacy rights, the government procured information about the defen-

30. *Randolph*, 590 S.E.2d at 838.

31. *Randolph*, 604 S.E.2d at 837; *Randolph*, 590 S.E.2d at 838.

32. *Randolph*, 604 S.E.2d at 837; *Randolph*, 590 S.E.2d at 836–37.

33. Georgia v. Randolph, 547 U.S. 103, 108 (2006).

34. *Id.* at 114 ("[T]he co-tenant wishing to open the door to a third party has no recognized authority in . . . social practice to prevail over a present and objecting co-tenant."). The holding in *Matlock* was preserved such that a court will not consider a cotenant who was not participating in the consent procedure because she was not available to participate in the conversation as having refused to consent. *Id.* at 121.

35. The Court distinguished the case from instances where the cotenant is not at the door and objecting. *Id.* ("[T]he potential objector, nearby but not invited to take part in the threshold colloquy, loses out."). The Court also made an exception for exigent circumstances where the police must protect a potential victim. *Id.* at 118 ("No question has been raised . . . about the authority of the police to enter a dwelling to protect a resident from domestic violence.").

36. *Id.* at 121 (explaining that if *Matlock* and *Rodriguez* "are not to be undercut by today's holding, we have to admit that we are drawing a fine line" that turns on whether "a potential defendant with self-interest . . . is in fact at the door and objects").

37. *Id.* at 113–14.

38. Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1606 (1987).

39. 277 U.S. 438 (1928).

dant's violation of the National Prohibition Act by wiretapping the defendant's external phone line from outside the defendant's property.[40] The *Olmstead* Court interpreted the Fourth Amendment as protecting "material things" and held that there was no search because no physical trespass was committed by wiretapping.[41] Cases following *Olmstead* focused on protecting individuals from physical trespass by law enforcement.[42] However, developments in technology made a property-based approach to privacy implausible and underinclusive. As technology allowed for less physically intrusive methods of surveillance and searches, the Court was forced to recognize that there were other privacy interests at stake which could not be characterized properly by the laws of property. This section begins with an overview of the separation of property law from the search and seizure clause of the Fourth Amendment and then discusses the development of consent searches and the third-party consent doctrine.

1. The Bifurcation of Property and Privacy Rights

In *Katz v. United States*, the Warren Court made a marked move away from the traditional notions of privacy rights.[43] In that case, the Supreme Court faced the question of whether wiretapping a public phone booth was an unreasonable search under the Fourth Amendment.[44] Holding that the search was unreasonable, the *Katz* decision expanded the boundaries of privacy beyond the constraints of property.[45] The Court emphasized that the protections of the Fourth Amendment extend to "people, not places,"[46] rejecting the previous boundaries of privacy which were largely defined by physical trespass.[47] It was Justice Harlan's concurrence, however, that established the two-prong approach that is now predominately utilized by courts to determine when a search has occurred. The first (subjective) prong requires a determination of whether a person manifested an actual expectation of privacy; the second

40. *Id.* at 456–57.

41. *Id.* at 464 ("The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. . . . The amendment does not forbid what was done here. There was no searching. . . . There was no entry of the houses or offices of the defendant.").

42. *Compare* Goldman v. United States, 316 U.S. 129, 131–33 (1942) (placing of a microphone against the wall of adjoining apartments is not a search), *with* Clinton v. Virginia, 377 U.S. 158, 158 (1965) (use of a "spike mike" that penetrates the wall from an adjacent apartment is a search), *and* Silverman v. United States 365 U.S. 505, 509 (1961) (use of a "spike mike" in the heating duct of a home is a search).

43. 389 U.S. 347 (1967).

44. *Id.* at 349.

45. The Court overruled their previous decision in *Olmstead* and acknowledged that Katz had a privacy right in his private conversations, rejecting the argument that there was no violation because there was no physical intrusion into his property. *Id.* at 353–58; *see also* Lain, *supra* note 7, at 1432 (noting that by the time *Katz* was decided "it was clear that the Court's property rights approach to the Fourth Amendment had become outdated. . . . [due to] technological advances").

46. *Katz*, 389 U.S. at 351.

47. *Id.* at 353.

(objective) prong asks whether the person's expectation of privacy would be deemed reasonable by society.[48] A right to privacy is established only if the answer to both these inquires is affirmative. Under Justice Harlan's approach, Katz manifested an expectation of privacy in the telephone booth that society would recognize as reasonable.[49] In practice, the subjective prong of Justice Harlan's test has been underutilized and the test has evolved into a question of "whether the government's conduct violates an expectation of privacy that is constitutionally reasonable."[50]

Following *Katz*, the role of property rights in relation to privacy rights has significantly fluctuated.[51] There has been no single approach consistently utilized by the Court to determine whether a privacy right is reasonable or unreasonable.[52] The Court has, in some instances, refused to find a right of privacy on the basis of property rights, while at the same time relying on property rights as a point of analysis in its privacy determinations.[53] Although the Court has moved away from a property-based approach to determining privacy rights, it has yet to completely abandon property rights as a factor in its analysis.[54]

2. Consent Searches and the Third-Party Consent Doctrine

When a person has a recognized right to privacy, a warrant based on probable cause is typically required before law enforcement can conduct

48. *Id.* at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

49. *See id.*

50. Orin S. Kerr, *Search and Seizure: Past, Present, and Future* 8 (George Wash. Univ. Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 152, 2005), *available at* http://ssrn.com/abstract=757846.

51. *See* Coombs, *supra* note 38, at 1609–10; Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809 (2004) ("[A] strong and underappreciated connection exists between the modern Fourth Amendment and real property law. . . . [T]he basic contours of modern Fourth Amendment doctrine are largely keyed to property law.").

52. *See* Kerr, *supra* note 50, at 8–9 ("The Supreme Court has not offered a clear or consistent methodological framework to answer when an expectation is constitutionally reasonable . . . .").

53. *Compare* Oliver v. United States, 466 U.S. 170, 183–84 (1984) (stating that property rights and trespass actions have no relevance to the search of open fields), *with* Rawlings v. Kentucky, 448 U.S. 98, 112 (1980) (Blackman, J., concurring) (finding that defendant had no property interest that would give rise to an expectation of privacy in a purse), *and* Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978) ("[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.").

54. *See* Coombs, *supra* note 38, at 1609–10 ("[T]he relevance of property to fourth amendment law has been unclear. . . . [P]roperty may be relevant as an indicium of legitimate expectations of privacy."); Kerr, *supra* note 50, at 9 ("Government conduct generally violates the defendant's reasonable expectation of privacy when it violates his property interests.").

a search which invades that sphere of privacy.[55] With the exception of specific articulated exigent circumstances, one of law enforcement's few alternatives to obtaining a warrant is obtaining consent.[56] Consent searches further the interests of the community because these searches can produce evidence that is critical to proving an individual's innocence or guilt.[57] Additionally, there are several incentives for officers to seek consent rather than obtain a warrant, including convenience,[58] increased scope,[59] and lack of probable cause.[60]

In *Schneckloth v. Bustamonte*,[61] the Court held that the validity of consent was to be examined under a "voluntariness" test and proceeded to establish factors to consider when assessing "voluntariness."[62] The Court then adopted a totality-of-the-circumstances approach in evaluating whether consent had been given voluntarily or through coercion or duress.[63] In *Bustamonte*, the Court addressed the question of whether consent was valid when the defendant did not have the knowledge that he could withhold consent, establishing that a defendant's consent may be valid regardless of his knowledge of the right to refuse.[64] Nevertheless, the *Bustamonte* Court accepted that "the subject's knowledge of a right to refuse is a factor to be taken into account" when determining the "voluntariness" of the consent.[65] Subsequent cases have established that a person's consent may be inferred from her words, gestures, or conduct.[66] Therefore, a defendant does not necessarily have to say, "I consent to a search" for that consent to be valid, nor do they need to sign a consent form.[67] Other factors considered under the totality-of-the-circumstances approach include: any claim of authority by police;[68] any

55. *See* Wright, *supra* note 10, at 1845–49 (summarizing the background of the Warrant Clause and explaining its relation to the Reasonableness Clause).

56. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973); Davis v. United States, 328 U.S. 582, 593–94 (1946); Zap v. United States, 328 U.S. 624, 630 (1946).

57. *Schneckloth*, 412 U.S. at 243.

58. The consent search allows law enforcement to circumvent the time-consuming warrant process created by the "various constitutional and statutory requirements which attend the issuance and execution of a search warrant." 4 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT § 8.1 (4th ed. 2004). The warrant process can also be time consuming and tedious because of the necessity to physically go and obtain one. *Id.*

59. The consenting party often fails to "condition or qualify his consent" allowing for the search to exceed the limits that may have otherwise been set by a search warrant based on probable cause. *Id.*

60. *Id.*

61. 412 U.S. 218 (1973).

62. *Id.* at 232–33.

63. *Id.* at 227.

64. *Id.* at 234 ("[T]he traditional definition of 'voluntariness' [does not] require proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search."). Additionally, a defendant need not have knowledge that they may rescind consent even after it has been given. *See* 4 LAFAVE, *supra* note 58, § 8.2(i) n.265.

65. *Schneckloth*, 412 U.S. at 248–49.

66. *See* United States v. Barahona, 990 F.2d 412, 417–19 (8th Cir. 1993).

67. *See* Fiske, *supra* note 9, at 724 (noting that verbal as well as written waivers have been held valid).

68. 4 LAFAVE, *supra* note 58, § 8.2(a).

show of force or coercive surroundings;[69] the consenter's age;[70] and the consenter's physical, mental, or emotional state.[71]

The Court has addressed third-party consent in the context of two significant relationships: lessor-lessee and cotenants. Although the scope of this note is constrained to consent in the context of cotenants, it is helpful to briefly examine consent in the lessor-lessee relationship in order to understand the rationales supporting the current third-party consent doctrine.[72]

Under current Fourth Amendment jurisprudence a lessor has no authority to consent to a warrantless search of the lessee's property.[73] The determinative cases dealing with this lessor consent are *Chapman v. United States*[74] and *Stoner v. California*.[75] *Chapman* involved a search conducted after the landlord of rented premises had given consent while the tenants were not present, and *Stoner* involved a search of a hotel room on the basis of the consent of a hotel clerk. In *Chapman*, the Court explicitly refused to utilize landlord-tenant law to determine the validity of a warrantless search.[76] Likewise, in *Stoner*, the Court refused to allow the search of a hotel room on the basis of the manager's apparent authority over the premises.[77] The few exceptions to this otherwise bright-line rule involve cases where the lessee has relinquished authority over the premises or where the landlord has common authority over the premises.[78]

69. *Id.* § 8.2(b).

70. *Id.* § 8.2(e).

71. *Id.*

72. The decision in *Randolph* focused on the scope of third-party consent to searches of the home. It is unclear from the decision whether the decision is limited to homes or whether the decision will apply to other situations in which third-party consent was previously held to be valid. While this note will mostly discuss third-party consent in the context of the home, it is equally important to recognize that the third-party consent doctrine has been applied outside the home using similar rationales. For example, courts have admitted evidence obtained from the warrantless search of personal effects, based on consent obtained from a joint user or co-owner. *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969) (holding that consent of a joint user of a duffle bag was valid).

73. *See* Chapman v. United States, 365 U.S. 610, 616 (1961) (holding that a search of rented premises upon the consent of the landlord but without the consent of the tenant was invalid).

74. *Id.* (establishing that a landlord could not authorize the police to forcibly enter the leased premises even when the landlord suspected illegal use of his rented property).

75. Stoner v. California, 376 U.S. 483 (1964) (establishing that police could not rely on the consent of a hotel clerk to search the hotel room, even when the guest was not present in the hotel room to allow entry).

76. *Chapman*, 365 U.S. at 616–17 (noting that although property law allowed the landlord to enter the premises to "view waste," it does not allow forcible entry to do so, and that the purpose was not to view waste but to conduct a search).

77. *Stoner*, 376 U.S. at 489 (noting that the hotel tenant does not give any express or implicit authority to the hotel clerk to allow entry into their hotel room by anyone other than normal hotel staff). The clerk had no reasonably apparent authority to allow law enforcement officials to enter the defendant's room in the absence of express consent. *Id.*

78. *See, e.g.*, Abel v. United States, 362 U.S. 217, 239 (1960) (hotel management may consent to warrantless search of a room after it has been vacated); United States v. Elliot, 50 F.3d 180, 186 (2d Cir. 1995) (landlord may consent to search of areas of apartment building over which he has joint access or control); United States v. Roberts, 465 F.2d 1373, 1375 (6th Cir. 1972) (landlord may consent to warrantless search of rental property after lessee has been evicted); United States v. Kellerman, 431

Prior to *Randolph*, the Court maintained that a cotenant or common resident may consent to the warrantless search of jointly occupied property.[79] This rule was laid out in *United States v. Matlock* in which the Court allowed the warrantless search of the defendant's premises on the consent of a third party who possessed common authority over the property.[80] In *Matlock*, the Court had to address whether the consent to search given by the defendant's girlfriend was valid when the defendant was nearby in a police car.[81] The Court, reasoning from previous cases, endorsed the idea that shared control and access to a dwelling exposes cotenants to the risk that the other cotenant will consent to a search of the premises in her absence.[82] This common-authority consent was based on the idea that all cotenants have equal access and control over the premises and that each cotenant assumed the risk that in her absence another cotenant would consent to a search.[83] This reasoning is consistent with the Court's previous decisions regarding third-party consent.[84] Cases following *Matlock* slowly restricted third-party consent, limiting the consent to common areas and restricting access to personal effects and areas of exclusive control.[85]

The history of third-party consent searches has been especially convoluted. The Court has utilized a variety of theories in its approach to determining when third-party consent is valid. Two theories that have repeatedly appeared in the Court's decisions are the assumption-of-the-risk theory and the common-authority theory.[86]

The assumption-of-the-risk theory has been utilized in several third-party consent cases.[87] The theory articulates that a person relinquishes her expectation of privacy when she shares that privacy with another in-

F.2d 319, 324 (2d Cir. 1970) (landlord may consent to search of the common area which was not under the exclusive control of the defendant); Feguer v. United States, 302 F.2d 214, 248–50 (8th Cir. 1962) (landlord may consent to the warrantless search of leased premises which have been abandoned).

79. United States v. Matlock, 415 U.S. 164, 169–70 (1974).

80. *Id.* at 164. In this case, defendant Matlock challenged the admission of evidence found in his bedroom during a search based on consent obtained from another resident of the house, Mrs. Graff. *Id.* at 166. Matlock had been arrested in the yard and was in the patrol car when officers asked Mrs. Graff for her consent; his consent was never solicited. *Id.* The Court readily accepted the notion that consent may be obtained "from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id.* at 171.

81. *Id.* at 166.

82. *Id.* at 169–71.

83. *See infra* Part II.B.2 for a discussion on the rationales behind third-party consent.

84. In comparison to consent in the context of lessor-lessee cases, the lessor's consent does not make the search reasonable unless the lessor has mutual use of the area. *See* United States v. Elliot, 50 F.3d 180, 186 (2d Cir. 1995) (landlord may consent to search of areas of apartment building over which he has joint access or control).

85. *See, e.g.*, United States v. Hughes, 441 F.2d 12, 17 (5th Cir. 1971) (a cotenant cannot validly consent to a warrantless search of an area under the exclusive control of another cotenant); United States v. Martinez, 450 F.2d 864, 866 (8th Cir. 1971) (cotenant could not consent to a warrantless search of another cotenant's exclusive area).

86. *See* Wright, *supra* note 10, at 1857.

87. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); Frazier v. Cupp, 394 U.S. 731, 740 (1969).

dividual.[88] Initially, the theory was overinclusive, assuming that anything exposed to the public may be subject to search because of a reduced privacy interest.[89] This led to a narrowing of the assumption of the risk rationale in *Illinois v. Rodriguez*,[90] where the Court stated that a primary party only assumes the risk of consent by another party who has apparent authority over the premises to be searched.[91] This decision limited the ability of third parties to consent only when it was reasonable to believe that the third party had a privacy interest in the premises due to her common authority.[92] Therefore, individuals need not fear that they have relinquished their privacy to third parties who happen to be on the premises incidentally. Even though the assumption-of-the-risk theory has been narrowed, it is often a factor in the common-authority theory.[93]

Since *Rodriguez*, the Supreme Court has more frequently utilized the common-authority theory in analyzing third-party consent cases, deemphasizing the assumption-of-the-risk theory. The common-authority theory asserts that valid consent can be obtained from a person who is reasonably believed to have common authority or joint control of the premises to be searched.[94] The Court has emphasized that the common-authority theory is not based on actual property ownership and is distinct from property law. In fact, the notion of common authority

> [r]ests rather on the mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[95]

Separating common authority from property rights in this manner allowed people who do not have a real property interest in the premises to nevertheless assert or waive a privacy interest. For example, the Supreme Court has recognized that a house guest has a reasonable expecta-

88. *See Frazier*, 394 U.S. at 740 (indicating that the defendant assumed the risk that a joint user of a bag would allow someone to search it).

89. *See* Shane E. Eden, Note, *Picking the Matlock:* Georgia v. Randolph *and the U.S. Supreme Court's Re-Examination of Third-Party-Consent Authority in Light of Social Expectations*, 52 S.D. L. Rev. 171, 184–86 (2007) (noting early third-party consent jurisprudence in which the Court developed assumption of the risk analysis).

90. 497 U.S. 177 (1990).

91. Rodriguez was arrested in his apartment when the police entered with the consent and assistance of Gail Fischer, who had informed them she had at one point lived there and still had some belongings in the apartment. *Id.* at 179. The Court invalidated the search on the basis that the State did not establish that Fischer had common authority over the premises. *Id.* at 181–82.

92. *Id.*

93. *See* Wright, *supra* note 10, at 1858 ("[A]ssumption of the risk is part and parcel of the rationale that the third party can consent because she has common authority over the searched item or area.").

94. *See Rodriguez,* 497 U.S. at 181–82; United States v. Matlock, 415 U.S. 164, 171 (1974).

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

tion of privacy in the home even though she may not have a property interest.[96]

Thus far, the consent theory has been applied in a manner that suggests that an individual with common authority can include persons regardless of another cotenant's wishes.[97] This theory is consistent with common law notions of property rights between cotenants as well as with the Court's previous decisions repudiating the validity of the lessor's consent in lessor-lessee relationships. The consent theory that the Court applied in *Randolph,* however, significantly changes the idea of common authority and control, subjecting it to limitations established by other cotenants.[98]

III. ANALYSIS

The Supreme Court's treatment of third-party consent in *Randolph* has left many questions unanswered. The Court's narrow analysis, focusing on antiquated notions of spousal relationships, fails to adequately explain how its decision applies in situations that do not arise out of husband-wife disputes. The "social expectations" analysis applied by the majority is largely unsupported by evidence and does not provide the necessary foundation for the Court's conclusions. Where the Court has attempted to create a bright-line rule for police enforcement, they have only succeeded in further complicating the task of interpreting the Fourth Amendment for lower courts. The majority decision in *Randolph* is a disappointing treatment of existing Fourth Amendment and third-party consent jurisprudence.

To understand how the *Randolph* decision falls short in its treatment of the Fourth Amendment, it is important to examine the questions presented in lower courts since the *Randolph* decision. Several aspects of the Court's decision merit careful analysis: first, how the Court's social expectations analysis fits, if at all, with other Fourth Amendment jurisprudence; second, how courts should interpret and apply the *Randolph* holding; and finally, what the practical consequences of the *Randolph* decision are for households with more than two cotenants and its impact on domestic violence cases. A closer examination of the implications of *Randolph* suggests that although *Randolph* purports to expand individual privacy rights, the decision provides little, if any, additional protection for the individual.

96. *See* Minnesota v. Olson, 495 U.S. 91, 98–99 (1990) (concluding that an overnight guest has a reasonable expectation of privacy in the home in which he is a guest).

97. *See* Wright, *supra* note 10, at 1861.

98. *See id.* at 1865–66.

A. Social Expectations and the Property Connection[99]

In reaching its decision, the *Randolph* Court utilized a "social expectations" analysis that used widely held social expectations to determine the validity of a search based on third-party consent.[100] Justice Souter, writing for the majority, relied heavily on notions of social norms without offering a basis for determining the source of these norms.[101] Souter's umbrella assumption is that a guest would not enter a premises over the protests of a cotenant.[102] This analysis invites the question of whether this assumption is realistic, taking into account various cotenancy relationships.[103] A property-based approach to social expectations arrives at a conclusion that contradicts the Supreme Court's conclusion that an objecting cotenant has a reasonable expectation that a third party will stay out in light of the objection.

Take as an example two roommates, Tom and Jerry. Both Tom and Jerry enjoy an affable relationship, but Jerry has a dislike for Tom's friend Mike. Will Jerry's protests keep Mike from entering his friend's home when Tom specifically asks him to enter? Intuition says that in modern times, this is an unreasonable assumption. It becomes even more unreasonable if Tom and Jerry are disgruntled roommates with little or no consideration for the wishes of the other. The Court's analysis centered on a similar situation between married individuals. However, it is not difficult to imagine that when Mr. and Mrs. Smith are not living happily ever after, they are as indifferent to the wishes of the other as our disgruntled roommates, Tom and Jerry.

The Fourth Amendment has had a long and involved relationship with the law of property. Although the Court often resorts to property

99. The Court's social expectations analysis has been criticized as a misapplication of the analysis "as originally articulated" in *United States v. Katz*. *See* Georgia v. Randolph, 547 U.S. 103, 130 (2006) (Roberts, C.J., dissenting) (explaining that the social expectations analysis has previously been applied "only to determine when a search has occurred and whether a particular person has standing to object to a search"); *see also* Fiske, *supra* note 9, at 732; Adrienne Wineholt, Note, Georgia v. Randolph: *Checking Potential Defendants' Fourth Amendment Rights at the Door*, 66 MD. L. REV. 475, 492–93 (2007) (discussing how the idea of shared social expectations is traditionally applied in the determination of whether a defendant's subjective expectation is one which society will view as reasonable). Another valid criticism of the social expectations analysis is that it has been incorrectly expanded to determine whether a search is reasonable. This note, however, explores how the social expectations analysis is incorrect as applied by the Court in light of property law and modern living arrangements.

100. *Randolph*, 547 U.S. at 111.

101. *Id.* at 130 (Roberts, C.J., dissenting) ("Such shifting expectations are not a promising foundation on which to ground a constitutional rule, particularly because the majority has no support for its basic assumption—that an invited guest encountering two disagreeing co-occupants would flee—beyond a hunch about how people would typically act in an atypical situation.").

102. *Id.* at 113 (majority opinion) ("[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.'").

103. As Chief Justice Roberts emphasized, "The fact is that a wide variety of different social situations can readily be imagined, giving rise to quite different social expectations. . . . The reason the invitee appeared at the door also affects expectations . . . . The nature of the place itself is also pertinent . . . . The possible scenarios are limitless . . . ." *Id.* at 129–30 (Roberts, C.J., dissenting).

law principles, it has been reluctant to fully acknowledge and articulate the link. The majority in *Randolph*, while recognizing a role for property law, limits it to the shaping of "widely shared social expectations" which form the true foundation for privacy expectations.[104] After admitting the existence of a link between the two areas of law, however, the Court fails to thoroughly explore how the laws of property actually shape the social expectations of cotenants in modern society. Further analysis shows that these laws, especially those that frame the right to exclude and include, give rise to social expectations that are contrary to those proposed by the *Randolph* majority.

The law of property has given rise to many principles that define and protect society's privacy interest in individuals' homes and personal effects. For example, Fourth Amendment jurisprudence has protected the homeowner's reasonable expectation of privacy in her home. It likewise protects the renter's privacy expectation so long as she has legal occupancy and the visitor's expectations so long as the property owner has bestowed either "explicitly or implicitly . . . the homeowner's right to exclude others from the property."[105] The privacy protections surrounding ownership extend further to protect property other than the home, including vehicles and containers:

> The owner of a car enjoys Fourth Amendment protection in the car, as does a guest who has been allowed to use the car by the owner. A person who is found driving a stolen car, however, does not enjoy Fourth Amendment protection within it. . . .
>
> The same property-based rules apply to Fourth Amendment rights in 'closed containers'. . . . If the owner abandons the container, relinquishing his property right, a government search of the container cannot violate his Fourth Amendment rights. Similarly an individual normally will not retain a reasonable expectation of privacy in the contents of a stolen container because he lacks a property interest in the container.[106]

The Court has validated and defended these interests by relying on the basic right to exclude from the law of property. Although the *Randolph* Court highlights the departure from property law in Fourth Amendment jurisprudence, a closer look suggests that the departure was necessitated by a threat to privacy interests from emerging technology, upon which the law of property could shed little light.[107] This was evidenced by the Court's reasoning in both *Katz* and *Kyllo v. United States*,[108] which pre-

104. *Randolph*, 547 U.S. at 111.

105. Kerr, *supra* note 51, at 810–11.

106. *Id.* at 811–12.

107. *See* 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, 891 (2004); Coombs, *supra* note 38, at 1607 ("Searches that can be carried out without physical manipulation of the objects searched and without physical presence in a protected area can invade privacy, but they do not interfere with traditional property rights."); Lain, *supra* note 7, at 1432.

108. 533 U.S. 27 (2001).

sented questions regarding privacy that did not involve a physical intrusion.[109] The invasion in *Katz* was not a physical trespass into the phone booth, but rather involved the use of wiretapping equipment.[110] In *Kyllo* a thermal image scanner was used to scan the defendant's home to determine if he was cultivating marijuana.[111] The Court held that the scan constituted a search, even though it was not a physical invasion, because it provided information that could otherwise only be obtained by physical entry.[112] Thus, the Court stepped away from property law not because of its irrelevance, but rather because of the need to establish a rationale that would expand privacy beyond the confines of property law.

The question presented to the *Randolph* Court, in contrast to *Katz* and *Kyllo*, centers around physical intrusion into the home. Because the intrusion in *Randolph*—police presence in the home—does not involve technological considerations, the need to consult the law of property seems not only evident but mandated by precedent. The law of property suggests that the rights to exclude and include are substantial rights, highly valued by society and zealously guarded by the courts. With regard to third parties, trends in property law point to a conclusion which is contradictory to the majority's opinion.

Trends in state law and common law indicate that a cotenant has strict rights in her portion of the property and over all shared property. Each cotenant has the rights under common law that are granted to sole proprietors.[113] These rights include the right to use, to exclude, and to enjoy profits from the property's income.[114] In the absence of an agreement between the cotenants they may occupy and utilize every portion of the property at all times, and in all circumstances.[115] Between roommates and married individuals, there is usually an unspoken agreement that there are certain areas of the property which are exclusive to both parties. Most people usually do not put into formal contract what these expectations are and how they expect to restrict or allow access to areas of common and even exclusive control.[116] For example, it is mutually un-

109. *See id.* at 29 (government use of thermal imaging scanner to obtain information about inside temperature of home); Katz v. United States, 389 U.S. 347, 348 (1967) (government attachment of electronic listening device to outside of public phone booth).

110. *Katz*, 389 U.S. at 348.

111. *Kyllo*, 533 U.S. at 27.

112. *See id.* at 40 ("Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

113. *See* A. C. FREEMAN, COTENANCY AND PARTITION: A TREATISE ON THE LAW OF CO-OWNERSHIP AS IT EXISTS INDEPENDENT OF PARTNERSHIP RELATIONS BETWEEN CO-OWNERS § 248 (2d ed. 1886).

114. *Id.* § 258.

115. *Id.* § 248.

116. *See* Coombs, *supra* note 38, at 1595. Professor Coombs' article discusses how the nature of relationships supports the idea of third-party consent because "[w]hile this may seem to privilege the consenter's autonomy over the defendant's interest in the relationship . . . it actually recognizes the fragility of relationship." *Id.* at 1597. The current treatment of privacy rights by the court is an "indi-

derstood that one roommate will not enter the room of another roommate while that roommate is absent. Similarly, a husband may have exclusive use of a private study under a silent agreement with his wife. Nevertheless, these expectations do not give rise to tort actions when violated.

By the nature of cotenancy, each cotenant has the right to confer her right over the premises to a lessee or a licensee.[117] This right is not subject to the approval of the other cotenant. Therefore, one cotenant may rent or allow the use of their property to a third party without the other cotenant having a cause of action for the third party's use. Imagine this right in the context of our two roommates, Tom and Jerry, and third party Mike. Jerry wishes to rent his room to Mike, but Tom strongly objects to the transaction. The most Tom can hope for is that Jerry will oblige his wishes and not rent to Mike, a hope based solely upon the relationship between the two roommates. This scenario is not uncommon in roommate living arrangements, college campuses for example, where roommates often sublease their share for periods of time during which they do not plan to occupy the premises. Under property law Jerry does not have a legal duty to take into account Tom's objection to Mike. Likewise, Tom does not have legal recourse against Jerry for that decision.

More importantly, a cotenant does not have a legal right to object to the presence of a third party on her property when the third party has another tenant's consent.[118] One of the most fundamental rights of modern property law is the right to exclude. In the case of cotenants, however, this right is modified by the nature of the possession. Although cotenants have a right to exclude, that right is limited by the other cotenant's right to include.[119] It follows then that while cotenants may exclude persons from their property, they must do so in a way that does not impede the right of their cotenant to include third parties. Therefore, in the case of Tom, Jerry, and Mike, although Tom may not approve of Mike's sublease, he would be unable to oust Mike on that basis. It would not be unusual for roommates to disapprove of another roommate's guests or to make that disapproval known to all parties involved.

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vidualistic rhetoric of 'privacy' and 'rights'. . . . [S]uch language pictures people as essentially separate, each carrying his rights around him like protective armor." *Id.* at 1598.

117. *See* Waterford Irrigation Dist. v. Turlock Irrigation Dist., 194 P. 757, 759 (Cal. Dist. Ct. App. 1920) ("One tenant in common may, by either lease or license, confer upon another person the right to occupy and use the property of the cotenancy as fully as such lessor or licensor himself might have used or occupied it."); FREEMAN, *supra* note 113, § 253.

118. For example, a cotenant cannot pursue an action of trespass against an unwanted guest that is on the premises on the authority of the other cotenant. *See* Ord v. Chester, 18 Cal. 77, 80 (1861) (stating that the third party, having been permitted to occupy and use "the common premises," cannot be charged as a trespasser); Verdier v. Verdier, 313 P.2d 123, 125 (Cal. Ct. App. 1957) ("[A] cotenant has no right to oust a person who holds possession with the consent of another tenant in common.").

119. *See* FREEMAN, *supra* note 113, § 253 (noting that either cotenant has a right to lease or license their interest and the other cotenant may not expel that lessee or licensee).

However, it is equally foreseeable that roommates will disregard that disapproval as will guests who have the invitation of at least one cotenant.

Under a property-based analysis, it is apparent that "widely shared social expectations" do not necessarily lead to the conclusion that one cotenant's refusal should trump the consent of another cotenant. Practically speaking, shared spaces and relationships come with some surrender of autonomy, including the expectation that privacy in shared areas is diminished as well.[120] The objection of a cotenant may result in an uncomfortable tension and a clear signal to the third party that their presence is in some part unwelcome. However, it does not give the cotenant any basis, legal or social, to expect that the third party will not cross the threshold. This property-based analysis undermines what the *Randolph* Court concludes are "widely shared social expectations," and demonstrates how the Court's test fails to adequately support the notion that one cotenant's refusal must trump another's consent. Further application of the "social expectations" analysis threatens established Fourth Amendment jurisprudence if lower courts attempt to make sense of the test and utilize it in subsequent cases.[121]

B. Consent to Enter Versus Consent to Search

The most basic question stemming from *Randolph* currently faced by lower courts is one that has a seemingly simple answer: does the Court's holding, allowing refusal to trump consent, apply to consent to enter or consent to search?[122] The distinction between entry and search is substantial and has significant implications. A request to search necessarily includes a request to enter; it is not necessary, however, that a request to enter will always extend into a request to search. Searches are substantially more intrusive than mere entrance. On the other hand, entry will trigger the plain view doctrine, allowing an officer to seize any contraband that is plainly visible.[123]

120. *See* Coombs, *supra* note 38, at 1642–44.

121. *See* Alissa C. Wetzel, Comment, Georgia v. Randolph*: A Jealously Guarded Exception—Consent and the Fourth Amendment*, 41 VAL. U. L. REV. 499, 514 (2006).

122. Several courts have characterized the *Randolph* decision as applicable to consent to search while several courts have characterized it as applicable to consent to enter. *Compare* United States v. Wilburn, 473 F.3d 742, 745 (7th Cir. 2007) (framing the question as concerning consent to search), *and* United States v. Murphy, 437 F. Supp. 2d 1184, 1189 (D. Kan. 2006) (framing the question as concerning consent to search), *and* United States v. Brown, No. 1:06-CR-168 WSD, 2006 WL 3760383, at *3 (N.D. Ga. Dec. 19, 2006) (the defendant stated an objection on the basis that his wife's consent to search was invalid), *with* United States v. Uscanga-Ramirez, 475 F.3d 1024, 1028 (8th Cir. 2007) (finding consent to enter valid under *Randolph*), *and* United States v. Williams, No. 06-20051-B, 2006 WL 3151548, at *1 (W.D. Tenn. Nov. 1, 2006) (defendant challenges cotenant's consent to enter residence), *and* State v. Hahn, No. 05-CA-17, 2007 WL 428027, at *7 (Ohio Ct. App. Feb. 7, 2007) (discussing the right to consent to enter to protect potential victims).

123. *See* Texas v. Brown, 460 U.S. 730, 736 (1983) (noting that the plain view doctrine allows police to seize contraband if they are legitimately in a position to view the item and the item's illegal na-

The *Randolph* Court held that "a physically present co-occupant's stated *refusal to permit entry* prevails, rendering the warrantless *search* unreasonable and invalid as to him."[124] This suggests that the Court is regulating the request to search rather than the less intrusive request to enter. The ability of law enforcement to enter a residence can be encompassed by the laws surrounding trespass, whereas the ability of law enforcement to search a residence and rummage through personal items can be distanced from the laws of property. The laws of property and social expectations shaped by the laws of property, as discussed above,[125] show that it is possible that a person would in fact enter a residence against the express refusal of a cotenant so long as at least one cotenant has extended the invitation. It is difficult to extend that reasoning, however, to allow the invitee to rummage through the personal effects of the objecting cotenant.

Although the holding used the word 'entry,' the *Randolph* decision concentrated on the refusal of a search. Chief Justice Roberts criticized the majority's rule as one that "transforms what may have begun as a request for consent to conduct an evidentiary search into something else altogether, by giving veto power over the consenting co-occupant's wishes to an occupant who would exclude the police from entry."[126] The Court responded to the dissent by arguing that "[t]he dissent's argument rests on the failure to distinguish two different issues: when the police may enter without committing a trespass, and when the police may enter to search for evidence."[127] Although the ensuing discussion focused on rebutting the critique made by the Chief Justice regarding the negative impact on domestic violence victims, the Court proceeded to characterize the question presented in this case as "whether a search with the consent of one co-tenant is good against another."[128] The decision focused on the refusal of consent to search, not necessarily refusal of consent to enter. If lower courts interpret the holding in this manner, and several have,[129] it would be a significant narrowing of the purported protection of privacy provided by *Randolph*. If the holding applies to searches and not entry, it will also allow police to recover evidence under the plain-view doctrine.[130]

ture is immediately apparent); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) ("[U]nder certain circumstances the police may seize evidence in plain view.").

124. Georgia v. Randolph, 547 U.S. 103, 106 (2006) (emphases added).

125. *See supra* Part III.A.

126. *Randolph*, 547 U.S. at 139 n.2 (Roberts, C.J., dissenting).

127. *Id.* at 118 (majority opinion).

128. *Id.* at 118–19.

129. *See supra* note 122.

130. The Court conceded that in cases where the police entered in order to protect the cotenant, the plain view doctrine would allow them to confiscate any evidence that was in plain view. *See Randolph*, 547 U.S. at 118 (noting that there is no question that once police are inside they can seize any evidence in plain view or "take further action supported by consequent probable cause").

Although the Court's decision spoke in terms of searches, it only expressly condoned entry in situations of imminent danger and for the protection of potential victims.[131] This leaves open the question of whether entry in other situations would be prohibited under the *Randolph* holding if there is disagreement regarding consent between two present cotenants. For example, police may request to enter in order to question or speak with a cotenant. This sort of intrusion is not the same as the police conducting a search of the home. Although the distinction between consent to entry and consent to search is razor thin, it is a relevant distinction that must be clarified.

C. Making the Determination of Refusal

The third question facing lower courts in their application of *Randolph* is how to determine whether consent was refused in a manner that satisfies the *Randolph* holding.[132] In *Randolph*, the physically present cotenant made a refusal that was express, unambiguous, and contemporaneous with the consent,[133] allowing the Court to declare its holding without providing any insight on how to determine whether a cotenant has refused to consent to a search. Not every refusal will present itself in such a neat package; therefore, it is necessary to articulate how to determine when a refusal is valid under *Randolph.*

There are four significant factors which courts consider in determining whether a refusal to consent is valid: (1) the timing of the refusal, (2) the presence of the cotenant, (3) the manner in which the refusal was made, and (4) the scope of the refusal. Of these factors, timing and presence are most critical in determining if the cotenant's objection invalidates a search. These two factors are the legs upon which the *Randolph* rule stands. In contrast, the remaining two factors are significant in determining whether the refusal was in fact a refusal at all. To date no court has looked at all four factors together, but each factor has been independently sufficient to make the determination.

131. Chief Justice Roberts characterizes this distinction as "a strange way to justify a rule" and that to rely on exigency "does not show that entry pursuant to consent is unreasonable." *Id.* at 140 (Roberts, C.J., dissenting).

132. Countless permutations of the *Randolph* facts have been presented as possible problems in determining valid refusal. For example, Andrew Fiske poses some problem scenarios, asking if refusal trumps when the cotenant can be heard from the basement, if the cotenant is under the influence of drugs or alcohol, or if the cotenant is on the telephone with the consenting cotenant and makes his/her refusal known that way. *See* Fiske, *supra* note 9, at 738. Another popular classroom scenario poses the question of what happens if I post a sign in front of my house stating "I refuse to consent to all police searches?" Have I then effectively communicated my objections and invalidated any potential cotenant consent?

133. *Randolph*, 547 U.S. at 107 (defendant "unequivocally refused").

1. Timing

The timing factor centers around the question of when the cotenant refused consent to the search. *Randolph*'s holding suggests that the refusal must occur at the time that the police ask both cotenants, while all parties are present: the consenting cotenant, the refusing cotenant, and law enforcement officials. If every situation occurred in this way, this would be a simple analysis. At least two distinct scenarios, however, are foreseeable: (1) the refusal is made inside once the second cotenant becomes aware of police presence, shortly after one cotenant consents;[134] and (2) one cotenant refuses consent but is not present when the other cotenant is asked for consent or when the search commences.[135] Theoretically, once an officer is aware of a cotenant's refusal, they will be in the same position as the officer in *Randolph*, knowing that one cotenant is consenting and the other is not, regardless of the timing of the refusal.

State v. Udell[136] involved circumstances similar to the first scenario. The defendant and his girlfriend were both outside the residence.[137] Suspecting marijuana use, the police asked to speak to the girlfriend privately.[138] When the defendant entered the home, police asked the girlfriend for consent to search and the girlfriend consented.[139] When the police entered the residence, the defendant "objected to their presence in the residence and demanded that they exit the residence and secure a warrant."[140] Under these facts, the Utah Court of Appeals found that the refusal expressed inside, at a time later than the consent, is a valid refusal under *Randolph* and therefore made the ensuing search unreasonable and invalid.[141] This decision forecasts an interesting situation for law enforcement officials who act in good faith upon the consent of a cotenant when no other cotenants are present.

Arguably, *Udell* can be distinguished from *Randolph* because the defendant was not physically present when consent was solicited and only objected later after the police had secured consent. The Utah Court of Appeals extended *Randolph* beyond its facts and suggested that once police are made aware of an objection they must stop the search. On the other hand, if the officers have validly *entered* the residence, then unquestionably the plain view doctrine should apply even if a subsequent search would be unreasonable. Once inside, although officers may have to halt a search, there is a possibility that their presence has created an exigent situation, for example, possible destruction of evidence or danger

134. *See* State v. Udell, 141 P.3d 612, 612 (Utah Ct. App. 2006).

135. *See, e.g.*, United States v. Groves, No. 3:04-CR-76, 2007 WL 171916 (N.D. Ind. Jan. 17, 2007); United States v. Henderson, No. 04 CR 697, 2006 WL 3469538 (N.D. Ill. Nov. 29, 2006).

136. 141 P.3d 612.

137. *Id.* at 612.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

to the consenting cotenant.[142] This is an anticipated point of confusion for police officers in light of the supposed bright-line rule laid out by the *Randolph* Court.

United States v. Henderson[143] addressed a similar situation to *Udell*, however, it warrants a separate analysis because of distinguishing factors. In *Henderson*, the police obtained consent to enter from a cotenant and proceeded to enter the premises. The defendant expressed his refusal to consent upon the entrance of the police.[144] The defendant was then placed under arrest for domestic battery and removed from the premises, and police proceeded to procure consent to search from the other cotenant.[145] The district court held that the search based on the later consent of the cotenant was unreasonable in light of the fact that the defendant had already denied permission even though the defendant was not present when the later consent was requested.[146] The reasoning adopted by the district court would serve to eviscerate the fine distinction, based on absence versus presence, drawn by the *Randolph* Court between its holding and *Matlock*. It would also broaden *Randolph*'s holding to encompass situations not expressly contemplated in the opinion. The reasoning of the district court's decision, however, appears to be sensible and in line with the interest the *Randolph* Court attempted to protect: the expressed privacy expectations of the nonconsenting cotenant. Where the refusal has been made known to the police, regardless of whether they are present at the time consent is asked from another cotenant, it seems unreasonable to regard that refusal as invalid because the cotenant is not "physically present." A cotenant that can be heard refusing from a few feet away, from the squad car, or even from the other room, should be recognized as present and nonconsenting.

The final scenario regarding timing is closely related to the issue of physical presence discussed below.[147] In the previous scenarios, the refusal was expressed almost simultaneously with police presence in the residence and was almost contemporaneous with the officer's request for consent from the other cotenant. However, in *United States v. Groves*,[148] refusal was expressed two weeks prior to obtaining a later consent. Similarly, in *United States v. Dominguez-Ramirez*[149] refusal was expressed while defendant was detained by law enforcement and consent was ob-

142. Georgia v. Randolph, 547 U.S. 103, 116 n.6 (2006) (acknowledging that "the very exchange of information like this in front of the objecting inhabitant may render consent irrelevant by creating exigenc[ies]" such as the destruction of evidence).

143. No. 04 CR 697, 2006 WL 3469538 (N.D. Ill. Nov. 29, 2006).

144. *Id.* at *1.

145. *Id.*

146. *Id.* at *2 (relying on reasoning from *United States v. Hudspeth*, 459 F.3d 922 (8th Cir. 2006), *vacated*, 2007 U.S. App. LEXIS 16854 (8th Cir. Jan. 4, 2007)).

147. *See infra* Part III.C.2.

148. No. 3:04-CR-76, 2007 WL 171916, at *2 (N.D. Ind. Jan. 17, 2007).

149. No. 5:06-CR-6-OC-10GRJ, 2006 WL 1704461, at *2 (M.D. Fla. June 8, 2006).

tained later from his wife at the home.[150] The courts in both cases held that the ensuing search was valid based on third-party consent because the defendant did not object at the time the consent was given.[151] In these cases, the police are well aware of the defendant's refusal, but courts faced with this question must determine what period of time renders the refusal invalid.

2. Absence Versus Manufactured Removal

One of the qualifications *Randolph* placed on the absence of a cotenant is that the cotenant cannot be removed for the purpose of avoiding a refusal of consent.[152] This qualification requires courts to add another factor into the analysis of the validity of third-party consent in order to determine whether the defendant's absence was manufactured by law enforcement or was independent. In *Randolph* the Court provided very little guidance for lower courts regarding what should be involved in this analysis or what particular factors should be examined. Not surprisingly, courts faced with this analysis have approached it differently.

The majority of cases which deal with the question of removal versus absence are factually similar to *Matlock*, where the defendant is in a squad car nearby. Defendants have attempted to challenge the validity of the searches, which were consented to by a cotenant, on the basis that they were purposely removed in order to prevent them from refusing consent.[153] To date, lower courts have found reasons justifying removal in situations where the defendant was placed in a squad car or otherwise removed, and have therefore not found the removal to be for the purpose of avoiding a refusal.[154] The analysis employed by the lower courts stops there and does not address the imminent question of why the defendant was not asked for her consent before being taken away from the scene. The answer to this question is easily found in legal precedent and implied in the Court's reasoning: the police should not have to seek out

150. *Id.* at *2, *9 (finding that the defendant's qualification did not amount to a refusal without specifying the time period between the purported refusal and the consent obtained from his wife).

151. *See Groves*, 2007 WL 171916, at *5; *Dominguez-Ramirez*, 2006 WL 1704461, at *9.

152. Georgia v. Randolph, 547 U.S. 103, 121 (2006) ("[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection").

153. *See, e.g.*, United States v. Wilburn, 473 F.3d 742, 745 (7th Cir. 2007); United States v. Brown, No. 1:06-CR-168 WSD, 2006 WL 3760383, at *3 (N.D. Ga. Dec. 19, 2006); United States v. Henderson, No. 04 CR 697, 2006 WL 3469538, at *2 (N.D. Ill. Nov 29, 2006).

154. *See, e.g.*, *Wilburn*, 473 F.3d at 745; United States v. DiModica, 468 F.3d 495, 500 (7th Cir. 2006) (officers arrested and removed defendant with probable cause of domestic abuse); *Groves*, 2007 WL 171916, at *6 (officers did not ensure defendant's absence from the home in order to avoid an objection); *Brown*, 2006 WL 3760383, at *3 ("defendant was lured out of the apartment . . . for safety reasons"); United States v. Williams, No. 06-20051-B, 2006 WL 3151548, at *5 (W.D. Tenn. Nov. 1, 2006) (defendant removed from scene "based on his state of agitation").

the consent of every cotenant because it places too heavy of a burden on police and would impede effective law enforcement.[155]

Although in the majority of cases courts have found that the defendant's removal was pursuant to a valid reason, this still leaves the question of what courts will do where removal is pursuant to an invalid reason. The Seventh Circuit addressed this question in *United States v. Parker*.[156] In *Parker*, the defendant challenged the consent to search on the basis that he was removed from the interaction because of an illegal arrest lacking probable cause. Although custody was later conceded to be valid, the court proceeded to address the question of attenuation, finding that the consent of a cotenant constitutes "an intervening circumstance that is not outweighed by official misconduct, even assuming that . . . custodial detention developed into an arrest without probable cause."[157] *Parker* forecasts another dangerous loophole available for police to circumvent the *Randolph* decision. If the Seventh Circuit's decision is adopted by other circuits, it would allow the police to rely on the consent of one cotenant by removing the possible nonconsenting cotenant through an invalid detention so long as it is not expressly announced that the cotenant is being removed for the purpose of avoiding refusal.

Finally, there is a possibility that one of the cotenants could circumvent *Randolph* by waiting until the other cotenant leaves the premises and then calling the police. This note is not concerned with the ingenuity of the cotenant, but rather with the possibility that the same ingenuity may be utilized by law enforcement. Timing a police visit when the possible nonconsenting cotenant is conveniently away from the home is especially troubling when orchestrated by the police. Presumably it would be suspicious for the police to research a cotenant's schedule and plan to ask for consent when that cotenant was not present. In *United States v. Groves*,[158] however, the district court did not come to the same conclusion. In *Groves*, the defendant refused to allow the police to search his apartment upon their initial visit to his residence.[159] In the time period following the initial denial, the police obtained information about the defendant's work schedule and the approximate time he returned to the residence.[160] The officers then proceeded to go to the residence and obtain consent to search from another cotenant during the time in which they believed that the defendant would not be present.[161] On remand

155. *Randolph*, 547 U.S. at 122 ("[W]e think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received.").

156. 469 F.3d 1074 (7th Cir. 2006).

157. *Id.* at 1079 (although ultimately the defendant conceded that the arrest was valid, the court addressed the issue of attenuation in dicta).

158. 2007 WL 171916.

159. *Id.* at *2.

160. United States v. Groves, 470 F.3d 311, 315 (7th Cir. 2006).

161. *Id.* at 316.

from the Seventh Circuit, the district court found that the consent was valid because "the officers did not take any affirmative steps to remove Groves from the premises. . . . Groves simply was not home."[162]

The decision of the district court is troubling for two reasons. First, the officers were aware that the defendant had refused to consent. This initial refusal, although not dispositive of a second refusal, should place officers on notice that there is a greater possibility the cotenant would refuse a second time.[163] Second, although they did not cause the absence of the defendant, the police took affirmative steps to assure that he would not be present at the time consent was requested. Examination of the officer's actions, both subjectively and objectively, leads to the same conclusion: the officers wanted to make sure that the defendant did not have an opportunity to renew his refusal to search.

Randolph's emphasis on presence provides police with an incentive to remove a cotenant or ensure her absence before asking for consent to search.[164] Furthermore, the reasoning in *Groves* indicates that the police can circumvent *Randolph* and nullify any protection the decision may afford cotenants by researching a suspect's schedule and increasing investigation costs. This situation adds to the many loopholes that weaken the protections offered by the *Randolph* decision.

3. The Manner of Refusal

The facts of *Randolph* are unambiguous as to whether Randolph refused consent.[165] It is foreseeable, however, that courts will have to assess how the refusal was expressed in order to determine whether it was valid. Courts have implied that different actions or words may or may not qualify as a refusal, but have not articulated how to analyze those actions and words.[166] The *Randolph* decision itself requires that the refusal be "express,"[167] requiring an analysis of what constitutes "express."

162. *Groves*, 2007 WL 171916, at *6.

163. *See supra* Part III.C.1 for discussion regarding the timing of refusal in relation to the validity of the objection.

164. *See* Fiske, *supra* note 9, at 735–36 ("[T]he holding encourages police to take action that, from a practical standpoint, completely undermines the rule's original purpose of preserving a nonconsenting co-occupant's privacy rights.").

165. *See* Georgia v. Randolph, 547 U.S. 103, 107 (2006).

166. *See, e.g.*, United States v. Owens, No. 02-CV-607-JHP-SAJ, 2006 WL 2850314, at *1 (N.D. Okla. Sept. 29, 2006) (defendant's pleas to cotenant that they refuse consent not refusals); United States v. Sims, 435 F. Supp. 2d 542, 545–46 (S.D. Miss. 2006) (defendant's shutting the door was a refusal to consent); United States v. Murphy, 437 F. Supp. 2d 1184, 1192–93 (D. Kan. 2006) (defendant's statement "You cannot go in there. It's not my home, but none [sic] gave you permission," was not a refusal); United States v. Dominguez-Ramirez, No. 5:06-CR-6-OC-10GRJ, 2006 WL 1704461, at *9 (M.D. Fla. June 8, 2006) (defendant's consent to search only after a certain time not refusal to consent to search before that time); State v. Brunetti, 901 A.2d 1, 14 (Conn. 2006) (mother's refusal to sign a consent form not dispositive of refusal).

167. *Randolph*, 547 U.S. at 118–19.

The critical difference between assessing consent to search and assessing refusal in the *Randolph* context arises where the cotenant is silent. In analyzing consent, the "[f]ailure to object is not the same as consent."[168] On the other hand, in disputed consent situations, the other cotenant's silence will result in an assumption that she has also consented to the search without ever being asked. It is foreseeable that situations will arise where officers may only ask consent from one cotenant, and once that cotenant has consented, they will not proceed to actively seek consent from the second, present cotenant. In fact, in cases where other parties have remained silent when they know consent to search has been given, courts have interpreted silence as implied consent or that given the silence police have no reason to believe further consent is necessary.[169] Police may begin to enter and search on the basis of the first cotenant's consent, thus creating an environment where the second cotenant feels coerced into submission. For example, in *Owens v. Ward*,[170] the defendant pleaded with his girlfriend not to consent to a search, but did not refuse the search himself. The district court went on to emphasize that his refusal was not expressed under *Randolph* because "the police officers never asked him to consent to the search."[171] Presumably, the defendant had not changed his mind about refusing based on his cotenant's consent, but he did not restate his refusal to the police.

A possible method of determining refusal is to analyze refusal to consent under the same totality-of-the-circumstances approach used to determine whether a person has consented. Under this analysis a refusal need not be explicitly stated, but could be inferred where the defendant's words, gestures, or conduct indicate that she does not authorize a search. For example, where a defendant slams the door, shakes her head, or blocks entry, refusal may be inferred from her actions.[172] Additionally, under the totality-of-the-circumstances theory, a defendant's acquiescence to police authority may not be sufficient to constitute a lack of refusal.[173] This analysis allows courts to take into account various factors, such as her physical and mental state, in order to determine whether the defendant was capable of refusing consent.

168. *See* State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994).

169. *See, e.g.*, United States v. Elam, 441 F.3d 601, 603–04 (8th Cir. 2006); United States v. Stapleton, 10 F.3d 582, 583–84 (8th Cir. 1993); United States v. Langston, 970 F.2d 692, 698 (10th Cir. 1992); United States v. Anderson, 859 F.2d 1171, 1176–77 (3d Cir. 1988); State v. Walton, 565 So. 2d 381, 384 (Fla. Dist. Ct. App. 1990); State v. Rawls, 552 So. 2d 764, 765–67 (La. Ct. App. 1989); State v. Tomlinson, 648 N.W.2d 367, 378 (Wis. 2002).

170. No. 02-CV-607-JHP-SAJ, 2006 WL 2850314, at *1 (N.D. Okla. Sept. 29, 2006).

171. *Id.* at *7.

172. Cotenants that are otherwise incapable of giving consent verbally will also be able to manifest their refusal by physical action or other methods of communication. Of course, other factors will have to be considered to establish whether the described actions are in fact refusal or not.

173. *Cf.* Bumper v. North Carolina, 391 U.S. 543, 548–49 (1968) (noting that the burden of proving voluntary consent cannot be met by "showing no more than acquiescence to a claim of lawful authority").

The ambiguity surrounding an "express refusal" highlights the question of whether police should be required to establish if those present have a privacy interest and to solicit the consent of every present party before commencing a search, thereby giving any possible cotenant a right to refuse. Another factor in determining refusal is whether the cotenant felt free to refuse consent after one cotenant had consented. The *Randolph* Court stopped short of requiring that police actively seek out consent of every present cotenant. However, that restraint has left lower courts with the option of strictly applying *Randolph* or analogizing to existing doctrines.

4. Scope

The final factor courts consider in determining if a refusal is valid is whether a qualification that limits the search serves as a refusal to consent to a search surpassing the qualification. For example, in *United States v. Dominguez-Ramirez*, the defendant consented to a search with the limitation that officers wait until morning to conduct the search.[174] When officers went to the residence without waiting until morning, they obtained consent to search the residence from the defendant's wife.[175] The district court refused to characterize the defendant's consent as a refusal and instead found that it was a "consent with qualification . . . [which] was never a refusal to search . . . [and not] sufficient to raise the issue" framed in *Randolph*.[176] However, this is a semantic argument, with little support in existing consent jurisprudence. The officers could have easily framed their question as a request to conduct a search immediately, and presumably the defendant would have refused to grant consent.

Traditionally consent searches may be limited by qualifications made by the person consenting to the search.[177] This would imply that consent was not given to search anything that falls outside the scope of the qualification, such as allowing a search of the downstairs but not the upstairs. If a limited grant of consent is not interpreted as a refusal to grant consent to search outside that area, the power of a cotenant to restrict the consent granted by a second cotenant will be significantly limited. For example, the police come to the home of our roommates, Tom and Jerry, requesting to search the premises. Tom readily consents, but Jerry replies that the police may search every area but the coat closet.

174. United States v. Dominguez-Ramirez, No. 5:06-CR-6-OC-10GRJ, 2006 WL 1704461, at *2 (M.D. Fla. June 8, 2006).

175. *Id.* at *2–3 (police were on the premises to search defendant's brother's room pursuant to the consent of the brother).

176. *Id.* at *9.

177. *See* 4 LAFAVE, *supra* note 58, § 8.1(c) ("It is thus important to take account of any express or implied limitations or qualifications attending that consent" such as "time, duration, area, or intensity.").

Under the *Dominguez-Ramirez* reasoning, Jerry's response is not a refusal, but a qualified consent, and if the police search the coat closet, they will have acted reasonably on Tom's consent.

The test to determine whether a consent search was limited was articulated in *Florida v. Jimeno*.[178] In *Jimeno*, the defendant challenged the search of a paper bag inside his car as unreasonable when he had consented to search of his car.[179] The Court held that the scope of a search is to be determined by a standard of "'objective' reasonableness," or how a reasonable person would have interpreted the exchange between the person giving consent and the officer.[180] Therefore, the defendant's consent to search the car included consent to search unlocked containers within the car.[181] Under this test, it can be asserted that when a person has granted clear qualified consent, it is reasonable to interpret that as a refusal to extend the consent beyond the qualification. The scope of a search is thus inherently tied to the manner in which the refusal is expressed. Therefore, refusal is also subject to the analysis under which the manner of qualified consent is determined; how the qualification is communicated will also determine if it is a refusal. It is uncertain how courts will deal with situations where one cotenant consents to a search of the entire premises, but the other cotenant consents to a search of the premises except for certain areas or during certain times. However, the outcome predicated in *Dominguez-Ramirez* undermines *Randolph*'s purpose of allowing physically present cotenants to assert their Fourth Amendment rights despite their fellow cotenants' consent.

D. The Privacy Interest of the Third Cotenant

The *Randolph* Court explicitly refused to address a potential situation that has already appeared at least once since the decision—absent co-occupants.[182] This situation involves three cotenants: one present and consenting, one present and refusing, and a third absent from the interaction altogether. In his dissenting opinion in *Randolph*, Chief Justice Roberts alleged that the majority's decision allows for the possibility that a search in this situation would be unreasonable as to the objecting cotenant but "reasonable 'as to' . . . the consenting co-occupant *and any other absent co-occupants*."[183] The quandary posed by this situation is the validity of the search as to the third, absent cotenant.

A literal reading of *Randolph* will leave the third, absent cotenant without any standing to challenge the search. The Supreme Court of Connecticut chose to address this problem in *State v. Brunetti*, and im-

178. 500 U.S. 248 (1991).
179. *Id.* at 250.
180. *Id.* at 251.
181. *Id.* at 252.
182. Georgia v. Randolph, 547 U.S. 103, 120 n.8 (2006).
183. *Id.* at 137 (Roberts, C.J., dissenting) (emphasis added).

plied that if faced with the question it would address it with a literal reading.[184] In *Brunetti*, the defendant attempted to challenge a police search on the grounds that although he was absent and unable to consent or withhold consent, the fact that his mother had refused to sign the consent form rendered the search invalid under *Randolph* even though his father did sign the consent form.[185] The Connecticut Supreme Court reasoned that the *Randolph* decision was to be interpreted narrowly, such that the search would be held unconstitutional solely as to the nonconsenting cotenant.[186] Justice Katz, in his dissenting opinion, argued against a narrow reading of *Randolph*, suggesting that the majority's decision in *Randolph* should be read to find such a search unconstitutional against the cotenant refusing consent and all other absent cotenants.[187]

Either outcome should leave a potential cotenant with a sense of unease. The rationale advanced by the *Randolph* Court does not support the reading advocated by Judge Katz in his dissenting opinion. By specifically requiring that the objecting cotenant be physically present, the Court has placed the third, absent cotenant in a position where, although the search would be unconstitutional as to the present nonconsenting cotenant, it would still hold up against the absent cotenant. This approach may provide an incentive to law enforcement officials to proceed to conduct a search regardless of refusal where the target of the search is the absent, third cotenant.[188] At the same time, holding the search unconstitutional as to the third cotenant would require elimination of the fine line the *Randolph* Court established between absence and presence.

The Court's "social expectations" reasoning fails to provide an answer as to how this situation should play out. The majority opined that a social guest would not reasonably enter after an expressed refusal by one cotenant. According to the rationale, one cotenant's refusal to consent should be enough to render an ensuing search unconstitutional as to anyone but those that are consenting to the search. However, in order to comply with such an outcome, courts would have to confer standing on the third, absent cotenant to allow him to raise such an objection. Unfortunately, allowing the vicarious assertion of Fourth Amendment rights is something that courts have historically been hesitant to do.[189]

184. State v. Brunetti, 901 A.2d 1, 19 n.37 (Conn. 2006) (emphasizing that the *Randolph* court held the disputed search invalid "as to him" and refused to address the third cotenant question).

185. *Id.* at 9.

186. The Connecticut Supreme Court did not consider the merits of the claim, but still felt "compelled to respond to the one substantive point raised." *Id.* at 18–19 n.37.

187. *Id.* at 33 n.4 (Katz, J., dissenting).

188. *Cf.* Coombs, *supra* note 38, at 1602 ("[L]inking standing and the exclusionary rule may encourage police illegality in the multiparty context, especially where the police recognize that the target of their search is unlikely to have standing . . . .") (footnote omitted). Similarly, where the police are interested in searching a home for evidence against a cotenant that is absent, if the search is not necessarily unconstitutional as to the third cotenant, it provides officers with a way to circumvent the purported protections of *Randolph*.

189. *See id.*

E. Other Considerations: Domestic Violence and Same-Sex Couples

It is not difficult to foresee the dysfunctional cotenant circumstances in which the *Randolph* holding will eventually come into play. These households will not resemble the Cleavers. In most cases consent will be disputed in volatile environments, where husband and wife are less than amicable towards each other. Domestic violence is an increasing problem in American households,[190] and more often than not signs of problems and cries for help are not readily perceived. The Court attempts to account for this concern by relying on the exigency doctrine, allowing police to enter where they have good reason to believe that violence, or the threat of violence, has just occurred.[191] The Court's reliance on the exigency doctrine has significant implications for the effect of the *Randolph* holding and, when analyzed in a real world setting, poses two critical questions. First, although the majority is certain that the doctrine allows for the protection of victims of domestic abuse by a partner of the opposite sex, will the rule provide adequate protection for victims of domestic violence by a same-sex partner?[192] Second, since the standard of proof to enter to protect a potential victim has not previously been addressed,[193] will the "good reason" standard articulated by the *Randolph* majority become a loophole for law enforcement to enter homes regardless of the holding?

In his dissent in *Randolph*, Chief Justice Roberts severely criticized the majority for not recognizing the detrimental effect that this decision would have on victims of domestic violence.[194] A police officer may not immediately recognize situations where a man or woman is consenting to the officer's presence in the home as a means of self-protection. As Chief Justice Roberts commented, where there are no signs of violence what happens when the police leave and the door closes?[195]

This is particularly troubling for same-sex couples because the threat of violence is not immediately apparent.[196] The situation of same-

190. *See, e.g.*, Geetanjali Malhotra, Note, *Resolving the Ambiguity Behind the Bright-Line Rule: The Effect of* Crawford v. Washington *on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205, 212 ("In the United States, a woman is beaten every 15 seconds. . . . [N]inety percent of battered women never report the abuse[,] . . .[and] one in five victims are subject to repeated occurrences of abuse.").

191. *See* Georgia v. Randolph, 547 U.S. 103, 118 (2006).

192. The frequency of domestic violence among same-sex couples is the same as opposite-sex couples. Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 328–29 (1999).

193. *See* Craig Bradley, *The Case of the Uncooperative Husband* 4 (Ind. Univ. Sch. Law-Bloomington Legal Stud. Research Paper Series, Research Paper No. 51, 2006), *available at* http://ssrn.com/abstract=901480. Some exigent circumstances require probable cause, but it is not clear that this standard would protect an individual from impending violence. *See id.*

194. *Randolph*, 547 U.S. at 137–42 (Roberts, C.J., dissenting).

195. *Id.* at 138.

196. Same-sex couples are often not provided the same domestic violence protections afforded to opposite-sex couples. *Cf.* Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1875–79 (2006) (noting that several states do not recognize domestic violence

sex couples poses a problem for the expansion of the exigency model because officers may be hesitant to recognize the same dangers which are apparent in the case of opposite-sex couples. The *Randolph* holding will only magnify the practical concerns that currently exist in protecting same-sex couples in domestic violence situations, such as the problem of identifying the victim and the aggressor.[197] The exigency doctrine will not provide adequate protection for victims in this situation and will lead to confusion among officers who attempt to distinguish same-sex couples from same-sex roommates.[198] When couple situations are mistaken for roommate situations, the suspicion of violence decreases since domestic violence is a concern between intimate partners and not necessarily roommates. Although police will protect any victim from imminent harm, domestic violence can be considered a unique circumstance where the standard of suspicion can be lowered to include the threat of violence where there is little evidence of existing violence. Pre-*Randolph*, either partner could consent to the police entering the home, providing them with protection, and perhaps bolstering them into admitting to a domestic violence situation. However, now the police are more likely to act on the refusal of one partner and, with less reason to suspect violence, will leave the consenting partner open to abuse and retribution.

Notably, the Court itself acknowledged that the disputed consent may give rise to the exigency situation that would validate police entry.[199] It is foreseeable that disputed consent over entry may arouse police suspicion of impending violence or retaliation and validate their entry into the home.[200] The *Randolph* Court asserted that police will only need "good reason" to enter, but on the other hand, various exigencies have required probable cause for police to act. Whether disputed consent is sufficient to create an exigency turns on what standard the courts apply. However, by allowing disputed consent to play a significant role in determining an exigent circumstance, the holding becomes almost meaningless. Although the exigent circumstance exception may provide the much needed protection for domestic violence victims, it may also undercut the purpose of *Randolph* altogether by allowing police to circumvent

protections for same-sex couples because those states support a same-sex marriage ban). This will affect how police and courts approach a situation where there is a possibility of domestic violence in a same-sex couple situation, as police are less likely to recognize an exigency situation and courts may require a higher standard of proof.

197. *See* Knauer, *supra* note 192, at 333–34 (noting that often both parties are arrested as "mutual combatants") (internal quotation marks omitted).

198. *See id.* at 348–49 (discussing how many victims of domestic violence in same-sex relationships are less likely to reveal that domestic violence has occurred for fear of criminal prosecution and general homophobia).

199. *Randolph*, 547 U.S. at 117 n.6 ("[T]he very exchange of information like this in front of the objecting inhabitant may render consent irrelevant by creating an exigency that justifies immediate action . . . .").

200. *Id.* at 141 (Roberts, C.J., dissenting) ("[A]pparently a key factor allowing entry with a 'good reason' short of exigency is the very consent of one co-occupant the majority finds so inadequate in the first place.").

the refusal by relying on a belief of impending violence based on "good reason."

IV. RESOLUTION

In attempting to articulate a bright-line rule, the Supreme Court succeeded in producing a decision which inexplicably deviated from previous Fourth Amendment jurisprudence and further complicated the third-party consent doctrine for courts and police. The hesitation to separate *Randolph* from its facts is evident among lower courts in their blatantly constrained application of the holding. The rationale employed by the *Randolph* Court to validate its holding is unworkable in light of the many ambiguities that it creates. In order to address these ambiguities, lower courts have had to revert to the Fourth Amendment jurisprudence that preceded *Randolph*, further demonstrating that the *Randolph* rationale is inadequate. Limited to its facts, *Randolph* fails to afford defendants any additional Fourth Amendment protections.

In order to settle the unrest caused by *Randolph*, the Court must revisit the decision and revise it so that it falls in line with current Fourth Amendment jurisprudence. First, weaknesses in the "social expectations" analysis require that the test be abandoned with respect to third-party consent searches. Second, courts should apply the *Randolph* holding only when analyzing consent-to-search situations and not in consent-to-enter situations. Third, the Court should abandon its bright-line rule in favor of the totality-of-the-circumstances approach proposed by Justice Breyer in his concurrence.[201]

A. Courts Should Abandon the Social Expectations Analysis

The "social expectations" test is unworkable as a means of assessing whether a search is reasonable and should be confined to its role in determining whether an act is a search. Extension of this test would result in unpredictable and overly subjective reformation of Fourth Amendment jurisprudence. The social expectations asserted in *Randolph* are especially weak because they remain unsupported by legal theory or substantive studies. If such an analysis is allowed in courts, decisions will be guided by the subjective beliefs of judges regarding what constitutes proper societal norms.

The Court inappropriately relied on the "social expectations" analysis in holding that where there are two present cotenants, the refusal of one cotenant renders a search invalid. The *Randolph* Court described the test as an examination of "widely held social expectations"

201. *Id.* at 125 (Breyer, J., concurring) ("[N]o single set of legal rules can capture the ever changing complexity of human life. . . . '[R]easonableness . . . is measured . . . by examining the totality of the circumstances.'" (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996))).

that are shaped by property considerations. However, as discussed above, property considerations can result in an outcome that is contrary to the Court's conclusions, thus undermining the foundation necessary for a bright-line rule. Without emphasizing social norms, the Court could have invalidated Janet Randolph's consent as unreasonable even under a totality-of-the-circumstances analysis, thus leaving Fourth Amendment jurisprudence undisturbed and providing a better articulated rationale for lower courts.

B. Courts Should Not Apply Randolph *to Consent to Enter Requests*

The question of whether *Randolph* should be applied to consent-to-enter versus consent-to-search turns on whether the decision is read broadly, as protecting homes from police presence, or narrowly, as protecting persons from an unreasonable search. A narrow interpretation of *Randolph* is preferable, as it will allow the protection of residents without undermining the privacy interests of those residents in their personal effects. Additionally, allowing third parties to consent to police entry will alleviate some of the concerns surrounding domestic violence victims. The police would not have to rely on exigent circumstances in order to simply enter and provide protection for potential victims.

Under a property-based view, the entry itself would not be unreasonable, as either cotenant has the right to include regardless of the refusal of other cotenants. Although entry does involve some invasion of privacy when coupled with doctrines such as plain view, this is not sufficient to make the entry unreasonable. The *Randolph* Court specifically delineated the difference between entry and search as the difference between when police commit a trespass and when they violate the Fourth Amendment.[202] Although a cotenant's consent to search might be unreasonable in light of a fellow cotenant's objections, her consent to enter should not be considered unreasonable.

C. Courts Should Examine Third-Party Consent Cases Under a Totality of the Circumstances Analysis

In his concurring opinion in *Randolph*, Justice Breyer asserted that the Court could have reached the same result under a totality-of-the-circumstances analysis.[203] In *Randolph*, the police were faced with deciding between Janet Randolph's consent and Scott Randolph's refusal. Each had equal interest in the premises, there were no exigent circum-

202. *See id.* at 118 (majority opinion).

203. *See id.* at 125–26 (Breyer, J., concurring) ("The search at issue was a search solely for evidence. The objecting party was present and made his objection known clearly and directly to the officers . . . . The officers did not justify their search on grounds of possible evidence destruction. . . . And . . . the officers might easily have secured the premises and sought a warrant . . . .") (citations omitted).

stances, and no circumstances that would prevent them from obtaining a search warrant. Arguably, under a totality-of-the-circumstances analysis, acting on Janet Randolph's consent might be held unreasonable, therefore invalidating the search.

By restricting *Randolph* to a totality-of-the-circumstances analysis, lower courts can avoid having to deal with the many questions arising from the decision. Under a totality-of-the-circumstances approach, the timing of the refusal and the presence of the defendant will no longer have to be the determining factors in application of the *Randolph* holding. Searches where law enforcement have knowledge of a defendant's refusal and when the timing of the refusal is not contemporaneous with the timing of the consent can still be found unreasonable under a totality-of-the-circumstances approach. For example, there would be no need to distinguish the cotenant objecting at the door from the cotenant objecting from the sidewalk if in both situations the police are made equally aware of the objection. Therefore, the approach will provide defendants with the Fourth Amendment protections the *Randolph* Court intended.

Furthermore, under this approach, courts can assess whether it was reasonable for a police officer to fail to ask the defendant for consent. For example, in conducting the search of a sorority house, under a totality-of-the-circumstances doctrine it may be reasonable to act on the consent of one cotenant in searching the common areas because it is burdensome to have to solicit the consent of every resident. However, it may not be reasonable to act on a single cotenant's consent to search bedrooms and other private areas where it is obvious there is no common authority and consent only needs to be solicited from one other present party. Because the analysis will not necessarily turn on absence or presence, courts can analyze the search as a whole and not as to each particular cotenant. This would allow courts to hold a search valid as to all cotenants, even the third, absent, nonconsenting cotenant. On the other hand, where a search itself is invalid, it will be invalid as to all cotenants, even those that are absent. This will provide third, fourth, and fifth cotenants with some Fourth Amendment protection.

The dilemma of how to determine whether the defendant's conduct or words were a refusal becomes easier under a totality-of-the-circumstances analysis. Taking into account the same factors that are considered when determining consent under the analysis, such as absence of coercion, maturity, and physical and mental state, courts can apply the totality-of-the-circumstances analysis to conclude whether a defendant did in fact refuse to consent and whether a qualified consent is reasonably a partial refusal of consent. A totality-of-the-circumstances approach also protects domestic violence victims without resorting to exigent circumstances.

If *Randolph* is applied as a bright-line rule, courts may eventually expand the rationale in ways that would result in arbitrary decisions and

further eviscerate Fourth Amendment jurisprudence. The totality-of-the-circumstances analysis is already integral in analyzing Fourth Amendment cases, and it fits within the current search and seizure framework. Therefore, the totality-of-the-circumstances analysis is the preferable approach to analyzing third-party consent cases.

V. CONCLUSION

In *Georgia v. Randolph*, the Court's attempt at creating a bright-line rule for law enforcement has resulted in murky rationales and ineffective Fourth Amendment protections. The Court provides inadequate support for its social expectations rationale, which, when reexamined through a property-based approach, actually leads to a conclusion that undermines the holding. At the same time, the emphasis on the timing of the refusal and the location of the defendant have resulted in decisions that do not in fact protect the defendant's Fourth Amendment right to privacy any more than pre-*Randolph* decisions. Courts are now faced with numerous questions as to how to apply *Randolph,* largely choosing to apply the decision narrowly. The Court could have avoided the creation of an arbitrary rule had it avoided using a "social expectations" analysis, constrained the decision to apply only to requests to search, and adopted a totality-of-the-circumstances approach for third-party consent cases.