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You Say Yes, But Can I Say No? The Future of Third-Party Consent Searches After *Georgia v. Randolph*

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You Say Yes, But Can I Say No?

THE FUTURE OF THIRD-PARTY CONSENT SEARCHES AFTER *GEORGIA V. RANDOLPH*

I. INTRODUCTION

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures.[1] One way in which courts have applied this provision is by asserting that government agents generally cannot search a person's home and seize his belongings without a proper search warrant.[2] Nevertheless, a warrantless search and seizure is considered reasonable when the person whose belongings are being searched properly and voluntarily consents to the search[3] or when that person's co-occupant consents to the search.[4] When a co-occupant of the search target provides his consent, the warrantless search is valid as long as the police reasonably believe that this person shares authority over the common area[5] of the premises.[6] The next question becomes: is a search of the common area of a home reasonable under the Fourth Amendment when both co-occupants are physically present at the time of the search and one gives consent while the other contemporaneously refuses to consent? For decades, the federal circuit and state courts were split over this issue, with most courts answering in the

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

[2] Illinois v. McArthur, 531 U.S. 326, 330 (2001); United States v. Place, 462 U.S. 696, 701 (1983).

[3] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (holding that a warrantless search was valid where the subject of a search voluntarily consented to the search) (citing United States v. Davis, 328 U.S. 582, 593-94 (1946)).

[4] United States v. Matlock, 415 U.S. 164, 171 (1974) (holding that consent to a warrantless search by a third party possessing common authority over the premises was valid against the absent, nonconsenting person with whom that authority was shared).

[5] A common area might be a living room, for example.

[6] Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990) (holding that a warrantless search was valid where it was based upon consent by a third party whom police, at the time of entry, reasonably believed possessed common authority over the premises).

affirmative.[7] In 2006, the United States Supreme Court took the opposite position, holding in *Georgia v. Randolph* that when one co-occupant of a common area consents to a warrantless search of the area "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him."[8] The Court's holding, however, was not strong enough to provide lower courts with a uniform answer to this question.[9] While *Randolph* commendably sought to protect Fourth Amendment constitutional rights, its holding has been interpreted so narrowly by lower courts that the rule needs further clarification to have any significant effect on Fourth Amendment jurisprudence.[10] This Note will argue that in the context of a search and seizure in which one co-occupant gives consent and another is physically present and expressly refuses to consent, the Supreme Court needs to define the terms "physically present" and "express refusal" more clearly to ensure that lower courts apply *Randolph* consistently when analyzing the constitutionality of such searches under the Fourth Amendment.

Part II of this Note will discuss the rule on warrantless searches and seizures under the Fourth Amendment and the consent exception to this rule. Part III will focus on third-party consent to warrantless searches, with a discussion of Supreme Court precedent on the issue prior to *Georgia v. Randolph*. Next, Part IV will compare the approaches the federal circuit courts and the state courts have taken when one co-occupant refuses consent in the presence of a third party who grants consent. These approaches created the split of authority that *Georgia v. Randolph* sought to resolve. Part V will thoroughly discuss the recent Supreme Court decision of *Georgia v. Randolph*. Part VI will address the issue of a co-occupant's refusal in the presence of third-party consent to warrantless searches since *Randolph*. This Part will also discuss the effects of *Randolph* on lower courts and argue that the law should be changed to reflect concerns about a defendant's rights, the risk

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[7] *See, e.g.*, United States v. Morning, 64 F.3d 531, 537 (9th Cir. 1995); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (per curiam); United States v. Sumlin, 567 F.2d 684, 688 (6th Cir. 1977); Love v. State, 355 Ark. 334, 341-42 (2003); Laramie v. Hysong, 808 P.2d 199, 203-04 (Wyo. 1991).

[8] Georgia v. Randolph, 547 U.S. 103, 106 (2006).

[9] *See infra* Part VI.A.

[10] *See infra* Part VI.

to domestic abuse victims, and the preservation of peace in the home.

II. RULE ON WARRANTLESS SEARCHES AND THE CONSENT EXCEPTION

A. Unreasonableness of Warrantless Searches Under the Fourth Amendment

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."[11] The "central requirement" of the Fourth Amendment is one of reasonableness.[12] Searches and seizures of personal property are unreasonable under the Fourth Amendment "'unless . . . accomplished pursuant to a judicial warrant' issued by a neutral magistrate after finding probable cause."[13] The warrant requirement is based on the Fourth Amendment's essential purpose of protecting citizens from intrusions of privacy by the government.[14] Thus, the entry into a person's home by the government without a warrant is a physical intrusion that is "unreasonable *per se*,"[15] "whether to

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

[12] Illinois v. McArthur, 531 U.S. 326, 330 (2001) (citing Texas v. Brown, 460 U.S. 730, 739 (1983)).

[13] *Id.* (citing United States v. Place, 462 U.S. 696, 701 (1983)). This Note will focus particularly on the reasonableness of conducting warrantless searches. For the purposes of this Note, seizures of property only become an issue where the government wants to use such property as evidence against the defendant as a result of such searches.

[14] Jones v. United States, 357 U.S. 493, 498 (1958). The Fourth Amendment's protection of a person's privacy is based on a subjective expectation of privacy exhibited by the person, and an objective expectation of privacy that society is prepared to recognize as reasonable. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* McDonald v. United States, 335 U.S. 451, 455-56 (1948) (stating that "[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.").

[15] Georgia v. Randolph, 547 U.S. 103, 109 (2006) (citing Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971)). The *per se* rule is derived from combining the reasonableness requirement of the Fourth Amendment's first clause with the warrant requirement of the Fourth Amendment's second clause. *See* Sharon E. Abrams, Comment, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963, 963 n.3 (1984).

make an arrest or to search for specific objects."[16] Ultimately, under our current constitutional understanding, when a defendant challenges the validity of a warrantless search, a court's analysis begins with the presumption of unreasonableness.[17]

B. Consent Exception

Despite the *per se* rule that warrantless searches are unreasonable, the Supreme Court has recognized a number of exceptions. These exceptions occur mostly under exigent circumstances, such as danger to the public and hot pursuit of a suspect[18] or during a search incident to arrest.[19] Warrantless searches also may be considered reasonable under the Fourth Amendment where courts find diminished expectations of privacy.[20] Some view the exceptions, however, in a much more narrow light. As Justice Douglas wrote, "[O]nly the gravest of circumstances could excuse the failure to secure a properly issued search warrant."[21]

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

[17] *Katz*, 389 U.S. at 357 (holding that a government agent's electronic surveillance of the defendant's conversation in a telephone booth was unconstitutional without a proper search warrant); *see, e.g.*, FED. R. CRIM. P. 41; *Jones*, 357 U.S. at 497-99; Agnello v. United States, 269 U.S. 20, 33 (1925).

[18] Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (holding that the Fourth Amendment did not require police officers to delay an investigation where to do so could gravely endanger human life).

[19] Chimel v. California, 395 U.S. 752, 762-63 (1969); *Jones*, 357 U.S. at 499 (stating that "[t]he exceptions to a rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them."). Other exceptions include "investigatory detentions, warrantless arrests, seizure of items in plain view, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable." *Thirty-Second Annual Review of Criminal Procedure*, 91 GEO. L.J. 36, 36 (2003).

[20] Illinois v. McArthur, 531 U.S. 326, 330 (2001). Some examples of circumstances or places in which diminished expectations exist are "searches of automobiles, drunk-driving checkpoints, temporary seizure of luggage, and a temporary stop and limited search for weapons." Frank J. Eichenlaub, *Carnivore: Taking a Bite out of the Fourth Amendment?*, 80 N.C. L. REV. 315, 332 n.121 (2001).

[21] United States v. Matlock, 415 U.S. 164, 183 (1974) (Douglas, J., dissenting); *see also* McDonald v. United States, 335 U.S. 451, 455-56 (1948) ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.").

One Fourth Amendment-based exception to the rule on warrantless searches that has been the source of much controversy is the consent exception.[22] As set forth in *Schneckloth v. Bustamonte,* the search of property, without a warrant and without probable cause, but with proper and voluntary consent, is valid under the Fourth Amendment.[23] Proper consent must be obtained from an individual possessing authority over the property being searched.[24] To determine whether consent is voluntary, courts use a totality of the circumstances test, considering factors such as

> (1) knowledge of the constitutional right to refuse consent; (2) age, intelligence, education, and language ability; (3) the degree to which the individual cooperates with the police; (4) the individual's attitude about the likelihood of the discovery of contraband; and (5) the length of detention and the nature of questioning, including the use of physical punishment or other coercive police behavior.[25]

To determine whether a search is reasonable based on consent, courts use an objective standard.[26] A police officer is required to "ask him or herself what the typical, reasonable person would have understood by the exchange between the officer and the suspect" and to conclude whether or not the suspect gave his consent.[27] Arguably, the voluntariness of the defendant's consent does not have as much weight today as it did when the Court created the consent doctrine in *Schneckloth*. While a defendant's consent must still be voluntary, the Supreme Court's paradigm for the consent search doctrine has become less focused on the subjective test of the defendant's voluntariness and more concerned with the

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[22] *See* Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Doctrine*, 119 HARV. L. REV. 2187, 2187-88 (2006) (arguing that while the Supreme Court has favored consent searches, commentators have denounced their use and several states have banned their use because of "controversies about racial profiling") (citation omitted).

[23] 412 U.S. 218, 248 (1973).

[24] Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

[25] Douglas K. Yatter et al., Twenty-Ninth Annual Review of Criminal Procedure, *Warrantless Searches and Seizures*, 88 GEO. L.J. 912, 946-49 (2000) (citations omitted).

[26] *Rodriguez*, 497 U.S. at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968) ("[D]etermination of consent to enter must 'be judged against an objective standard.'").

[27] Nancy J. Kloster, Note, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99, 103 (1996) (citing Florida v. Jimeno, 500 U.S. 248, 251 (1991)).

objective test of whether the officer compelled the defendant's consent.[28]

The consent exception initially derived from the theory that a defendant could waive his Fourth Amendment rights,[29] either directly or though an agent.[30] Over time, however, the consent doctrine has broadened beyond the bounds of waiver and agency principles.[31] It has been held that a defendant's waiver of a constitutional right must be made knowingly and intelligently.[32] In *Schneckloth v. Bustamonte*, however, the Court held that providing consent could be voluntary without the defendant knowing that he had the right to refuse to do so.[33] The reason for this comes from balancing the need to protect an individual's constitutional rights while also allowing for effective law enforcement.[34] In this situation, law enforcement purposes win out over constitutional protections because the consent to search is not a trial or pre-trial right on which the defendant's "knowledge and intelligence" can easily be judged.[35] Because it was not required that defendants be aware of their Fourth Amendment right, some justices and commentators saw this as an erosion of constitutional protections.[36] Despite such criticism, the Supreme Court generally favors the consent exception.[37]

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[28] Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 776 (2001); *see also* United States v. Drayton, 536 U.S. 194, 206-07 (2002) (noting that where an exchange takes place between police officer and citizen in which a police officer asks a citizen for his consent, "it dispels inferences of coercion.").

[29] Kloster, *supra* note 27, at 104-05 (citing Stoner v. California, 376 U.S. 483, 489 (1964)).

[30] *Id.*

[31] *Id.* at 105-06.

[32] Illinois v. Rodriguez, 497 U.S. 177, 183 (1990) (citing Colorado v. Spring, 479 U.S. 564, 574-75 (1987)); Johnson v. Zerbst, 304 U.S. 458 (1938).

[33] Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973) ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement[,] suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures."); *see also* Kloster, *supra* note 27, at 107.

[34] INGA L. PARSONS, FOURTH AMENDMENT PRACTICE AND PROCEDURE 101 (National Institute for Trial Advocacy, 2005).

[35] *Id.*

[36] Kloster, *supra* note 27, at 107 (citing *Schneckloth*, 412 U.S. at 226 (Brennan, J., dissenting)). For a discussion on the criticism of consent searches, see generally Note, *supra* note 22.

[37] Note, *supra* note 22; *see also* WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, at 5 (4th ed. 2004); United States v.

Thus, the "strict requirement" of a warrant to conduct a search under the Fourth Amendment is not as strict as it seems. The Supreme Court has judicially created a number of exceptions to the *per se* rule, mostly for safety and law enforcement purposes, but also to allow an individual possessing authority to permit the search if he voluntarily consents. Accordingly, because any individual possessing common authority can give consent,[38] the target of the search does not always need to consent in order for a consent search to be reasonable and valid against him.

III. THIRD-PARTY CONSENT SEARCHES

Under the consent exception to the Fourth Amendment, the Supreme Court has recognized that consent may properly be obtained from a third party if it is not obtained from the subject of the search.[39] For the purposes of this Note, the person who is the target or subject of the search will be referred to as the primary party.[40] This is the person for whom the evidence is being sought and whose constitutional rights are at stake. A third party is an individual who possesses common authority to consent to a search but who does not become a defendant challenging the admission of evidence that is the fruit of the search.[41]

Less stringent constitutional protections are afforded to primary parties in the context of consenting to a warrantless

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Drayton, 536 U.S. 194, 207 (2002) ("In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.").

[38] Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

[39] United States v. Matlock, 415 U.S. 164, 170-71 (1974). The Supreme Court had implicitly validated third-party consent searches in previous cases. *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543 (1968); Chapman v. United States. 365 U.S. 610 (1961); Amos v. United States, 255 U.S. 313 (1921); Weeks v. United States, 232 U.S. 383 (1914).

[40] The term "primary party" has not been used by courts. Elizabeth Wright adopted the phrase for the convenience of discussing third-party consent searches. *See* Elizabeth A. Wright, Note, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841, 1843 n.13 (2005).

[41] *Matlock*, 415 U.S. at 171 (stating that the justification of a warrantless search is not limited to proof of voluntary consent given by the defendant, but also extends to permission to search obtained from a third party). Of course, evidence as a result of the search can be used against the third party. *See* Donald v. State, 903 A.2d 315, 318-21 (Del. 2006).

search than in other aspects of a criminal prosecution, such as the waiving of trial rights.[42] Defendants cannot effectively waive their trial rights unless the waiver is "knowing and intelligent," whereas the validity of a consent to a warrantless search requires only voluntariness, evaluated on a variety of factors.[43] Given that the target of a search lacks the heightened constitutional protection of a defendant waiving a trial right, it is perhaps not surprising that a third party can effectively consent to a search against the defendant without the defendant's participation.

A. Matlock Rule: Common Authority and Assumption of Risk

United States v. Matlock has been at the core of Supreme Court jurisprudence on the third-party consent exception for roughly the last three decades.[44] The *Matlock* Court developed the rule that "consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[45] In *Matlock*, the police arrested the defendant Matlock in the front yard of the house where he and Mrs. Gayle Graff lived.[46] When the police officers went to the door, where Mrs. Graff stood, they asked her if they could search the house.[47] The officers entered and searched the house based on Mrs. Graff's consent without asking the defendant for his consent, despite knowing that Matlock lived there as well.[48] After Mrs. Graff told the officers that she shared the east bedroom with the defendant, the police entered that bedroom and found evidence to be used against the defendant.[49] The Court held that Mrs. Graff's voluntary consent validated the warrantless search against Matlock because she had common authority over the bedroom.[50]

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[42] *Schneckloth*, 412 U.S. at 245-46; *see also*, Abrams, *supra* note 15, at 967.

[43] *See supra* Part II.B; *see also* Illinois v. Rodriguez, 497 U.S. 177, 183 (citing Colorado v. Spring, 479 U.S. 564, 574-75 (1987); Johnson v. Zerbst, 304 U.S. 458 (1938)).

[44] Abrams, *supra* note 15, at 969.

[45] *Matlock*, 415 U.S. at 170.

[46] *Id.* at 166.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 166-67.

[50] *Id.* at 164, 177.

In order for a third party to have the authority to properly give consent, he must share common authority over the area or have some other sufficient relationship with the primary party over the premises being searched.[51] The two main rationales behind the *Matlock* "common authority" rule are: (1) the third party has mutual use of the property being searched because he has joint access or control with the primary party[52] and (2) the primary party has assumed the risk that a person with whom he shares an area will allow visitors into that area.[53] Several commentators have referred to the *Matlock* rule as the "possession and control" or "access and control" test.[54]

Even before *Matlock*, many lower federal and state courts had used "common authority" principles to judge the validity of third-party consent searches; the *Matlock* decision was the Supreme Court's ratification of this approach.[55] Despite this ratification, *Matlock* did not clearly articulate the parameters and constitutional justifications for its third-party consent exception.[56] Although the *Matlock* Court included an express reference to the "absent nonconsenting person,"[57] its "common authority" analysis did not mention *Matlock*'s

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[51] *See id.* at 171. For an example of the factors courts have used to determine whether a third party had common authority, see United States v. Groves, 470 F.3d 311, 319 (7th Cir. 2006).

[52] This principle is not based on rules of property. Rather than giving the authority to consent to the person who owns the property being searched, this principle gives only the persons who use the property the right to decide if they want to permit visitors to enter and search the area. *Matlock*, 415 U.S. at 171 n.7. It has been held that if a third party, even the property owner, does not share mutual use of the property with the defendant, this does not create the common understanding of authority to permit guests to enter without the consent of the occupant of the premises. *See* Georgia v. Randolph, 547 U.S. 103, 112 (2006). For the proposition that a landlord cannot by right give valid consent for a search of a tenant's area, see Chapman v. United States, 365 U.S. 610, 616-17 (1961). For the proposition that a hotel manager cannot give valid consent to search a guest's room, see Stoner v. California, 376 U.S. 483, 489 (1964).

[53] The "assumption of risk" theory, derived from tort law, espouses that "when two or more co-occupants share a space in common, each one accepts the possibility that another may permit a search." Wright, *supra* note 40, at 1857-58; *see* LAFAVE, *supra* note 37, § 8.3(a), at 148-49; Frazier v. Cupp, 394 U.S. 731, 740 (1969) (holding that the consent to search a duffel bag given by petitioner's cousin was valid because petitioner allowed his cousin to use the bag and therefore assumed the risk that his cousin might allow someone else to look inside).

[54] *E.g.*, Abrams, *supra* note 15, at 967-68.

[55] *Id.* at 967-69.

[56] *Id.* at 966 (quoting John B. Wefing & John G. Miles, Jr., *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 261 (1974)).

[57] *Matlock*, 415 U.S. at 170.

particular facts. Thus, the rule does not necessarily require that the primary party be absent for the third-party consent search to be valid.[58] In addition, because the defendant in *Matlock* was arrested in the front yard and detained in a squad car near the house when the police obtained consent,[59] lower courts disagree as to whether Matlock's absence was truly a deciding factor in the Court's holding.[60]

Despite the problems courts face in interpreting the scope of the ruling, *Matlock* clearly allows warrantless searches of a common area to be constitutional if a third party having common authority consented to the search.

B. The Illinois v. Rodriguez *Rule: Apparent Authority*

About fifteen years after *Matlock*, the Supreme Court held that a third party did not necessarily need to have common authority over the premises in order for a third-party consent search to be valid. Generally, under the Fourth Amendment, police officers do not need to be factually correct in their assessment of what evidence a search will produce in order for a search to be reasonable.[61] In *Illinois v. Rodriguez*, this principle was extended so that police officers do not need to be factually correct about who has common authority to consent to a search.[62]

Rodriguez held that if the police reasonably believe, even if erroneously, that a person who consents to a warrantless police entry is a resident of (or has common authority over) the premises, the search is valid and its fruits may be used as evidence against the defendant.[63] In *Rodriguez*, Gail Fischer told the police that Edward Rodriguez assaulted

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[58] *See Matlock*, 415 U.S. at 968; *see also Matlock*, 415 U.S. at 169-72; Wright, *supra* note 40, at 1872 (explaining that "[i]f common authority is the basis for third party consent searches, then the primary party's location is irrelevant").

[59] *See* Georgia v. Randolph, 547 U.S. 103, 109-10 (2006).

[60] Abrams, *supra* note 15, at 970; *see also id.* at 977 (arguing that "[a] theory that would allow a defendant's presence during and objection to a third-party consent search to invalidate that search . . . finds no theoretical support in the *Matlock* decision"); Wright, *supra* note 40, at 1871 (explaining that "[c]ourts that allowed third party consent to trump the primary party's refusal concentrated on the fact that the defendant [in *Matlock*] was actually present in his front yard, though the police failed to ask his permission to search, and, instead, received permission from a co-occupant of the house") (citing United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977)).

[61] Illinois v. Rodriguez, 497 U.S. 177, 184 (1990).

[62] *Id.* at 184.

[63] *Id.* at 186-89.

her.[64] Fischer consented to take the police to an apartment where she said Rodriguez was asleep so they could arrest him.[65] Fischer referred to the apartment as "our apartment" and told the police that she had clothes and furniture there.[66] The police entered the apartment without obtaining an arrest warrant or a search warrant; upon entering, they found contraband in plain view and proceeded to arrest Rodriguez, who was sleeping in the bedroom.[67] The Court remanded for a determination of whether the police officers reasonably believed that Fischer had the authority to consent to a search of the apartment.[68] If the lower court found that the police reasonably believed she had common authority, then the search would be valid.[69] The issue in *Rodriguez* was not whether the defendant waived his Fourth Amendment right, but whether the police violated his right to be free from unreasonable searches.[70] Therefore, the focus of reasonableness is no longer on the defendant's actions or inactions to determine whether he subjectively consented, but rather on the police officer's objective factual determination of whether a reasonable officer would believe properly authorized consent has been given.[71]

In effect, the *Rodriguez* Court adopted the doctrine of apparent authority to apply to third-party consent searches.[72] Under agency law, apparent authority allows an agent to bind his principal where it *appears* that the agent has authority to act for the principal, even if the agent does not actually have authority.[73] Accordingly, if a third party does not actually have common authority to give consent to the police, then an absent

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[64] *Id.* at 179.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 180.

[68] *Id.* at 189.

[69] *Id.* at 188-89.

[70] *Id.* at 187.

[71] *Id.* at 188 ("Determination of consent to enter must 'be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority of the premises?'") (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)); *see also* Kloster, *supra* note 27, at 103.

[72] The Court had previously rejected the applicability of this doctrine in *Stoner v. California*. 376 U.S. 483, 488 (1964) (stating that Fourth Amendment rights "are not to be eroded by unrealistic doctrines of 'apparent authority'").

[73] *See* W.W. Allen, Annotation, *Doctrine of Apparent Authority as Applicable Where Relationship Is that of Master and Servant*, 2 A.L.R. 2D 406, § 1 (1948) (citations omitted).

primary party is still vulnerable to a warrantless search. As a result of *Rodriguez*, a third-party consent search can be valid without a primary party necessarily assuming the risk that this person might permit someone to enter and search.[74] Thus, the apparent authority rule of *Rodriguez* undercuts the key principle of "assumption of risk" in the *Matlock* rule.[75] Justice Marshall noted this problem in his dissent, arguing that the constitutionality of the *Matlock* "assumption of risk" rule rested on the idea that a person had voluntarily given up his expectation of privacy when he shared access or control of a common area with a co-occupant.[76] If police officers are mistaken about a third party's authority to consent, the search loses its "constitutional footing" because the defendant may not have shared access or control with that person, and thus the defendant would not have a diminished expectation of privacy.[77] After *Rodriguez*, one commentator argued that the apparent authority test does not properly shield citizens from privacy intrusions by the government as required by the Fourth Amendment.[78] Another commentator, not expecting the "apparent authority test" to be adopted, hypothesized several years before *Rodriguez* that "[i]f searches are validated merely because police think that they are reasonable, very few searches will be found constitutionally invalid."[79] Thus, there is a strong argument that the *Rodriguez* rule is a violation of the Fourth Amendment.

Nevertheless, the Supreme Court was clearly moving in the direction of expanding the third-party consent exception. The lower federal courts and the state courts accordingly expanded this exception as well.

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[74] Wright, *supra* note 40, at 1858. For example, if the police reasonably believe that a landlord has common authority over a tenant's apartment, his consent will validate a warrantless search of the apartment despite the fact that the tenant did not give the landlord the authority to permit the police to enter. *See supra* note 52; *see also* Gregory S. Fisher, *Search and Seizure, Third-Party Consent: Rethinking Police Conduct and the Fourth Amendment*, 66 WASH. L. REV. 189, 200 (1991) ("*Rodriguez* effectively destroys the common authority test.").

[75] *See supra* note 53 and accompanying text.

[76] *Rodriguez*, 497 U.S. at 194 (Marshall, J., dissenting).

[77] *Id.*

[78] Fisher, *supra* note 74, at 198-99; *see also* Kloster, *supra* note 27, at 112-13 (arguing that by validating warrantless searches where a consenting party does not have at least some actual control over the premises, "the Court took a final bite from the already devoured Fourth Amendment").

[79] Abrams, *supra* note 15, at 977-78 (arguing that a theory in which the reasonableness of a search depends on the police officers' perceptions at the time of the search has major flaws).

IV. THIRD-PARTY CONSENT SEARCHES AND PRESENT PRIMARY PARTY REFUSAL BEFORE *RANDOLPH*

Arguably, the *Matlock* and *Rodriguez* holdings only resolved the issue of third-party consent when the primary party is absent. The Supreme Court had not expressly addressed the question of whether a warrantless search is valid when the police allow a third party's consent to override a nonconsenting primary party who is present at the time of the search. *Matlock* left courts with two possible interpretations. First, *Matlock* could be interpreted to imply that a search is valid whenever a third party with common authority consents to a search, even if his co-occupant is present and objects.[80] Second, under a more literal interpretation of the Court's ruling, *Matlock* could be read to limit the validity of third-party consent only to searches against the "absent, nonconsenting person."[81] The latter interpretation requires the consent of both present co-occupants under the rationale that both have equal rights over the home and one co-occupant's consent should not have more weight than the other's refusal.[82] This interpretation is more consistent with the objective of the Fourth Amendment: to protect against an intrusion by the government on one's expectation of privacy.[83] While it is reasonable to believe that a co-occupant assumes the risk of such an intrusion when he is absent and leaves his property in the hands of his co-occupant, it is not reasonable to do so when he is present and objects to the intrusion.[84] To undermine one's refusal because of another's consent is to undermine his or her personal autonomy.

Nevertheless, despite "the latter [interpretation's] somewhat greater appeal,"[85] most federal and state courts had adopted the former view.[86] The clear majority held that *Matlock* allows third-party consent to trump primary party refusal regardless of whether the primary party was present or absent

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[80] This is because of the fact that the defendant in *Matlock* was present in the front yard just before the search and in the squad car near the house at the time of the search. *See id.* at 975; United States v. Matlock, 415 U.S. 164, 179 (1974) (Douglas, J., dissenting).

[81] *Matlock*, 415 U.S. at 170.

[82] *Id.* at 170 (emphasis omitted); LAFAVE, *supra* note 37, at 159, § 8.3(d) (citations omitted).

[83] *See supra* note 14 and accompanying text.

[84] *See infra* notes 119-120 and accompanying text.

[85] LAFAVE, *supra* note 37, at 159, § 8.3(d).

[86] *See* Georgia v. Randolph, 547 U.S. 103, 108 n.1 (2006).

at the time of the search.[87] All the federal circuit courts that had addressed this question had taken this position.[88] Nearly all the state courts had reached the same conclusion as well.[89] A minority view, however, had interpreted *Matlock* narrowly by invalidating third-party consent when the primary party is present and nonconsenting.[90] The few state courts that had adhered to this view gave more weight to the present primary party's refusal than to the third party's consent.[91] Thus, some disagreement had existed among the courts over the reasonableness of third-party consent in the situation of a "disagreeing co-occupant."[92]

A. Majority View

All the federal circuit courts that had addressed this question had held that third-party consent trumps primary party refusal.[93] In the Ninth Circuit case of *United States v. Morning*,[94] for example, the defendant answered the door to federal agents and objected to a search before the defendant's co-occupant came to the door and provided the agents with consent.[95] The court determined that the federal agents' search of the defendant's house was valid against the defendant despite his presence and objection to the search because his co-occupant had consented.[96] The court struggled with applying *Matlock* because the defendant in *Matlock* was on the scene when the police asked the third party for consent, and the Court was unclear about the significance of the primary party's location in this situation.[97] Prior Ninth Circuit cases had interpreted *Matlock* to imply that it did not matter if the

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[87] *See Randolph*, 547 U.S. at 108 n.1.

[88] *Id.*; *see also* Linda Greenhouse, *Roberts Dissent Reveals Strain Beneath Court's Placid Surface*, N.Y. TIMES, Mar. 23, 2006, at A1.

[89] *See Randolph*, 547 U.S. at 108 n.1; Greenhouse, *supra* note 88.

[90] *See, e.g.*, State v. Randolph, 604 S.E.2d 835 (2004); State v. Leach, 782 P.2d 1035 (Wash. 1989); Silva v. State, 344 So. 2d 559 (Fla. 1977).

[91] *Cf.* Abrams, *supra* note 15, at 975 (arguing that, despite the author's disagreement with the principle, the *Matlock* test seems to mandate the result that one's objection to a police search of one's own home can be overridden by the consent of another occupant of that home).

[92] *Id.* at 969.

[93] *See infra* notes 94-107.

[94] 64 F.3d 531 (9th Cir. 1995).

[95] *Id.* at 532.

[96] *Id.* at 537.

[97] *Id.* at 534 ("[W]hile *Matlock* rendered the law in this area translucent, it did not render it transparent").

defendant was present or absent, but only whether the third party had common authority over or other sufficient relationship to the premises.[98] Ultimately, the *Morning* court applied the *Matlock* rule to find that the defendant assumed the risk by sharing the house with another occupant, and therefore his Fourth Amendment rights were not violated because there was a reasonable expectation that the co-occupant could allow someone to enter.[99]

To reach its conclusion, the *Morning* court looked to how other federal circuits had addressed the issue.[100] The Sixth Circuit, in *United States v. Sumlin*, had held that a defendant's presence and refusal to consent did not matter, noting that in *Matlock* the defendant was in the front yard at the time of the search.[101] As in *Matlock*, the defendant in *Sumlin* was first arrested, but unlike Matlock, Sumlin was asked for his consent before the police obtained consent from his female companion.[102] The *Sumlin* court determined that the defendant's refusal to consent did not overcome the assumed risk that a co-occupant would expose common private areas to a search; thus, he did not have a reasonable expectation of privacy.[103] Similarly, in *United States v. Donlin*, the First Circuit held that "[v]alid consent may be given by a defendant or a third party with 'common authority' over the premises" and that "[t]hird party consent remains valid even when the defendant specifically objects to it."[104] The D.C. Circuit held in *United States v. Hendrix* that consent obtained from a third-party joint occupant was valid when another occupant had been present and objected to search.[105] The Eleventh Circuit held in *Lenz v. Wilburn* that the consent of a third party with common authority is valid, "even when a present subject of the search objects."[106] The Fifth Circuit held in *United States v. Baldwin* that third-party consent trumps primary party refusal

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[98] *E.g.*, *id.* at 536; United States v. Childs, 944 F.2d 491, 495 (9th Cir. 1991); United States v. Canada, 527 F.2d 1374, 1379 (9th Cir. 1975).

[99] United States v. Morning, 64 F.3d 531, 534, 537 (9th Cir. 1995).

[100] *Id.* at 534.

[101] United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977).

[102] *Id.*

[103] *Id.* at 688.

[104] United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992).

[105] United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (per curiam).

[106] Lenz v. Wilburn, 51 F.3d 1540, 1548 (11th Cir. 1995).

in an automobile search.[107] In sum, no federal circuit court before *Randolph* had held that a search is unreasonable where the police rely on the consent of a third party in the face of an objection to the search by a physically present co-occupant.

Most state courts had agreed with the federal circuit courts. These courts admitted evidence against a defendant who was present and who objected at the time of a warrantless search if a co-occupant gave consent.[108] In the Arkansas case of *Love v. State*, for example, the defendant refused consent, but his co-occupant consented, and as a result of the permitted entry, the police officers saw contraband in the defendant's bedroom from the living room.[109] The court admitted the contraband into evidence over the defendant's objection.[110] On both the state and federal circuit court levels, the majority view had been that third-party consent trumps present primary party refusal.

B. Minority View

However, not all state courts agreed. A minority of state courts has held that a present primary party's refusal can trump a third party's consent. The leading post-*Matlock* case that adheres to this view is Florida's *Silva v. State.*[111] There, Mrs. Brandon, who lived with the defendant, called the police from outside the home after the defendant had hit her.[112] When the police arrived, she let them in and informed them about the defendant's guns kept in a hall closet.[113] Mrs. Brandon consented to a search of the closet, and, despite the present defendant's objections, the police searched the closet and found the guns.[114] The *Silva* court held that the search was unconstitutional on the theory that it is reasonable for a person whose property is being searched to have "controlling authority to refuse consent" and that "a present, objecting party should

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[107] United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981); *see also* United States v. Morales, 861 F.2d 396, 400 (3d Cir. 1988).

[108] *See* Georgia v. Randolph, 547 U.S. 103, 108 n.1 (2006).

[109] Love v. State, 138 S.W.3d 676, 680-81 (Ark. 2003).

[110] *Id.* at 681; *see also* Laramie v. Hysong, 808 P.2d 199, 203-04 (Wyo. 1991).

[111] 344 So. 2d 559 (Fla. 1977); *see also* Lawton v. State, 320 So. 2d 463, 464 (Fla. Dist. Ct. App. 1975) ("[T]he search cannot stand because appellant was physically present on the premises and affirmatively objected to the search.").

[112] *Silva*, 344 So. 2d at 560.

[113] *Id.*

[114] *Id.*

not have his constitutional rights ignored because of a leasehold or other property interest shared with another."[115]

Similarly, the Supreme Court of Washington had held in *State v. Leach* that the police must obtain the consent of a cohabitant who is present and able to object.[116] In *Leach*, the evidence was not even clear that the defendant objected to the search.[117] The Washington court, however, interpreted *Matlock* only to refer to "absent, nonconsenting persons," and sought to decide whether the rule was applicable to present primary parties.[118] The court examined both positions and ultimately held that an individual does not assume the risk that a cohabitant will permit someone's entrance over his objection when he is present. The assumption of risk principle is only reasonable, and thus applicable, when the individual is absent.[119] The court's majority reasoned that to rule otherwise would be placing "expediency over an individual's Fourth Amendment guarantees," and the court "refuse[d] to beat a path to the door of exceptions."[120]

While a small minority of state courts had invalidated third-party consent searches in cases of present primary party refusal, the majority of courts in this country had refused to apply the Fourth Amendment in these situations. Instead, most courts had interpreted *Matlock* to mean that third-party consent takes precedence over a primary party's refusal, whether or not the primary party is physically present at the time of the search. Although the minority view was not widely held, a lack of unanimity had developed over the issue prior to the Supreme Court's consideration of *Georgia v. Randolph*.

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[115] *Id.* at 562. However, under facts quite similar to *Silva*, the New York Court of Appeals held to the contrary, finding that "where an individual shares with others common authority over premises or property, he has no right to prevent a search in the face of the knowing and voluntary consent of a co-occupant with equal authority." People v. Cosme, 397 N.E.2d 1319, 1322 (1979).

[116] State v. Leach, 782 P.2d 1035, 1036 (Wash. 1989).

[117] *Id.* at 1038. When a detective came to search the defendant's office with the defendant's girlfriend, the defendant was present and was then placed under arrest and seated in an office chair. *Id.* at 1036.

[118] *Id.* at 1038.

[119] *Id.* at 1039.

[120] *Id.* at 1040; *see also* People v. Mortimer, 361 N.Y.S.2d 955, 958 (App. Div. 1974) ("[I]f the Fourth Amendment means anything, it means that the police may not undertake a warrantless search of defendant's property after he has expressly denied his consent to such a search. Constitutional rights may not be defeated by the expedient of soliciting several persons successively until the sought-after consent is obtained."). Georgia was also one of the states that adhered to the minority view. *See infra* Part V.B.

V. THE UNITED STATES SUPREME COURT ADDRESSES THE ISSUE IN *GEORGIA V. RANDOLPH*

When a Georgia Supreme Court case dealing with this issue reached the United States Supreme Court in 2005, the Court granted certiorari to resolve the split in authority.[121] Despite the existence of a clear majority view, the Supreme Court resolved the issue in favor of the minority view.[122] Although the Court had expanded the consent exception in recent years,[123] in 2006 it took a step back by restricting the validity of third-party consent searches in *Georgia v. Randolph*.[124] As a result, warrantless searches are unreasonable and invalid against a primary party who is present and expressly refuses consent, even if a third party having common authority gives his consent.[125]

A. The Facts of Randolph

Scott Randolph and his wife Janet were separated in May 2001, when Janet left their marital residence in Georgia with their son to stay with her parents in Canada.[126] Two months later, Janet returned with their child to their home in Georgia.[127] One morning, not long after having returned, Janet called the police complaining that after a domestic dispute with her husband, Scott took away their son.[128] When the police arrived at the house, Janet accused Scott of using cocaine.[129] When Scott arrived at the house, he denied being a cocaine user and accused his wife of having drug and alcohol problems.[130] Janet then volunteered information to the police that there were drugs in the house.[131] When one of the officers asked Scott for permission to search the house, "he unequivocally refused," but when the officer subsequently

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121 Georgia v. Randolph, 547 U.S. 103, 108 (2006).
122 *Id.*
123 *See supra* Part III.
124 *Randolph*, 547 U.S. at 108.
125 *Id.* at 120.
126 *Id.* at 106.
127 *Id.*
128 *Id.* at 107.
129 *Id.*
130 *Id.*
131 *Id.*

asked Janet for consent, she provided it.[132] The officer entered, and Janet showed him to a "bedroom that she identified as Scott's."[133] In the bedroom, the officer found a drinking straw on which he suspected there was cocaine.[134] The officer then left the house to apply for a warrant, but when he returned Janet withdrew her consent.[135] The police then obtained a search warrant and conducted a search from which they found evidence leading to Scott Randolph's indictment for possession of cocaine.[136]

B. The Georgia Courts' Decisions

The defendant argued that the warrantless search was unauthorized because, despite his wife's consent, he expressly refused the search.[137] The trial court denied his motion to suppress evidence on the grounds that the search was valid based on his wife's common authority to consent.[138] The Georgia Court of Appeals reversed, and the Georgia Supreme Court affirmed,[139] thereby applying the minority view on the issue. Georgia's highest court found *Matlock* distinguishable because Randolph was not absent in this case as the defendant was in *Matlock*.[140]

C. The Supreme Court's Decision

With a 5-3 majority[141] opinion written by Justice Souter, the Supreme Court affirmed the Georgia Supreme Court's decision in favor of the defendant.[142] The majority noted that widely shared social expectations have traditionally had a great significance when assessing the reasonableness of Fourth

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[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 107-08.

[138] *Id.*

[139] *Id.* at 108. The Georgia Supreme Court stated, "[T]he consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." State v. Randolph, 604 S.E.2d 835, 836 (Ga. 2004).

[140] *State v. Randolph*, 604 S.E.2d at 837.

[141] Justice Alito did not participate in the opinion because he was newly appointed and did not join the bench until after the Court had heard oral arguments on the case. *See Randolph*, 547 U.S. at 123; Greenhouse, *supra* note 88.

[142] *Randolph*, 547 U.S. at 122-23.

Amendment consent search cases.[143] Under the *Matlock* rule, these social expectations, which are influenced by property laws but not controlled by them, allow co-occupants to have certain authority over their shared property that may affect each other's interests.[144] The Court agreed with *Matlock* that it would be extraordinary for visitors to make sure that all cohabitants of a household do not object to their entry before accepting an invitation to come in the house.[145] Nevertheless, the majority stated that the issue of the reasonableness of a search where the police rely on the consent of one co-occupant in the face of an objection by another had not yet been addressed.[146] According to the majority, because co-occupants generally do not have superior rights over other co-occupants, *Matlock*'s common authority principle does not apply to situations where a co-occupant's consent would override the express objection of another co-occupant.[147] The Court noted that it had previously used customary social expectations to assert that "overnight houseguests have a legitimate expectation of privacy in their temporary quarters."[148] Accordingly, it follows that a resident of the home should have this expectation as well.[149] Therefore, a primary party's objection to a search should be respected because he has an expectation of privacy as one of the co-occupants of the home being searched.[150]

The Court applied the long-held principle of respecting the privacy of one's home[151] as well as the old adage that a man's home is his castle[152] to support its reasoning.[153] The Court

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[143] *Randolph*, 547 U.S. at 111.

[144] *Id.*

[145] *Id.* at 111-12.

[146] *Id.* at 109.

[147] *Id.* at 114 ("[T]here is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is color of curtains or invitations to outsiders.").

[148] *Id.* at 113 (citing Minnesota v. Olson, 495 U.S. 91 (1990)).

[149] *Id.*

[150] *See id.*

[151] *Id.* at 115 (quoting Wilson v. Layne, 526 U.S. 603, 610 (1999)).

[152] *Id.* (quoting Miller v. United States, 357 U.S. 301, 307 (1958)).

[153] *Id.* (asserting that "[d]isputed permission is thus no match for this central value of the Fourth Amendment, and the State's other countervailing claims do not add up to outweigh it"). The majority reasoned that an alternative to allowing a third-party consent search would be for the co-occupant to deliver evidence or information to the police. *Id.* at 115-16 (citing Coolidge v. New Hampshire, 403. U.S. 443, 487-89 (1971)). The police could also rely on information given by a co-occupant to obtain a warrant,

recognized that certain situations create exigencies that may justify immediate action by the police,[154] but emphasized that there needs to be a clear justification for government searches over a resident's objection.[155]

On the other hand, the majority was not completely deferential to the defendant.[156] The Court was careful not to overrule the holdings of *Matlock* or *Rodriguez*, making it particularly clear that *Matlock*'s rule that a third-party consent search is reasonable over an absent, nonconsenting co-habitant still stands firmly.[157] Therefore, if a primary party is not present and does not make an express objection to the search, the third party's consent is valid. Moreover, the police do not need to take affirmative steps to obtain the primary party's permission even if he is nearby, as long as the police do not remove the potentially objecting co-occupant from the entrance to avoid a possible objection.[158] Thus, under the facts of *Matlock*, in which the defendant was in a nearby squad car, or under the facts of *Rodriguez*, in which the defendant was asleep in the apartment, the *Randolph* holding would still deem the searches in both cases reasonable.[159]

D. Justice Breyer's Concurrence

Although Justice Stevens and Justice Breyer both joined the majority's judgment, each wrote his own concurring opinion.[160] Justice Breyer's opinion set forth the idea that there should be no "bright-line rules" to determine whether

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which is preferable to conducting a warrantless search. *Id.* at 116-17 (citing United States v. Ventresca, 380 U.S. 102, 107 (1965)).

[154] *Id.* at 116 n.6 (citing Illinois v. McArthur, 531 U.S. 326, 331-32 (2001)). Examples of such exigencies include preventing the objecting tenant from destroying evidence while police get warrant, or to provide protection in domestic violence situations. *See id.*

[155] *Id.* at 120.

[156] *See id.* at 121-22.

[157] *Id.* at 121 ("[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take party in the threshold colloquy, loses out."). *Cf.* Abrams, *supra* note 15, at 968-69 (arguing that *Matlock's* "final formulation" does not mention a nonconsenting party's absence, and thus the defendant's location does not limit the third-party consent exception).

[158] *Randolph*, 547 U.S. at 120-23.

[159] *Id.* at 121. *See supra* Part III.A-B.

[160] Justice Stevens's concurrence focused on the principle that neither spouse has the power to override the other's constitutional right to deny entry to their castle. *Id.* at 123-25 (Stevens, J., concurring).

warrantless searches are valid.[161] Instead, he argued that the Court must examine the "totality of the circumstances" in order to decide whether the search is reasonable under the Fourth Amendment.[162] A situation in which a possible domestic abuse victim invites a police officer into the home or consents to the officer's entry would be a circumstance in which one co-occupant's consent would be reasonable in the face of another's objection.[163] Justice Breyer concluded that in this case, the totality of circumstances did not justify the search.[164]

E. Chief Justice Roberts's Dissent

Each of the three dissenters in *Randolph* wrote a separate opinion.[165] Chief Justice Roberts, joined by Justice Scalia, wrote his first dissenting opinion since joining the Supreme Court. Roberts criticized the majority for providing a "case-specific" holding instead of a rule that would provide practical guidance for the police in the field and for the lower courts.[166] Accordingly, his dissent also contrasted with Justice Breyer's "totality of circumstances" approach.[167]

Chief Justice Roberts disagreed with the majority's interpretation of the assumption of risk principles applied in *Matlock*, arguing that a defendant's protection of privacy

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[161] *Randolph*, 547 U.S. at 125 (Breyer, J., concurring); *see also id.* at 121 (majority opinion) (stating that "we have to admit that we are drawing a fine line" by finding a search unreasonable as to the potential defendant who is at the door and objects, but not unreasonable as to "the potential objector nearby but not invited to take part in the threshold colloquy").

[162] *Id.* at 125 (Breyer, J., concurring) ("[T]he Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever changing complexity of human life.").

[163] *Id.* at 127.

[164] *Id.*

[165] Justice Scalia's separate dissenting opinion was a direct response to Justice Stevens's concurrence. *See supra* note 160; *Randolph*, 547 U.S. at 142-45 (Scalia, J., dissenting) (arguing that, although Justice Stevens seemed to be concerned about the relative rights of women to their husbands, the "effect of [the] decision . . . is to give men the power to stop women from allowing police into their homes—which is . . . *precisely* the power that Justice Stevens disapprovingly presumes men had in 1791"). Justice Thomas's dissent argued that when Janet Randolph led the police officer into the house and showed him the evidence of drug use, this was not a search under the Fourth Amendment. *Id.* at 145-46 (Thomas, J., dissenting); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (holding that when a citizen led police into a house to show them evidence relevant to the investigation of a crime, the citizen was not acting as an agent of the police, and no Fourth Amendment search had occurred).

[166] *Randolph*, 547 U.S. at 142 (Roberts, C.J., dissenting) (citing *id.* at 126-27 (Breyer, J., concurring)).

[167] *Id.* at 126-27 (Breyer, J., concurring).

cannot depend upon whether or not he is present at the door at the time of the search, as the majority maintains.[168] The Chief Justice argued that a third party's consent is valid even when the primary party is present and objects because the police would only be searching common areas over which both residents have authority.[169] If a person does not want to assume the risk that a co-occupant might consent to a police search, he can place his belongings "in an area over which others do *not* share access and control."[170] This search was also justified, Roberts argued, on grounds that the majority's rule would hinder the police from entering houses where domestic violence is occurring.[171] This is because, under the majority rule, the police cannot enter a home to assist with the dispute if the abuser objects to the police's entry.[172]

VI. POST-*RANDOLPH* ANALYSIS

According to a Northern District of California court, "*Randolph* does not represent a great change in Fourth Amendment jurisprudence."[173] Since *Randolph*, very few state or federal courts have used its holding to rule that third-party consent searches are unreasonable where the primary party is physically present at the time of the search. There are two reasons why this is so. First, the fact-specific and narrow holding of *Randolph* marginalizes its importance as a Fourth Amendment case.[174] Second, even if *Randolph* does apply factually, public policy arguments may weigh in favor of state and federal courts adhering to the pre-*Randolph* majority view that these types of warrantless searches are reasonable. A solution to this problem is to modify the definitions of "physically present" and "express refusal" so that they can be interpreted more uniformly while also compromising between conflicting policy considerations.

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[168] *Id.* at 134-35, 134 n.1 (Roberts, C.J., dissenting).

[169] *Id.* at 133-36.

[170] *Id.* at 135.

[171] *Id.* at 139.

[172] *Id.*

[173] United States v. McGregor, 2006 U.S. Dist. LEXIS 22503, at *15 n.4 (N.D. Cal. Apr. 17, 2006).

[174] David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 293 (2006).

A. Randolph*'s Narrow Holding and Lack of Factual Applicability*

Since the Supreme Court's decision, many state and federal courts have distinguished their cases factually from *Randolph*, finding it to be inapplicable.[175] These courts have interpreted the decision quite narrowly, as if it has "almost no precedential value."[176] In theory, of course, *Randolph* represents a marked change and provides a new restriction to the third-party consent exception to Fourth Amendment search and seizures.[177] In practice, however, the *Randolph* holding applies only in factually limited situations in which three distinct events must occur: (1) a third party must properly give consent to the search; (2) the defendant must be physically present at the time of the search; and (3) the defendant must expressly refuse to give consent to the search. While the first event is not much of an issue because *Randolph* does not change the third party's authority to consent, the other two events can only occur in limited circumstances. As a result, these lower courts are finding that, despite the Supreme Court's response to this issue, *Randolph* simply does not apply in many third-party consent cases. Courts consistently distinguish *Randolph* in one of two ways: they either find that the defendant did not expressly object to the search, or that the defendant was not physically present at the time of the search.

1. Express Refusal Distinctions

One group of courts has distinguished *Randolph* on the grounds that the defendant did not expressly object or refuse to consent to the search. These courts have held that a warrantless search conducted with the consent of a third party is valid. The Supreme Court in *Randolph* did not elaborate on the extent of the refusal of consent necessary other than to state that it must be expressly given.[178] In *United States v.*

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[175] *See infra* Part VI.A.1-2.

[176] Moran, *supra* note 174, at 284-85. *But see, e.g.*, United States v. Groves, 470 F.3d 311, 318-20 (7th Cir. 2006) (using *Randolph* as current precedent to address the issues within the third-party consent doctrine).

[177] *See supra* Parts III and IV.

[178] *Randolph*, 547 U.S. at 120 ("We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.").

McKerrell, the Tenth Circuit strictly interpreted this to mean that implied refusal by a physically present primary party is insufficient to trump a third party's consent.[179] In *United States v. Murphy,* the Kansas District Court found that it did not have to analyze the case under *Randolph* because the defendant waived his reliance on this case.[180] The court stated in dicta, however, that if it were to analyze the case under *Randolph*, it would find that the Supreme Court case was distinguishable because there was not an unequivocal refusal of consent by the defendant.[181] In *Murphy*, when the agent entered the home, the defendant stated, "You cannot go in there. It's not my home, but none gave you permission. It belongs to my mother."[182] The court stated that this would not be a personal objection.[183] In *United States v. Reed*, the Northern District of Indiana also differentiated between objecting to consent and declining to consent.[184] For example, when asked for consent to search his house, the defendant in *Reed* told the police, "[T]hat's not my place, I can't give you permission for that."[185] The court found that the defendant did not expressly refuse to consent in the manner that *Randolph* requires.[186]

Similarly, in *United States v. Dominguez-Ramirez,* the Middle District of Florida held that "consent with qualification" is not a refusal to consent.[187] There, the defendant was arrested,

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[179] United States v. McKerrel, 491 F.3d 1221, 1227 (10th Cir. 2007).

[180] United States v. Murphy, 437 F. Supp. 2d 1184, 1192 (D. Kan. 2006). The *Randolph* decision came down after this case was briefed, but before the evidentiary hearing. The defendant chose not to rely on this case because he believed he had no right to relief under *Randolph*. Instead of arguing the lack of valid third-party consent, he contended that no one consented to the search at all. *Id.* at 1189 n.4.

[181] *Id.* at 1193.

[182] *Id.* at 1192.

[183] *Id.* at 1193.

[184] United States v. Reed, No. 3:06-CR-75, 2006 WL 2252515, at *5 (N.D. Ind. Aug. 3, 2006) (holding that a search was reasonable where the defendant's co-occupant gave consent while the defendant was in police custody and had earlier declined the police officer's request for his consent).

[185] *Id.* The fact that the police believed and later confirmed that it was in fact the defendant's premises did not change the court's ruling that the defendant's response was not an objection. *Id.* at *5.

[186] *Id.* at *4-5.

[187] United States v. Dominguez-Ramirez, No. 5:06-CR-6-OC-10, 2006 WL 1704461, at *9 (M.D. Fla. June 8, 2006); *see* LAFAVE, *supra* note 37, at 8, § 8.1 (explaining that a consent may be expressly or implicitly limited by terms such as time, duration, area, or intensity, and police officers must take these limitations into account); *see also* Model Code of Pre-Arraignment Procedure § SS 240.3 (1975) (providing that a consent search "shall not exceed, in duration or physical scope, the limits of the consent given"); Mason v. Pulliam, 557 F.2d 426, 428 (5th Cir. 1977) ("Nothing in *Schneckloth* suggests . . . that a consent which waives Fourth Amendment

and he told agents during an interview that they could search his residence but not until the morning because he did not want them to disturb his sickly wife.[188] The agents subsequently went to the defendant's house and asked the defendant's wife for permission to search the house then or, if she would prefer, they would come back in the morning. She told the police that it was fine for them to search then.[189] The defendant relied on *Randolph* to argue that by telling the agents to wait until the morning he had made a refusal.[190] The court disagreed, ruling that this was merely "a time frame on the consent" and not a refusal to consent.[191] The *Dominguez-Ramirez* court noted, however, that even if the defendant's refusal to consent to the search were valid, his absence from the premises at the time of the refusal distinguishes the case.[192]

In sum, lower courts have been very strict about what they consider "express refusal" in these situations. As a result, *Randolph* is typically distinguished and third-party consent searches—even where the primary party is present—have seldom been found unreasonable.

2. Physically Present Distinctions

Another group of cases has distinguished *Randolph* on the grounds that the defendant was not present at the time a third party gave consent. This is a result of the Supreme Court majority's unwillingness to undermine the *Matlock* rule to the extent that a person who is nearby but not actually part of the conversation with the police officers is not physically present, but is instead an "absent, nonconsenting person."[193] While determination of consent is based on an objective standard,[194]

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rights cannot be limited, qualified, or withdrawn"); United States v. Griffin, 530 F.2d 739, 744 (7th Cir. 1976) (finding that limitations placed on consent were valid, but holding that the officers acted within those limitations); United States v. Miller, 491 F.2d 638, 650 (5th Cir. 1974) (finding that any limitations on the consent given were withdrawn by the defendant's later actions); United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971) (stating that consent searches are reasonable only if they kept within the bounds of the consent given).

[188] *Dominguez-Ramirez*, 2006 WL 1704461, at *2.

[189] *Id.* at *2-3.

[190] *Id.* at *9.

[191] *Id.*

[192] *Id.* (stressing that *Randolph* had "left intact the rule that the consent of only one co-tenant is sufficient so long as the objector is not present").

[193] Georgia v. Randolph, 547 U.S. 103, 121-22 (2006); *see* United States v. Matlock, 415 U.S. 164, 170 (1974).

[194] *See supra* Part II.B.

the determination of "physically present" or "nearby but not part of the colloquy" is not.[195] *Randolph* did not define these terms other than to say that one making an objection at the door would be considered physical present.[196] Yet the door cannot be the only valid place to object, since a colloquy regarding consent can easily take place elsewhere, such as the front yard or backyard. Thus, despite the Court's bright-line rule, there is still room for interpretation over what is close enough to be "at the door," and what is required to be "part of the colloquy." Without further guidance, it is utterly subjective whether a suspect is sufficiently close to the door to be entitled to participate in the colloquy regarding consent. The police and, ultimately, the prosecutor might perceive the defendant to be at a far enough distance so as to be considered merely "nearby" at best. The defendant, in contrast, could perceive his distance at the time he objects to be close enough to be considered part of the colloquy.

In *United States v. Reed*, the Northern District of Indiana found that *Randolph* was distinguishable on the ground that the defendant was not physically present at the time of the search, even though the police knew he declined consent earlier.[197] Because *Randolph* did not discuss other types of withheld consent, such as where the primary party makes his objection to a search before the police arrive at the home, the Court found no reason to apply the *Randolph* holding.[198] The court argued that *Randolph* does not require the police to obtain affirmative consent from all known occupants of a residence.[199] In *United States v. Davis*, the defendant was asleep in the house and did not object when the police knocked on the door and shouted into the house; therefore, the court found *Randolph* inapplicable because he was not physically present at the door.[200] In *Davis*, the court did not have to

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[195] *Randolph*, 547 U.S. at 121.

[196] The closest the Court comes to explaining how these terms should be defined is the majority's distinction between the facts of *Randolph* and those of *Matlock* and *Rodriguez*. *See Randolph*, 126 U.S. at 121.

[197] United States v. Reed, No. 3:06-CR-75, 2006 WL 2252515, at *4-6 (N.D. Ind. Aug. 3, 2006).

[198] *Id.* at *5.

[199] *Id.* at *6.

[200] United States v. Davis, No. 1:06-CR-69, 2006 WL 2644987, at *2 (W.D. Mich. Sept. 14, 2006); *see also* United States v. Crosbie, 2006 WL 1663667 at *1-2 (S.D. Ala. June 9, 2006) (declining to extend *Randolph's* "narrow holding" where defendant claimed he did not have an opportunity to object after his wife ordered him out of the home, and a subsequent search was conducted pursuant to the wife's consent); Starks

factually distinguish *Randolph* because the Supreme Court specifically stated that a potentially objecting co-occupant does not override the consent of a third party if the objecting co-occupant is nearby but not at the door and objecting.[201]

Thus, in addition to their strict construal of "express refusal," lower courts interpret *Randolph*'s definition of "physically present" very narrowly as well. This is not surprising, however, because under *Randolph* a third-party consent search could be reasonable even where the primary party is not very far from the search.

3. *The* Randolph *Precedent Still Results in Some Invalidation of Searches*

Not all courts, however, have refused to find a third-party consent search unreasonable under *Randolph*. In *United States v. Hudspeth*, the Eighth Circuit originally held that a third party's consent was invalid where the defendant expressly objected to consent even though he was not present at the time of the search.[202] This would have expanded the *Randolph* holding and would have been contrary to *Reed*,[203] but the court vacated its opinion after a rehearing en banc. In *Hudspeth*, the police asked the defendant for consent to search his home computer, which he refused to give.[204] Subsequently, he was arrested and taken to jail while the police went to the defendant's home and obtained consent to search from his wife.[205] Distinguishing the hypothetical situation discussed in *Randolph*, in which a "potential objector" is not asked for his consent,[206] the court held that, because "[the defendant] was invited to participate and expressly denied his consent to search,"[207] there was a disputed invitation that made the search

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v. State, 846 N.E.2d 673, 677-78, 682 n.1 (Ind. Ct. App. 2006) (distinguishing *Randolph* on the basis that, where police were informed the suspect was in the house and police subsequently entered the house to find the suspect, the defendant was not physically present at the time a third party consented).

[201] *Randolph*, 547 U.S. at 121.

[202] United States v. Hudspeth, 459 F.3d 922, 930-31 (8th Cir. 2006), *vacated* 2007 U.S. App. LEXIS 16854 (8th Cir. Jan. 4, 2007).

[203] United States v. Reed, No. 3:06-CR-75, 2006 WL 2252515, at *10 (N.D. Ind. Aug. 3, 2006).

[204] *Hudspeth*, 459 F.3d at 925.

[205] *Id.*

[206] *Randolph*, 547 U.S. at 121-22.

[207] *Hudspeth*, 459 F.3d at 931 (citing *Randolph*, 547 U.S. at 121).

unreasonable.[208] A dissenting opinion argued that *Randolph* should not apply because the defendant was not physically present, and that to hold otherwise would mean that *Randolph* overruled *Matlock*, which it expressly did not do.[209]

Relying on the original *Hudspeth* opinion (before it was vacated), the Northern District of Illinois in *United States v. Henderson* suppressed evidence that was the fruit of a third-party consent search.[210] In *Henderson*, after the police entered the defendant's house, the defendant told them to get out, but the police obtained consent to search the house from the defendant's wife.[211] Under *Randolph,* because the defendant was physically present when he objected to the search, a search based on the subsequent third-party consent was unreasonable.[212] A Texas Court of Appeals, in *Odom v. Texas*, also held that a third party's prior consent was invalid when the appellant, a guest at the third party's home, was present at the time of the search and expressly objected to it.[213]

B. Public Policy Implications

Although courts distinguish *Randolph* on an objective, factual basis, there are also subjective, public policy reasons that make the *Randolph* holding undesirable. The public policy implications of the *Randolph* rule include, ironically, the risk of infringing a defendant's constitutional rights as well as the risk posed to domestic violence victims. Because there was such a clear majority view among the courts before *Randolph*, it is not surprising that various public policy considerations support the pre-*Randolph* majority position, which deemed a search reasonable and valid when a third party consents while a physically present primary party refuses consent. Nevertheless, other public policy arguments favor adopting what had been the minority view, as *Randolph* did, that such searches should be deemed unreasonable and therefore invalid.

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208 *Id.* (citing *Randolph*, 547 U.S. at 113).

209 *Id.* at 933 (Riley, J., concurring in part and dissenting in part).

210 United States v. Henderson, 2006 WL 3469538, at *2-3 (N.D. Ill. 2006).

211 *Id.* at *1.

212 *Id.* at *2.

213 Odom v. Texas, 200 S.W.3d 333, 335-37 (Tex. App. 2006).

1. Infringing a Physically Present Defendant's Rights Due to Law Enforcement Objectives

Although, ideally, *Randolph* should serve to benefit suspects, in reality a suspect's Fourth Amendment rights are more likely to be infringed in these types of third-party consent situations. As the *Randolph* majority acknowledges, it may be too difficult or impractical for the police to obtain consent from a suspect in the vicinity of the premises being searched.[214] The Court insisted that the police do not have to take affirmative steps to find a potentially objecting co-occupant if they already have the consent of another co-occupant, as long as the police do not deliberately remove the potential objector from the scene to avoid an objection.[215] Yet the police are not prohibited from avoiding an objection by excluding the potential objector from the dialogue in which the police seek consent. With respect to what is considered an objecting co-occupant, the Court drew the line at a co-occupant who is nearby but not part of the colloquy with the police regarding consent.[216] The co-occupant who talks to one police officer on the driveway while his co-occupant gives consent to another police officer at the door is not physically present, and a search would be reasonable as to him. Thus, despite the "bright-line" rule,[217] law enforcement agents still have the flexibility not to engage the suspect in a conversation in order to avoid an objection to a third party's consent. As a result, defendants in these situations could easily be precluded from the opportunity to object to a search, which would interfere with their expectation of privacy and Fourth Amendment rights if the fruits of that search were admitted as evidence against them at trial.

Articulating this point, the dissent in *Hudspeth* stated that finding these types of searches unreasonable will encourage the police to avoid obtaining the defendant's consent.[218] By not asking a primary party for his consent, the police will avoid the problem of his potential objection and thus render the search reasonable under *Matlock* if they obtain

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[214] Georgia v. Randolph, 547 U.S. 103, 122 (2006).

[215] *Id.*

[216] *Id.* at 121.

[217] *Id.* at 125 (Breyer, J., concurring).

[218] United States v. Hudspeth, 459 F.3d 922, 933-34 (8th Cir. 2006) (Riley, J., concurring in part and dissenting in part).

consent from a co-occupant.[219] Worried about this "troubling situation," one commentator lamented that "police could circumvent the 'ask the present primary party' rule simply by taking the primary party into custody and removing him from the scene, as they did in *Matlock*."[220] In *United States v. DiModica*, this situation confronted the Seventh Circuit.[221] The defendant's wife called the police to report domestic abuse and gave permission to search her home.[222] When the police arrived at the house, they arrested the defendant based on probable cause of abuse.[223] The defendant's wife was not present at the time of the search.[224] The defendant analogized the facts of this case to *Randolph* and argued that the police arrested him to avoid his potential objection to the search.[225] Nevertheless, the court easily distinguished *Randolph* because here the police never asked the defendant for his consent as they had in *Randolph*, nor did the defendant voluntarily express his objection to a search.[226] *DiModica*, however, is an example of a court relying on the subjectivity of the police's judgment. Because they already had the consent of a third party through the defendant's wife, the police decided to arrest the suspect instead of attempting to obtain his consent to search.[227] Alternatively, the police could have attempted to obtain a search warrant before arriving at the suspect's home. Nevertheless, the court in *DiModica* ratified the police's decision to arrest the defendant by rejecting his *Randolph* argument that the police deliberately avoided his potential objection; thus the court found that the defendant's Fourth Amendment rights were not violated even though he was present.[228]

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[219] *Id.*

[220] Wright, *supra* note 40, at 1871 (citing United States v. Matlock, 415 U.S. 164, 170 (1974) (Douglas, J., dissenting)).

[221] United States v. DiModica, 468 F.3d 495 (7th Cir. 2006).

[222] *Id.* at 496-97.

[223] *Id.* at 497.

[224] *Id.*

[225] *Id.* at 500. The majority in *Randolph* expressly noted that the police cannot remove a potentially objecting co-occupant for the sake of avoiding a possible objection. Georgia v. Randolph, 547 U.S. 103, 121 (2006).

[226] *DiModica*, 468 F.3d at 500.

[227] Because the defendant's wife was not home with the defendant at the time, she was not at risk of further harm, unlike other situations of domestic violence.

[228] *DiModica*, 468 F.3d at 500.

2. Protecting Defendants' Rights at the Expense of Possible Domestic Violence Victims

A second public policy reason that may make the *Randolph* decision unappealing to lower courts is the fear that domestic violence victims will not be protected because of the new constitutional protections given to the defendant.[229] There is a concern about protecting a domestic violence victim in a situation where the victim calls the police but the alleged abuser does not allow the police to enter and stop the abuse.[230] Although *Randolph* recognizes domestic violence as an exigency that may justify a warrantless search despite a primary party's objection over a third party's consent,[231] the new doctrine could cause the police to hesitate before entering or searching a house when it is not clear that domestic violence is occurring.

When it is not clear that domestic violence is taking place, it will not be clear whether exigent circumstances are present. In *Randolph*, Chief Justice Roberts found the majority's reliance on exigent circumstances insufficient to justify an entry during a domestic dispute.[232] Scholars have different views about the efficacy of the exigent circumstances exception to the warrant requirement under circumstances indicating domestic violence. One Fourth Amendment scholar, Wayne LaFave, supports the proposition that "'where the defendant has victimized the third party . . . the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant's objections.'"[233] Other commentators complain that a court's decision on third-party consent searches where there is disputed permission will depend on the court's degree of understanding of domestic violence.[234] Roberts argued that it

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[229] *See Randolph*, 547 U.S. at 139-42 (Roberts, C.J., dissenting).

[230] *Id.*

[231] *Id.* at 118-19 (majority opinion) (stating that certain exigencies may justify immediate action by the police).

[232] *Id.* at 139-40 (Roberts, C.J., dissenting) (arguing that the majority's rule would prohibit the police from entering to assist during a domestic dispute if the potential abuser who had prompted police involvement objected to the entry).

[233] LAFAVE, *supra* note 37, at 161, § 8.3(d) (quoting Comment, 41 U. CHI. L. REV. 121, 136 n.88 (1973)); *see also* United States v. Donlin, 982 F.2d 31 (1st Cir. 1992); United States v. Hendrix, 595 F.2d 883 (D.C. Cir. 1979); People v. Sanders, 904 P.2d 1311 (Colo. 1995). *But see* Silva v. State, 344 So. 2d 559 (Fla. 1977).

[234] *E.g.*, Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801,

would be better to "give effect to a consenting spouse's authority to permit entry into her house to avoid such situations."[235] However, the difference between justifying the search upon a domestic violence exigency and effectively allowing the victimized spouse's consent to override the other spouse's objection may prove to be insignificant in practice.[236] One way or another, the police will find a way to protect victims of domestic violence in these situations. Although courts and the government should be wary of how it plays out, it is unlikely that the result of *Randolph* will have much of an effect on this issue.

3. Arguments Supporting *Randolph*: Preserving Peace and Possessory Interests

Despite arguments against the adherence to *Randolph*, there are also public policy considerations that support the *Randolph* holding. One policy is the preservation of possessory interests in the property.[237] The *Randolph* majority based much of its reasoning on the theory that no one occupant should have a superior property right over the other.[238] The Court in *Randolph* also opined that it is not reasonable to recognize a greater expectation of privacy for overnight houseguests than for the co-occupant of a home.[239] With these ideas in mind, consider this hypothetical situation: Michael and Jennifer are husband and wife and share a house together. Their friend

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1156 (1993) (arguing that in Commonwealth v. Rexach, 20 Mass. App. Ct. 919 (1985), the court "demonstrated an in depth understanding of the dynamics of domestic violence" as it held that a warrantless search was valid on the wife's consent because "following the defendant into the bedroom" despite his objections "was justified by the exigent circumstances exception to the warrant requirement").

[235] *Randolph*, 547 U.S. at 140.

[236] Because *Randolph* still allows the police to enter over a resident's objection in the case of an emergency situation, *Randolph* does not have much of a practical impact. Moran, *supra* note 174, at 292; *see also* Stephen Henderson, *Justices Limit Home Searches*, PHILA. INQUIRER, March 23, 2006, at A01 (quoting a Burlington County prosecutor, "I don't think this [decision] will hamper police. . . . [They] presently have the authority to enter when there is evidence of domestic violence occurring or having occurred."); Charles Lane, *High Court Restricts Right of Officers to Enter Homes*, BATON ROUGE ADVOC., March 23, 2006, at A1 (quoting a chief criminal deputy, "[A]s far as this Sheriff's Office is concerned, our duty to protect life in an emergency will always win out over the possible suppression of evidence.").

[237] Abrams, *supra* note 15, at 973.

[238] *Randolph*, 547 U.S. at 114 (majority opinion); *see also* LAFAVE, *supra* note 37, at 160, § 8.3(d) (explaining that there are no superior property rights only where occupants have equal use of place, and that this principle does not apply to children).

[239] *See supra* Part V.

Thomas, their houseguest, is sleeping on the living room sofa for the night. The police knock on the door, and Michael, Jennifer, and Thomas all answer the door. The police do not have a warrant, but they ask all three occupants whether they can enter and search the living room. Thomas, the houseguest, refuses to give consent. Michael also refuses. Jennifer, however, does give consent. The Court suggested that if it did not rule the way it did, then this search could be valid as to Michael, a resident of the house, but not valid as to Thomas, the houseguest.[240] The absurdity of recognizing a greater expectation of privacy for a houseguest than for a co-occupant undermines the protection of privacy rationale behind the Fourth Amendment.

Another policy reason in favor of *Randolph* is that it promotes peace and tranquility among joint occupants.[241] By invalidating searches in which there is a dispute between the two occupants over whether to allow the police to enter, the Court created a rule that minimizes interference in such private disputes. There will be less chance of increasing the flare-up between the two occupants by respecting the wishes of the objector rather than the consenter. An objector may be furious at a consenter for allowing the police to invade the privacy of his home, whereas the consenter would typically be only frustrated at most. Even so, the consenter is not hindered from providing the police with evidence or information to assist them in obtaining a search warrant.[242] The *Randolph* holding protects the sanctity of the home and continues to demonstrate that our society favors searches pursuant to a warrant.[243] It is important to remember that the presumption is that warrantless searches are unreasonable under the Fourth Amendment.[244] Thus, there are strong reasons to support and adhere to the holding of *Randolph*.

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[240] *Randolph*, 547 U.S. at 113 (explaining that if that our society gives a legitimate expectation of privacy to an overnight houseguest, "it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim").

[241] Abrams, *supra* note 15, at 973.

[242] *See* Coolidge v. New Hampshire, 403 U.S. 443, 487-89 (1971).

[243] Timothy H. Everett, *Developments in Connecticut Criminal Law: 2005*, 80 CONN. B.J. 185, 189 (2006).

[244] *See supra* Part II.

C. *Modifying* Randolph *by Defining "Physically Present" and "Express Refusal"*

The fact that many federal and state courts have distinguished *Randolph* within a year after it was decided indicates that there is a problem with its holding. Either *Randolph* is objectively narrow and only applies in certain factual situations, or the lower courts are subjectively reluctant to apply *Randolph* because of public policy reasons. Instead of providing uniformity on the issue, *Randolph*'s case-by-case formula maintains the split in authority that existed before the case was decided.[245] There are two main issues on which lower courts distinguish the Supreme Court's decision: (1) what is an express refusal of consent and (2) what is the meaning of being "physically present" in a warrantless search scenario?[246] The Supreme Court did not fully clarify either of these terms in its holding, which gives lower courts flexibility in defining them. As some courts uphold these types of warrantless searches while other courts invalidate them, our constitutional law is inconsistent. The Court should address both questions to ensure uniformity. By interpreting "physically present" broadly and "express refusal" narrowly, it will promote consistency among future court rulings.

1. "Physically Present" Primary Parties

a. Physical Presence Should Be Defined Broadly

The physical presence of a primary party at the time the police seek, obtain, or apply a third party's consent is a crucial factor in protecting the primary party's personal autonomy. Requiring the consent of both present co-occupants strikes the appropriate balance between preserving individual liberties and permitting police expediency.[247] This approach reaffirms that *Matlock* third-party consent searches are only valid against "absent, nonconsenting persons."[248] Such an interpretation incorporates the *Randolph* doctrine to the extent

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[245] *See Randolph*, 547 U.S. at 142 (Roberts, C.J., dissenting).

[246] *See supra* Part VI.A.

[247] State v. Brunetti, 883 A.2d 1167, 1181 (Conn. 2005) (reasoning that while an assumption-of-risk analysis is reasonable when applied against an absent co-occupant, applying it against a present objecting co-occupant would render as inferior that co-occupant's constitutional rights, given the "manifest preference for warrants").

[248] United States v. Matlock, 415 U.S. 164, 170 (1974). *See supra* Part III.A.

that third-party consent searches are invalid with respect to a present and objecting primary party.[249] Simultaneously, this definition requires a significant deviation from the *Randolph* holding, which validates searches where the same person is "nearby but not invited to take part in the threshold colloquy."[250]

Although much of the pre-*Randolph* commentary and many cases did not interpret *Matlock* this way, *Randolph* surprisingly made it clear that physically present primary parties are protected under the Fourth Amendment. However, *Randolph* limited the significance of this holding by not extending this protection to potentially objecting parties who are merely nearby.[251] The *Randolph* majority went too far to preserve the holding of *Matlock* by allowing the police to bypass nearby suspects without asking for their consent. Expanding the term "physically present" in this context would not undercut *Matlock*, as the *Randolph* court feared it might,[252] because searches are still valid against absent, nonconsenting co-occupants. For example, although the Court interpreted *Matlock* as drawing a distinction between a present and an absent primary party, it declared that the defendant in *Matlock* who was in a squad car near the house during the search was absent. That reasoning blurs the line between a primary party who is absent and one who is present.

The significance of deeming searches unreasonable as to a physically present co-occupant who expressly refuses consent is meaningless unless the definition of physical presence gives that co-occupant an *opportunity* to express his refusal. Nearly all defendants will be considered absent if the definition of physical presence does not include those who are "nearby but not part of the colloquy."[253] Yet the Court did not define "nearby" and only recognized objections made at the door.[254] As a result, the government can bypass the consent requirement by instructing the police to only ask for consent when the suspect is in very close proximity to the scene and to avoid or

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[249] *Randolph*, 547 U.S. at 120.

[250] *Id.* at 121.

[251] *Id.*

[252] *Id.*

[253] *Id.*; *see supra* Parts V.C, VI.A.2.

[254] *Randolph*, 547 U.S. at 121.

ignore him when he is a short distance away.[255] Physical presence should be defined broadly so as not to exclude a nearby defendant from Fourth Amendment protection and to respect his possessory interests when he is close enough to object to the search. This would bolster the Fourth Amendment protection that has been eroded by recent Supreme Court jurisprudence.[256]

One possible definition for this term is to deem an occupant to be physically present if he is visible to the police or if the police know that he is on or near the premises (for example, sleeping or in the yard). This is a subjective approach, and the test would be whether the police officer actually knows or should know where the primary party is at the time of the search. The *Randolph* majority was concerned that requiring the police to take affirmative steps would be impractical or too complicated.[257] However, for their own protection, it does not seem too onerous a burden for the police to at least attempt to learn the location of their suspect before attempting to enter his residence. This approach would prevent law enforcement agents from purposely remaining ignorant of a suspect's location as a way of circumventing the requirement of asking for his permission. Even where the police knock on the door and a co-occupant third party answers and readily consents, the police are still likely to first ask where the suspect is before entering.[258] Presumably, the officers would want to protect themselves from a possible attack by the suspect.

Albeit similar, this approach is not as strict as the one proposed by Elizabeth Wright, where the police must make a reasonable attempt to obtain the consent of the primary party regardless of the primary party's location.[259] The key difference here is that the police need only seek a primary party's consent if he is visible to the police or if the police know or should know that he is physically present on the premises. Wright's

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[255] *See supra* Part VI.B.1. Alternatively, the police could find that exigencies were present that justified removing him from the scene by arresting him, or that justified conducting an immediate search of the premises without his consent. *See Randolph*, 547 U.S. at 118-19 (stating that certain exigencies may justify immediate action by the police). Whether the police would contrive such exigencies is beyond the scope of this Note.

[256] *See* Kloster, *supra* note 27, at 104-15.

[257] *Randolph*, 547 U.S. at 121-22.

[258] John C. Klotter & Jacqueline R. Kanovitz, CONSTITUTIONAL LAW FOR POLICE 214 (3d ed. 1977) ("It is quite common for the officer to arrive at the residence of the suspect and find that the suspect is not home.").

[259] Wright, *supra* note 40, at 1873-76.

approach goes too far by requiring that the police "take reasonable steps to obtain consent from the party at whom the search is directed, whether or not that party is present at the scene."[260] The intermediate approach better balances the conflicting policy interests.

b. A Physically Present Primary Party Must Have an Opportunity to Refuse

Once the primary party is considered physically present, he should be given an opportunity to express his objection to the search. This would require the police to at least indicate to the primary party that they will be conducting a search, but not necessarily to ask him for permission. This prevents the problem discussed earlier where the police purposely remove the potential objector from the conversation with his co-occupant regarding consent.[261] Instead of automatically "losing out," as *Randolph* suggests, he should be invited to take part in the colloquy. If the primary party is considered to have a reasonable expectation of privacy, which would invoke Fourth Amendment rights, and if he is physically present at the time of the search, then the police should make an effort to invite either consent or a refusal to the search.

For example, consider a situation in which the primary party is restrained by the police in the front yard about fifteen feet from the front door and does not know that the police are obtaining consent to conduct a search from his co-occupant. In that situation, the primary party does not have the opportunity to express his refusal to the search because he may not know such a search is about to occur.[262] If the police are successful in obtaining consent from the third party, they should notify the primary party that they are about to conduct a search. If the primary party knows that the police are obtaining his co-occupant's consent to conduct a search and the primary party expresses his refusal from the yard, that refusal must be

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[260] Wright, *supra* note 40, at 1874-75.

[261] *See supra* Part VI.B.1.

[262] *See* Note, *supra* note 22, at 2203 (arguing that "courts stand unanimous in finding consent invalid when individuals are not fully aware that consent was being sought"). *But c.f.* Donald v. State, 903 A.2d 315, 318-21 (Del. 2006) (finding that a defendant who had an opportunity to object to a search after answering the door to probation officers did not express any objection when the officers began the search).

respected even though he is "nearby but not [taking] part in the threshold colloquy."[263]

A case in which this approach could have been applied was *Starks v. State*, from the Indiana Court of Appeals, in which the police were informed that the suspect, Starks, was in the basement of the house prior to entering the residence.[264] Knowing that Starks was armed, the police entered and placed him in handcuffs.[265] The police then conducted a search based upon a third party's consent without first discussing it with Starks, who was clearly present and not about to go anywhere.[266] The court held that, under *Primus v. State*,[267] it was unnecessary for the police to ask for his consent when they already had the permission of a third party.[268] While *Randolph* discounted the idea of requiring the police to take affirmative steps to find a potentially objecting co-occupant, this approach would only require affirmative steps to be taken when the co-occupant had already been found. The issues involved with locating the co-occupant, such as time consumption, impracticalities, and lack of clarity about whom to locate,[269] are limited when the potentially objecting co-occupant is within feet of the police and when it would take seconds, or minutes at most, to indicate that they will be conducting a search.

The *Randolph* majority feared that "every cotenant case would turn into a test about the adequacy of the police's efforts to consult with a potential objector."[270] The Court reasoned that, since most suspects actually give their consent when asked for it,[271] the police should not be required to ask the primary party for his consent. Yet for this precise reason, assuming that supposition is true, requiring the police to tell a physically present suspect of an impending search would not interfere with the goals of law enforcement. If the primary party is likely to give consent and actually does so, no third-party consent is needed at all. If the primary party does not consent but is at least informed of the impending search and

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263 *See Randolph*, 547 U.S. at 121.

264 Starks v. State, 846 N.E.2d 673, 677 (Ind. Ct. App. 2006).

265 *Id.* at 677-78.

266 *Id.* at 678.

267 813 N.E.2d 370, 374 (Ind. Ct. App. 2004).

268 *Starks*, 846 N.E.2d at 681-82, 682 n.1 (distinguishing *Randolph* in that Starks was not physically present or did not expressly refuse to consent to the search).

269 *Randolph*, 547 U.S. at 121-22.

270 *Id.* at 122.

271 *Id.*

does not object, the prosecutor has a stronger argument that the search was reasonable, rather than having to rely on the adequacy of the third-party consent alone. By adopting this approach, law enforcement agents do risk receiving an express refusal to a search request, but in the more common scenario where the primary party consents or acquiesces, the facts would likely support a finding that the search was reasonable under *Randolph*.

This approach can be illustrated through the example of when the primary party is asleep. If the police know that the primary party is asleep while the police obtain a third party's consent, an attempt to wake him should be made either by the police or his co-occupant. The *Randolph* majority considered this scenario, but rejected it so as not to undercut *Rodriguez* and also to draw the "fine line" for reasonableness of these searches when the defendant is at the door and objecting.[272] This result, however, is too harsh for the primary party. In *United States v. Davis*, for example, the defendant, who was asleep in his house, was considered "absent" because he did not come to the door after the police knocked and shouted before entering.[273] Even though the defendant was presumably not too far from the door, this was still considered an absence under *Randolph*.[274] This further illustrates that the difference between being considered absent or present is fundamental to the protection of a defendant's Fourth Amendment rights.

What would happen if the primary party woke up in the middle of the search and objected to it? Would the police stop the search and not use any evidence they found against him? In order to maintain our "widely held social expectations,"[275] someone should tell the primary party that his property is being searched by the police instead of having the suspect wake up to find the police rummaging through his belongings. Such actions run counter to a person's expectation of privacy and thus are inconsistent with a key concept of the Fourth Amendment. If no one is available to wake a primary party before the search, the police should then obtain a warrant.

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[272] *Randolph*, 547 U.S. at 121. *See* Illinois v. Rodriguez, 497 U.S. 177 (1990) (holding that a search was reasonable where the defendant was asleep and the police did not rouse him before entering and searching the premises). *See supra* Part III.B.

[273] United States v. Davis, No. 1:06-CR-69, 2006 WL 2644987, at *2 (W.D. Mich. Sept. 14, 2006).

[274] *See Randolph*, 547 U.S. at 121. *See supra* note 196.

[275] *Randolph*, 547 U.S. at 111.

Without such a requirement, the police may not bother making any attempt to obtain a sleeping primary party's consent and instead begin the search before he awakes and has an opportunity to object. This would be analogous to removing the primary party to avoid his possible objection, which *Randolph* prohibits.[276]

Therefore, the *Randolph* rule should be modified to provide a more expansive definition of "physically present" and to require the police to at least notify a physically present primary party that they will be conducting a search. This is necessary even though it undercuts the *Matlock* rule. The *Matlock* rule should apply to absent primary parties, and the *Randolph* rule should apply to present primary parties. As a result, there would be less confusion about which case applies under a given set of circumstances.

2. "Express Refusal" Should Be Defined Narrowly

Once the primary party is considered physically present and the police have told him about the search, the primary party then has the opportunity to make an express refusal to the search. The determination of whether there is express refusal by the primary party should be based on the objective reasonableness of a police officer, as in any consent case.[277] It should be the responsibility of the defendant to expressly object or make a refusal to the search when he is given the opportunity to do so. Under *Randolph*, the police cannot validly conduct a warrantless search where at least one present co-occupant expressly refuses to consent to the search.[278] The Court should continue to have a strict requirement of the term "express refusal" because this will strike an appropriate balance with a more expansive definition of physically present.[279] While law enforcement agents should be required to maximize the number of co-occupants included in the consent colloquy, agents should not be required to refrain from

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[276] *Id.* at 121.

[277] *See supra* notes 26-28 and accompanying text; *see also* Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing, inter alia, *Rodriguez*, 497 U.S. at 183-89 (1990)) (noting that the "standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

[278] *Randolph*, 547 U.S. at 120.

[279] *See supra* Part VI.C.1.

searching where one co-occupant expressly consents and another does not expressly refuse. The Court should go a step further, however, by defining the parameters of express refusal. Although *Randolph* did hold that the refusal must be unequivocal, courts have been interpreting this phrase differently, with some courts applying *Randolph* and others not.[280] A more uniform definition of express refusal will make it simpler to determine if the search was reasonable under the circumstances.

For example, the term "express refusal" could require that a primary party clearly indicate his unequivocal objection to the search in the negative. This does not require one particular way for a primary party to express refusal, as long as it is reasonable for an officer to understand that an objection was made. For example, a primary party does not need to say "I refuse to consent to a search" in order for an express refusal to be recognized. A simple "No" or "I don't want you to search" should be sufficient. Thus, the police would have the simple task of determining whether the primary party's statement, whether unsolicited or upon request, unequivocally objects to the search.

There is a clear difference, however, between objecting to a search and declining to consent.[281] Declining to consent should not be sufficient to create a dispute over permission to enter or search, and therefore it should not invalidate a third-party consent search. For example, silence in response to a request for consent should not be considered an express refusal. Nor should any statement that the police could reasonably understand to be an abdication of authority over the premises being searched.[282] If the primary party says to the officer "It's not my home; you can't go in there," this would not be an express refusal because the primary party has not unequivocally stated his personal objection to the search.[283]

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[280] *See supra* Part VI.A.1.

[281] *See* United States v. Reed, No. 3:06-CR-75, 2006 WL 2252515, at *5 (N.D. Ind. Aug. 3, 2006).

[282] *See* United States v. Sandoval-Espana, 459 F. Supp. 2d 121, 136 (D.R.I. 2006); *see also* United States v. Jones, 184 Fed. Appx. 943, 947-48 (11th Cir. 2006) (holding that the defendant did not have standing to challenge the validity of a search because he failed to show a subjective expectation of privacy where he stated that he had no authority to give consent to search the residence, despite having personal effects there).

[283] *See* United States v. Murphy, 437 F. Supp. 2d 1184, 1192-93 (D. Kan. 2006); *see also Reed*, 2006 WL 2252515 at *5 (citing *Randolph*, 547 U.S. at 113) (reasoning that if a visitor is at the door of a residence, his confidence about whether he

Similarly, if the primary party answers "It's not mine" in response to a request for permission to search the vehicle he is operating after obtaining the consent of a co-passenger, this also would not be an express refusal.[284] Instead of expressing his objection, such a statement merely indicates to the police that the primary party does not believe the police have permission. On the other hand, "consent with qualification"[285] should be respected if the primary party makes clear that he refuses and if it is reasonable for the police officer to understand the limitations on the consent.[286]

There are several reasons why the standard for express refusal should be defined more narrowly. First, in these situations, there would already be third-party consent, which has been recognized as valid consent for years in Supreme Court jurisprudence.[287] The express refusal must be sufficiently clear to the police to render the permission disputed, which would negate the validity of the third party's consent.[288] Just as a warrantless consent search will only be reasonable with clearly expressed consent from the primary party,[289] a warrantless third-party consent search should only be unreasonable if the primary party expressly refuses in the face of a third party's express consent. Second, as mentioned above, most suspects when asked for consent are likely to give it.[290] Thus, where one co-occupant expressly gives consent, there is a rebuttable presumption that another co-occupant will also consent if given the opportunity. If the primary party objects, he should be required to rebut this presumption with a clear showing that he, unlike his co-occupant, is not the typical suspect who gives his consent when asked. Third, the search being done without the primary party's consent is only of

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has permission to enter "would be unshaken if one occupant said 'come in,' and the other said, 'this isn't my place'").

284 *See Sandoval-Espana*, 459 F. Supp. 2d at 136.

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

286 *See* supra Part IV.A.1.

287 *See supra* Part III.

288 *See Randolph*, 547 U.S. at 113-20; *see also* Fisher, *supra* note 74, at 204-05.

289 *See, e.g.*, Johnson v. United States, 333 U.S. 10, 12-15 (1948) (finding that a search violated the Fourth Amendment when the defendant merely acquiesced to an officer's demand to enter); *see also* Note, *supra* note 22, at 2203 (noting that courts consistently find consent searches invalid where there is "some indication [that] consent is not clearly given").

290 *See* Georgia v. Randolph, 547 U.S. 103, 122 (2006).

common areas that the co-occupants share.[291] Therefore, the primary party has already assumed the risk that his co-occupant will expose that area to the police in his absence,[292] and he must clearly cancel that assumption when he is present.

Thus, there should continue to be a strict requirement of the defendant to expressly object to a search when a third party has consented to it. The refusal should be sufficiently clear to the police such that a reasonable law enforcement agent would understand that the defendant disputes the consent offered by a co-occupant.

VII. CONCLUSION

The United States Supreme Court changed the warrantless third-party consent search doctrine in *Georgia v. Randolph*.[293] Previously, under *United States v. Matlock*,[294] warrantless consent searches of the common area of a home were deemed reasonable if a person with common authority over the premises consented to the search.[295] A majority of federal and state courts had interpreted *Matlock* to mean that third-party consent searches are reasonable even if the defendant is physically present at the time of the search and objects to the search.[296] A minority of state courts had interpreted *Matlock* to mean that a third party's consent is not reasonable against the defendant if the defendant is present at the time of the search and does not consent to it. Under *Randolph*, the Supreme Court adopted the minority view by holding that third-party consent searches are unreasonable as to the defendant if the defendant is physically present and expressly refuses to give consent to the search.[297] Despite the new doctrine, which in theory expands Fourth Amendment rights, the *Randolph* holding has not had a substantial impact on invalidating third-party consent searches as unreasonable in lower federal and state courts. *Randolph's* narrow holding allows lower courts to maintain the previously existing majority view by distinguishing *Randolph* on the basis that a

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[291] *See Randolph*, 547 U.S. at 133-36 (Roberts, C.J., dissenting).

[292] *See supra* Part III.A.

[293] *Randolph*, 547 U.S. at 108.

[294] 415 U.S. 164 (1974).

[295] *Id.* at 171.

[296] *See Randolph*, 547 U.S. at 108 n.1; *see also supra* Part III.A.

[297] *Randolph*, 547 U.S. at 108, 120.

defendant was either not physically present at the time of the search or did not expressly object to the search.[298] To remedy this continuing lack of uniformity, the Supreme Court must modify the existing doctrine. The term "physically present" should be defined more broadly so that more suspects have the opportunity to object to the search, and consequently more defendants' Fourth Amendment rights are protected.[299] The term "express refusal" should be defined more narrowly so that when the police obtain the consent of a third party, an ambiguous refusal by the defendant does not prevent a search from being reasonable.[300] As a result, lower courts will be less likely to distinguish *Randolph* when it is appropriate, and conflicting public policy concerns—such as permitting police expediency while preserving defendants' Fourth Amendment rights—will be adequately balanced.

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[298] *See supra* Part VI.A.

[299] *See supra* Part VI.C.1.

[300] *See supra* Part VI.C.2.

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