POST-*GEORGIA V. RANDOLPH*: AN OPPORTUNITY TO RETHINK THE REASONABLENESS OF THIRD-PARTY CONSENT SEARCHES UNDER THE FOURTH AMENDMENT

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INTRODUCTION

When police entered Kevin Henderson's southwest Chicago home on an autumn Sunday morning, he greeted them with profanity-laced instructions to leave.[1] Minutes later, the officers hauled him to jail for domestic battery.[2] Henderson's wife, Patricia, signed a consent-to-search form and led the officers to the home's attic.[3] The warrantless search turned up an assortment of narcotics, drug paraphernalia, and a variety of weapons in the attic, including an AR-15 automatic assault rifle and live ammunition, and a machete, a crossbow, additional ammunition, and an explosive device in the basement.[4] Prosecutors charged Kevin with possessing with intent to distribute narcotics and possessing weapons as a felon.[5]

Consent searches as illustrated above implicate practical values as significant as nearly any other in Fourth Amendment jurisprudence and are likely law enforcement's prevailing method of conducting warrantless searches.[6] The U.S. Supreme Court has long deemed warrantless third-party consent searches reasonable for Fourth Amendment purposes,[7] and until 2006, the Court steadily

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1. United States v. Henderson, No. 04 CR 697, 2006 U.S. Dist. LEXIS 88404, at *1-2 (N.D. Ill. Nov. 29, 2006), *reversed*, 536 F.3d 776, 777 (7th Cir. 2008); *see also* Marc McAllister, *What the High Court Giveth the Lower Courts Taketh Away: How to Prevent Undue Scrutiny of Police Officer Motivations Without Eroding* Randolph*'s Heightened Fourth Amendment Protections*, 56 CLEV. ST. L. REV. 663, 686-87 (2008) (discussing the district court's suggestion that the testifying officers altered their story regarding Henderson's salutation).

2. *Henderson*, 2006 U.S. Dist. LEXIS 88404, at *2.

3. *Id.*

4. *Id.* at *2-3.

5. *Id.* at *4.

6. *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 261 n.5 (4th ed. 2006) (citing RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 21 (1984) for the statistic that ninety-eight percent of warrantless searches are consent searches).

7. *See* United States v. Matlock, 415 U.S. 164, 171, 172 n.7 (1974); Charles R. Johnson, Recent Case, Henry v. Commonwealth, *175 S.E.2d 416 (Va. 1970)*, 39 U. CIN. L. REV. 807, 808 (1970) (noting that third-party consent doctrine is "an anomalous doctrine").

broadened this exception to the warrant requirement.[8] The Court has used a two-prong rationale in upholding third-party consent searches: (1) individuals who share a residence or an automobile assume the risk that the co-occupant could allow a search; and (2) a co-occupant has authority to consent in their own right.[9]

Yet in 2006 the Court seemed to reverse course in *Georgia v. Randolph*.[10] A five-justice majority held that a co-occupant could not validly consent when another co-occupant: (1) is physically present; and (2) expressly refuses to consent at the home's entrance.[11] Soon after *Randolph*, critics predicted police would simply remove non-consenting co-occupants, despite the Court's suggestion in dicta that such tactics were impermissible.[12] Kevin's removal, along with other similar cases, illustrates the fulfillment of these predictions.[13]

But courts have diverged and the circuit courts of appeals are split over whether *Randolph* bars searches when police obtain consent to search from a third-party in the absence of the non-consenting party.[14] The circuit split provides the Court with an opportunity to revisit and rejuvenate this maligned doctrine,

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8. *See* Florida v. White, 526 U.S. 559, 569 (1999) (Stevens, J., dissenting) (noting that "exceptions have all but swallowed the [Fourth Amendment's] general rule" requiring warrants); Illinois v. Rodriguez, 497 U.S. 177, 198 (1990) (Marshall, J., dissenting) (allowing persons with mere apparent authority to consent to searches purges "some of the liberty" protected by the Fourth Amendment).

9. DRESSLER & MICHAELS, *supra* note 6, at 273.

10. Georgia v. Randolph, 547 U.S. 103, 121-22 (2006); *see* C. Dan Black, Note, Georgia v. Randolph*: A Murky Refinement of the Fourth Amendment Third-Party Consent Doctrine*, 42 GONZ. L. REV. 321, 334 (2007) (noting that *Randolph* provides a "much needed refinement"). *But see* McAllister, *supra* note 1, at 668 (concluding that *Randolph* is not a "watershed case").

11. *Randolph*, 547 U.S. at 122-23.

12. *Id.* at 121-22. See Stephanie M. Godfrey & Kay Levine, *Much Ado About* Randolph*: The Supreme Court Revisits Third Party Consent*, 42 TULSA L. REV. 731, 748 (2007), for the prediction that police would relocate a search's target to avoid *Randolph*'s holding. *See also* Andrew Fiske, *Disputed-Consent Searches: An Uncharacteristic Step Toward Reinforcing Defendants' Privacy Rights*, 84 DENV. U. L. REV. 721, 735 (2006) (arguing that *Randolph* incentivizes police to remove occupants "most likely to refuse a search").

13. *See* United States v. Henderson, 536 F.3d 776, 777-78 (7th Cir. 2008), *cert. denied*, No. 08-9834, 2009 WL 1043883 (U.S. Oct. 5, 2009); *see also* United States v. Travis, 311 F. App'x 305, 310 (11th Cir. 2009) (holding that Travis's arrest was not for the purpose of avoiding his "possible objection"); United States v. McKerrell, 491 F.3d 1221, 1228-29 (10th Cir. 2007) (holding that there was no evidence police arrested McKerrell to avoid objections); United States v. Alama, 486 F.3d 1062, 1066-67 (8th Cir. 2007) (rejecting a claim that officers arrested Alama to avoid objections); United States v. Parker, 469 F.3d 1074, 1078-79 (7th Cir. 2006) (noting that although police arrested Parker before requesting a co-occupant's consent, there was no evidence they arrested him to coerce consent).

14. *See Henderson*, 536 F.3d at 783 (noting that Henderson's case, *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) (en banc) and *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008) are "materially indistinguishable" based on the case's facts); cases cited *supra* note 13; discussion *infra* Part IV.A.

and *Randolph* opens the door for the Court to restore meaning to co-occupants' rights to be secure "against unreasonable searches and seizures."[15]

This Note first analyzes the Fourth Amendment's history of protecting liberty and the development of third-party consent search doctrine. Part II examines *Randolph*, its undercutting of existing third-party consent doctrine, and lower courts' responses. Part III proposes a new approach for determining the reasonableness of third-party consent searches that endeavors to better support Fourth Amendment liberties.

I. DIMINISHING FOURTH AMENDMENT RIGHTS: "NOTHING NEW UNDER THE SUN"[16]

Over the centuries, legal systems have treated the right to be free from unreasonable government searches as anything but a jealously guarded liberty.[17] Government officials operating in societies ostensibly governed by the rule of law have authorized unfettered searches and seizures since the 1500s.[18] Even after the courts and society recognized the danger of unrestricted searches, abuses continued to the extent that when thirteen of Great Britain's North American colonies declared independence, the revolution's leaders instituted limits on their government's search and seizure powers.[19] But U.S. courts have failed to consistently guard this liberty, particularly in its third-party consent doctrine.[20]

A. A Brief History of Fourth Amendment Liberties

The mid-sixteenth-century Tudor dynasty used broad search and seizure

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15. U.S. CONST. amend. IV; *see* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (offering that Fourth Amendment law "is an embarrassment"); Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 3-4 (2009) (proposing that the Supreme Court's "emphasis on liberty" in *Lawrence v. Texas*, 539 U.S. 558 (2003), "provides a fruitful way of reorienting Fourth Amendment protections when considering particular kinds of interpersonal relationships" for the purposes of re-considering the Court's third-party consent doctrine).

16. *Ecclesiastes* 1:9 (New King James Version) ("That which has been is what will be, That which is done is what will be done, And there is nothing new under the sun.").

17. *See* FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL 82 (1956).

18. *See id.*

19. *See* U.S. CONST. amend. VI; *see also* Godfrey & Levine, *supra* note 12, at 732 (noting that "the British government's willingness to abandon [principles] for its own ends convinced the framers that more proactive steps were necessary to prevent similar abuses").

20. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 288-90 (1973) (Marshall, J., dissenting) (arguing "police always have the upper hand" in consent searches); Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1726 n.128 (2009) (noting that both *Randolph* and the Court's 1966 decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), "place[d] limits on police, but not on their discretion. They both create procedural hurdles, but once clear of them, police can largely act as they see fit").

powers to control printing presses.[21] Queen Mary I chartered a printing company with powers to "search whenever it shall please them in any place, shop, house, chamber, or building of any printer, binder or bookseller."[22] The system experienced some success, but within decades, the government's power diminished and individuals demanded "to see, to hear, and to know."[23] But nearly a century later, Parliament attempted to censor printers who criticized the legislative body by ordering searches and seizures.[24] The printers resisted, and after decades of suppression, efforts to control the press through search and seizure lost practical effectiveness as the searches' targets successfully obtained arrest warrants against the searchers through common-law courts.[25]

British common law ultimately evolved to where authorities could only grant search warrants "for stolen goods," and courts deemed warrants "obnoxious" if they were not particularized as to the location.[26] In 1604 in *Semayne's Case*,[27] Sir Edward Coke famously said, "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose."[28] Nevertheless, the British readily discarded these principles for the convenience of government officials.[29] The "general warrant" granted government officers an expansive authority to search and seize an indeterminate number of persons and items and was the "most powerful legal weapon" against government critics.[30] British authorities used this legal bludgeon to have "the secret cabinets and bureaus . . . thrown open to . . . search and inspection . . . whenever the secretary of state [thought] fit to charge, or even to suspect, a person . . . of a seditious libel."[31] Lord Chief Justice Pratt planted the seeds of the Fourth Amendment in 1763 when he recognized that the general warrant's power subverts liberty.[32]

The British government's abuses prompted Revolutionary leaders to enshrine protections against such abuses in a Bill of Rights.[33] John Adams reported that the Boston merchants' 1761 attempt to block new writs of assistance sparked the

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21. SIEBERT, *supra* note 17, at 82.

22. *Id.* at 82 (citing I A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554-1640 xxxi (Edward Arber ed., 1950)).

23. *Id.* at 86-87.

24. *Id.* at 175.

25. *Id.* at 175-177.

26. Davis v. United States, 328 U.S. 582, 603-04 (1946) (Frankfurter, J., dissenting).

27. 77 Eng. Rep. 194, 195 (K.B. 1604).

28. *Id.* (instituting the "knock and announce" rule).

29. Godfrey & Levine, *supra* note 12, at 732-33.

30. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983); *see* BLACK'S LAW DICTIONARY 1723 (9th ed. 2009).

31. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 327-28 (1972) (Douglas, J., concurring) (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 1063, 95 Eng. Rep. 807 (K.B. 1765)).

32. Stewart, *supra* note 30, at 1370.

33. Godfrey & Levine, *supra* note 12, at 732-33.

"flame of fire," which bore "the Child Independence" that fifteen years later "grew up to manhood, and declared himself free."[34] At George Washington's urging, Congress passed a Bill of Rights that contained the Fourth Amendment,[35] which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[36]

The academy continues to debate the Fourth Amendment's original meaning.[37] Often forgotten is that past generations considered its protections "[s]o basic to liberty" that every state adopted its own version.[38] Yet scholars observe that the erosion of Fourth Amendment liberties in favor of police convenience produces "frightening" semblances of the despised general warrants that prompted the adoption of the Fourth Amendment.[39]

B. Early American Search and Seizure Jurisprudence

The leading search and seizure case is *Boyd v. United States*,[40] in which the U.S. Supreme Court held that "compulsory extortion" of a person's "private papers to be used as evidence to convict him" is no different from forcing individuals to testify against themselves in violation of the Fifth Amendment.[41] The Court, in language long substantively disregarded, recognized that "the [F]ourth and [F]ifth [A]mendments run almost into each other" with regard to

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34. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.1 (4th ed. 2009) (citing and quoting 10 C. ADAMS, THE LIFE AND WORKS OF JOHN ADAMS 247-48 (1856)). A Writ of assistance was a legal device customs officials used to search for smuggled products in buildings. *Id.*

35. *Id.*

36. U.S. CONST. amend. IV. See James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of* Robinson *and* Matlock, 1974 SUP. CT. REV. 165, 172 n.14 (1974), who notes that the House's version of the Amendment differed from what the Senate ratified and the States' adopted, diminishing arguments that the framers found significance in the precise wording.

37. For an extensive Fourth Amendment analysis, see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999), who argues that the modern understanding of the Fourth Amendment is the product of unanticipated developments.

38. *See* Davis v. United States, 328 U.S. 582, 604 (1946) (Frankfurter, J., dissenting).

39. *See* 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, 123 (1996).

40. 116 U.S. 616 (1886); *see* Carroll v. United States, 267 U.S. 132, 147 (1925) (noting that *Boyd* is the leading case on search and seizure); *see also In re* January 1976 Grand Jury, 534 F.2d 719, 724 (1976) (same).

41. *Boyd*, 116 U.S. at 630.

searches and forcibly extorting testimony from criminal suspects.[42] *Boyd* and *Mapp v. Ohio*,[43] where the Court applied the exclusionary rule to state courts through the Fourteenth Amendment's Due Process clause, raised the Fourth Amendment from "a dead letter."[44]

One of the Court's first consent search cases was *Amos v. United States*.[45] Here, the Court rejected an argument that when a suspect's wife granted police access to the home she shared with the suspect, she "waived" the suspect's constitutional rights.[46] But in *Davis v. United States*,[47] the Court held that a willing consent made a warrantless search reasonable under the Fourth Amendment.[48] In *Davis*, Justice Douglas distinguished *Amos* by noting that the search occurred in public during business hours and not in a private residence.[49] In dissent, Justice Frankfurter strongly objected to law enforcement's ability to skirt the limits of the warrant requirement by obtaining consent, reasoning that the Constitution did not "make it legally advantageous not to have a warrant, so that the police may roam freely" in search of evidence.[50]

Officers regularly seek consent for convenience's sake in lieu of getting a warrant.[51] Police perform over ninety percent of warrantless searches using consent.[52] Law enforcement talk openly about consent searches' benefits. One officer went so far as to state that officers are encouraged "to try to talk their way

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42. *Id.*; *see* Schneckloth v. Bustamonte, 412 U.S. 218, 246-47 (1973) (noting that *Miranda*'s rational, where statements obtained from a defendant unaware of his rights violated the Fifth Amendment privilege against self-incrimination, did not apply to consent searches).

43. 367 U.S. 643, 655 (1961). A main purpose of the rule is to deter police from excessive searches. *See* LAFAVE, *supra* note 34, § 1.1. Scholars criticize the rule because of the "pressure" to reduce the rule's reach. *See* James Boyd White, Comment, *Forgotten Points in the 'Exclusionary Rule' Debate*, 81 MICH. L. REV. 1273, 1281 (1983) (noting that courts do not administer the rule sensibly).

44. *Mapp*, 367 U.S. at 670 (Douglas, J., concurring) (citing Wolf v. Colorado, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting)); Abel v. United States, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting).

45. 255 U.S. 313 (1921); *see* George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 545 (2003) (noting that *Amos* is the earliest consent search case).

46. *Amos*, 255 U.S. at 317 (declining to consider whether the wife could waive her absent husband's constitutional rights because it was "perfectly clear" she was coerced).

47. 328 U.S. 582 (1946).

48. *Id.* at 593. The District Court did not believe Davis's claim that the agents "threatened to break down the door" if he did not provide them access. *Id.* at 586-87.

49. *Id.* at 592.

50. *Id.* at 595 (Frankfurter, J., dissenting).

51. 4 LAFAVE, *supra* note 34, § 8.1.

52. DRESSLER & MICHAELS, *supra* note 6, at 261 n.5 (citing VAN DUIZEND, *supra* note 6, at 21); Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 415 (1986).

into a search."[53] But according to the New Jersey Attorney General's Office, consent searches are not effective because most "do not result in a positive finding" of criminal activity.[54] Consent searches encourage distrust of the judicial system, and no one has empirically validated the claim that consent searches produce efficient results.[55]

Critics condemn consent searches arguing that no one would consent willingly to a search that uncovers criminal activity.[56] Courts exalt the form of a person's consent—an expression of words that seem to suggest consent despite the circumstances—over a genuine consent.[57] In *Schneckloth v. Bustamonte*,[58] in which the Court held that the State did not have to demonstrate that an individual had knowledge of the right to refuse consent to a warrantless search,[59] Justice Thurgood Marshall said in dissent that consent searches permit a "game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police."[60] Justice Douglas, in his own dissent, noted that reasonable individuals might "read an officer's 'May I' as the courteous expression of a demand backed by force of the law."[61] Some scholars have called for a "per se ban on" the use of consent searches.[62] Others have

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53. Kate Shatzkin & Joe Hallinan, *Highway Dragnets Seek Drug Couriers—Police Stop Many Cars for Searches*, SEATTLE TIMES, Sept. 3, 1992, at B6. *See* Kathy Barrett Carter, *Senate Panel to Look at Profiling Bans*, STAR-LEDGER, May 9, 2002, at 45 (quoting former New Jersey Governor James E. McGreevey describing consent searches as "valuable" police tools).

54. PETER VERNIERO & PAUL H. ZOUBEK, OFFICE OF THE ATT'Y GEN. OF THE STATE OF N.J., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 28 (1999), http://www.state.nj.us/lps/intm_419.pdf.

55. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 260 (2001) (noting that the "magnitude of [the police's] interests are unclear").

56. *See id.* at 211-12 (arguing that "most people don't willingly consent"); JAY-Z, *99 Problems*, *on* THE BLACK ALBUM (Roc-A-Fella/Def Jam 2004) ("'Well, do you mind if I look round the car a littl' bit?' . . . And I know my rights so you gon' need a warrant for that . . . Nah, I ain't pass the bar but I know a little bit. Enough that you won't illegally search my shit.").

57. *See* Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 56-57 (1974) (noting that little weight should be given to a person's consent "if he extends the invitation to a policeman sitting on his chest and pounding his head on the steps").

58. 412 U.S. 218 (1973).

59. *Id.* at 248-49. The Court also held that the State must demonstrate that the consent was granted voluntarily and not the product of express or implied duress or coercion. *Id.* at 248.

60. *Id.* at 289-90 (Marshall, J., dissenting).

61. *Id.* at 275-76 (Douglas, J., dissenting) (citing Bustamonte v. Schneckloth, 448 F.2d 699, 701 (9th Cir. 1971)). Justice Douglas seems less excited about consent searches in *Schneckloth* than he was as the author of the majority in *Davis v. United States*, 328 U.S. 582, 593-94 (1946). *See supra* notes 47-49 and accompanying text.

62. *See* Strauss, *supra* note 55, at 271. *But see* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 562 (2009); Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2197-98 (2006) (arguing consent searches gives people "power to stand up for their own rights").

called for the elimination of consent searches in only specific situations.[63]

C. Third-Party Consent: Undermining Fourth Amendment Liberty Protections

Third-party consent searches draw on an ancient tactic employed by government officials to implicate individuals in crime.[64] One of the earliest recorded third-party consent searches occurred when Joseph, Egypt's overseer, ordered his steward to plant his silver goblet in his youngest brother's food bag.[65] As the brothers left Egypt, the steward stopped and accused them of goblet theft.[66] The brothers, astonished by the accusation, consented to a search and promised to be Joseph's slaves if the steward found the goblet in their belongings.[67] The text does not suggest whether the youngest brother objected, or whether he knew the silver goblet was in his sack, but the goblet's discovery provides an example of how third-party consent could cause harsh consequences.[68] The brothers returned to face their brother, but fortunately for them, Joseph maintained the ruse only temporarily.[69] For individuals in U.S. criminal justice systems, third-party consent searches have lasting consequences not likely contemplated when individuals agree to share property with their roommate, friend, or spouse.

The Supreme Court has paid little attention to third-party consent searches, despite their controversial nature.[70] Initially, the Court seemed reluctant to sanction third-party consent searches.[71] In *Chapman v. United States*,[72] the Court rejected landlord-tenant law as a means to decide whether an owner's consent to a search of a tenant's home made the search valid.[73] The Court held that allowing warrantless searches under a property owner's authority reduced "the Fourth Amendment to a nullity," as tenants' privacy would be subject to an owner's

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63. Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 133-34 (1998).

64. *See Genesis* 44:1-13.

65. *Id.* at 1-21; *see* ALAN M. DERSHOWITZ, THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN MORALITY AND LAW 186-87 (2000).

66. *Genesis* 44:6.

67. *Id.* at 8-9.

68. *Id.* at 11-12 ("Then each man speedily let down his sack to the ground, and each opened his sack. So he searched.") (New King James Version).

69. *Id.* at 44:13-45:1.

70. *See* 4 LAFAVE, *supra* note 34, § 8.3; *see also* Note, *Consent Searches: A Reappraisal After* Miranda v. Arizona, 67 COLUM. L. REV. 130, 148 (1967) (noting that co-occupant consent search admissibility problems are "most perplexing").

71. *See* 4 LAFAVE, *supra* note 34, § 8.3.

72. 365 U.S. 610 (1961). *Chapman* was the first third-party consent case since *Amos* forty years earlier. *See* 4 LAFAVE, *supra* note 34, § 8.3; *supra* notes 45-50 and accompanying text.

73. *Chapman*, 365 U.S. at 612, 617.

discretion.[74] But since the 1960s, the Court has framed Fourth Amendment liberties as a tension between privacy rights and the fact that individuals surrender some of those rights by sharing property.[75]

In *Stoner v. California*,[76] the Court held that the Fourth Amendment protects hotel guests against searches of their rooms despite a desk clerk's consent.[77] The Court concluded that Fourth Amendment rights would not "be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'"[78] The Court held that only the hotel guest's rights were at stake, and thus, only the guest could waive that right.[79] Legal scholars have noted that *Stoner* "could have sounded the death knell" of third-party consent searches if lower courts interpreted the decision to hold that third-party consent searches were valid only if "the consenting party was actually an agent of the nonconsenting party."[80] But in *Frazier v. Cupp*,[81] the Supreme Court adjusted its approach by launching the assumption of risk theory.[82]

Since the 1974 decision in *United States v. Matlock*,[83] the Supreme Court has held that a co-occupant's consent validates warrantless entries and searches.[84] Police arrested Matlock in the front yard of a home he rented with his girlfriend.[85] The officers knew that Matlock lived there, but did not ask him if they could search.[86] Instead, Matlock's girlfriend, wearing a robe and holding her son, allowed the officers to search, which turned up $4,995 in a diaper bag.[87]

In abandoning *Stoner*,[88] the Court held that consent from an individual

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74. *Id.* at 617 (quoting Johnson v. United States, 330 U.S. 10, 14 (1948) (alteration omitted)).

75. *See* Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 810 (1966); *see also* John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 659 (2008) (noting that reasonableness analysis has "devolve[d] into little more than an awkward balancing exercise between the needs of law enforcement and the interests of privacy").

76. 376 U.S. 483 (1964).

77. *Id.* at 488-89.

78. *Id.* at 488.

79. *Id.* at 489.

80. *See* Steven H. Bow, Case Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U. L. REV. 1087, 1104 (1973); Comment, *supra* note 75, at 801-03 (describing the agency principles as applied in the third party consent context).

81. 394 U.S. 731 (1969).

82. *Id.* at 740 (holding that people assume "the risk" that a third party will allow someone else to search shared property). The Court did not have to overrule *Stoner* because the police wanted to search a bag they believed the consenting party owned. 4 LAFAVE, *supra* note 34, § 8.3.

83. 415 U.S. 164 (1974); *see* Sharon E. Abrams, Comment, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963, 964 (1984) (noting that *Matlock* was the Court's first third-party consent case).

84. *See Matlock*, 415 U.S. at 171; *see also* U.S. CONST. amend. IV.

85. *Matlock*, 415 U.S. at 166.

86. *Id.*

87. *Id.* at 166-67.

88. 4 LAFAVE, *supra* note 34, § 8.3.

possessing "common authority" justifies warrantless searches.[89] In a footnote, the Court adopted a two-prong rule.[90] First, "common authority" could not be based on a "mere property interest [that] a third party has in the property."[91] Instead, the Court based "common authority" on "mutual use of the property by persons generally having joint access or control for most purposes."[92] The "common authority" made reasonable a co-occupant's consent to the search "in his own right."[93] Second, the Court recognized that co-occupants assume "the risk that one of their number might permit the common area to be searched."[94]

In 1990, the Court extended *Matlock*'s first prong in *Illinois v. Rodriguez*.[95] Gail Fischer told police that Edward Rodriguez assaulted her earlier that day in an apartment that she referred to as "our" apartment.[96] Fischer told the officers that Rodriguez was asleep in the apartment and consented to unlock the door to have Rodriguez arrested.[97] The officers entered without a warrant and saw drug paraphernalia and cocaine.[98] Police found Rodriguez asleep in the bedroom with more cocaine, and the State charged him with possession with intent to deliver.[99] At trial, Rodriguez moved to suppress the evidence, claiming that Fischer lacked the authority to consent to the entry because she moved out of the apartment weeks earlier.[100] The trial court agreed, finding that Fischer was merely an "infrequent visitor," and rejected the State's argument that as long as police reasonably believed Fischer had authority to consent, the police did not violate the Fourth Amendment.[101] The U.S. Supreme Court reversed the trial court, holding that a third party's *apparent* authority, as judged by the police, could make a search reasonable despite the fact that the third party lacked *actual* authority.[102]

Despite this expansion, the approach had a problem: if police requested

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

90. *Id.* at 172 n.7.

91. *Id.*

92. *Id.*

93. *Id.*; *see* Bow, *supra* note 80, at 1108 (noting that privacy expectations allow courts to "dilute or devalue" a non-consenter's "rights in order to add substance to the consenting party's independent right" to consent to a search).

94. *Matlock*, 415 U.S. at 172 n.7; *see* Virginia Lee Cook, *Third-Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121, 131-32 (1973) (noting that assumption of risk is inadequate because co-occupants generally are "unaware that they can refuse"). *But see* Abrams, *supra* note 83, at 983 (noting that "assumption of risk" could mean that non-consenters do not have privacy).

95. 497 U.S. 177, 179, 186 (1990).

96. *Id.* at 179.

97. *Id.*

98. *Id.* at 180.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 186.

consent to search and one co-occupant refused while another consented, applying the *Matlock* rationale no longer seemed so reasonable. Logically, *Matlock* dictated that the non-consenter assumed the risk that co-occupants could consent. Thus the warrantless search would be reasonable under *Matlock*'s rationale. But this is not what the Supreme Court concluded in 2006 in *Georgia v. Randolph*.[103]

II. *GEORGIA V. RANDOLPH*: THIRD-PARTY CONSENT DOCTRINE SHIFTS COURSE

Before 2006, the Supreme Court's third-party consent doctrine appeared to reinstate the hated general warrant.[104] Police merely had to find someone who *appeared to them* to have common authority over an area and convince them to agree to a search without informing them of their right to refuse, and courts would deem the search reasonable.[105] Although the Court had not definitively declared whether a present co-occupant could prevent such searches, the issue seemed all but decided for finding such warrantless searches reasonable.[106] But in 2006, the Supreme Court decided otherwise in its hotly contested five-to-three *Georgia v. Randolph* decision.[107] Not only did the Court find a search in the face of an express refusal of consent unreasonable, the Court also adjusted its approach to third-party consent searches,[108] suggesting that the time was ripe for a complete overhaul of the tattered doctrine.

A. Georgia v. Randolph*: The Road to "Widely Shared Social Expectations"*[109]

Scott Randolph separated from his wife, Janet, when she moved to Canada with their son in May 2001, but about three months later, she returned to their Georgia home.[110] Janet called the police early one morning to report that Scott took their son.[111] When the officers arrived, Janet told them about their marital troubles, her trip to Canada, and that Scott's cocaine habit caused them financial problems.[112] Not much later, Scott returned, told the police officers that he took their son to a neighbor's house because he worried that Janet would take him to Canada again, that he did not use cocaine, and that it was his wife who was the drug abuser.[113]

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103. 547 U.S. 103, 120 (2006); *see supra* text accompanying note 11.

104. Kloster, *supra* note 39, at 123.

105. *See Rodriguez*, 497 U.S. at 185-86.

106. *See* Posting of Orin Kerr to the Volokh Conspiracy, http://www.volokh.com/posts/1131323472.shtml (Nov. 6, 2005, 18:31) (predicting that the Supreme Court would not likely limit or overrule the broad *Matlock* interpretation).

107. *Randolph*, 547 U.S. at 105 (Alito, J., did not participate).

108. *Id.* at 136-37 (Roberts, C.J., dissenting).

109. *Id.* at 111 (majority opinion).

110. *Id.* at 106. It not clear whether she returned to reunite with Scott or get property. *Id.*

111. *Id.* at 107.

112. *Id.*

113. *Id.*

After an officer retrieved their son, Janet claimed that there was evidence of Scott's drug habit in the home, but when the officer asked Scott to consent to a search, he "unequivocally refused."[114] The officer turned to Janet who "readily" consented and took the officer to the upstairs bedroom where the officer found a powdery residue that he suspected was cocaine.[115] Scott, Janet, and the officer went to the police station, where the State indicted Scott for cocaine possession after a subsequent search of the home, authorized by a warrant, turned up copious amounts of drug-related items.[116] The trial court denied Scott's motion to suppress the evidence as a product of an invalid warrantless search due to his refusal to consent, ruling that Janet had the necessary authority to consent to the initial search.[117]

The Georgia Court of Appeals reversed, holding that "'if 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."[118] The court further held that the Fourth Amendment protected "the right to be free from police intrusion, not the right to invite police into one's home," and that it would be "disingenuous to conclude" that Scott waived his rights.[119]

The Georgia Supreme Court affirmed the Court of Appeals's reversal in a brief opinion that distinguished *Rodriguez* and *Matlock* on the basis that the police faced *physically present* co-occupants.[120] The court held that when a co-occupant was present and capable of objecting, the police were required to obtain the co-occupant's consent because holding otherwise exalted expediency over Fourth Amendment liberties.[121]

B. The U.S. Supreme Court's Ruling

When the U.S. Supreme Court granted certiorari in *Georgia v. Randolph*, some scholars predicted that the Court would reverse the Georgia Supreme Court, because the Court had long held "that anyone with common authority over a space can consent to a police search."[122] Instead, the U.S. Supreme Court adopted the Georgia Court of Appeals's bright-line rule:[123] if both parties are present, a

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 107-08.

118. Randolph v. State, 590 S.E.2d 834, 838 (Ga. Ct. App. 2003) (quoting Lawton v. State, 320 So. 2d 463, 465 (Fla. Dist. Ct. App. 1975)).

119. *Id.*

120. State v. Randolph, 604 S.E.2d 835, 836-37 (Ga. 2004).

121. *Id.* at 837 (concurring with and quoting State v. Leach, 782 P.2d 1035, 1040 (Wash. 1989)).

122. Kerr, *supra* note 106 (citing United States v. Matlock, 415 U.S. 164 (1974)).

123. *See* Georgia v. Randolph, 547 U.S. 103, 122-23 (2006); Jason M. Ferguson, Randolph v. Georgia*: The Beginning of a New Era in Third-Party Consent Cases*, 31 NOVA L. REV. 605, 622

co-occupant's consent cannot take precedence over another co-occupant's refusal.[124] The Court used a "widely shared social expectations" framework[125] in deciding that Fourth Amendment reasonableness dictates that "a physically present co-occupant's stated refusal to permit entry prevails" over another co-occupant's consent.[126]

Justice Souter's majority opinion in *Randolph* distinguished *Matlock* and *Rodriguez* on the basis that Randolph was physically present when he refused to consent.[127] Under his "widely shared social expectations" framework, Souter deemed that visitors to a shared residence "would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'"[128] Justice Souter admitted that if *Matlock* and *Rodriguez* were not "undercut by" *Randolph*'s holding, the Court was "drawing a fine line" because requiring police to locate suspects in order to obtain their consent "would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field."[129]

Yet in oral arguments, Justice Souter said that *Matlock* and *Rodriguez* would "become almost silly cases" if the Court accepted Randolph's "argument that the presence of the person there expressing an objection is what makes the difference" because *Matlock* and *Rodriguez* "rest upon an assumption that is clearly contrary to fact."[130] That false assumption was that the defendants in *Matlock* and *Rodriguez* supposedly gave up their Fourth Amendment right by failing to be present when the police requested the co-occupant to consent because Matlock was in a nearby police car, and Rodriguez was sleeping in the home.[131] It remains to be seen whether other justices agree with Justice Souter's assertion that *Matlock* and *Rodriguez* would become "silly cases" if an express objection by a present co-occupant make searches conducted with the consent of another co-occupant per se unreasonable.

Despite the Court's efforts to preserve *Matlock* and *Rodriguez*, *Randolph* places a crippling limitation on the concept that "authority to consent over a common area constitutes an actual individual right."[132] In addition, *Randolph*

(2007).

124. *Randolph*, 547 U.S. at 120; *see* Jason E. Zakai, Note, *You Say Yes, But Can I Say No?: The Future of Third-Party Consent Searches After* Georgia v. Randolph, 73 BROOK. L. REV. 421, 444-47 (noting that courts interpret "express refusal" strictly and "physically present" narrowly).

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

126. *Id.* at 106.

127. *Id.* at 120-21.

128. *Id.* at 113.

129. *Id.* at 121-22.

130. Transcript of Oral Argument at 46-47, *Randolph*, 547 U.S. 103 (No. 04-1067).

131. *See* Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 69-70 (2008).

132. Shane E. Eden, Student Article, *Picking the* Matlock*:* Georgia v. Randolph *and the U.S. Supreme Court's Re-Examination of Third-Party-Consent Authority in Light of Social Expectations*, 52 S.D. L. REV. 171, 177 (2007).

appears "to alter, if not in part overrule" *Rodriguez* by failing to discuss "the reasonableness of the officer's conduct."[133] *Matlock*'s first prong seemed to give co-occupants unlimited authority to consent to searches, but Justice Souter's opinion limits that right in concluding that the right is "not an enduring and enforceable ownership right" limited "by customary social usage."[134] The fact that Justice Souter hardly addressed the *Matlock*'s second prong to determine whether Randolph assumed the risk that his co-occupant would consent to a warrantless search suggests that prong is possibly a dead letter.[135] Chief Justice Roberts recognized as much in arguing in dissent that the Court "should acknowledge that a decision to share . . . necessarily entails the risk that those with whom we share may in turn choose to share . . . with the police."[136] The decision, although sensible, only narrowly protects the Fourth Amendment liberties of individuals who share, leaving ample ways for police to circumvent the substantive protections the decision attempted to implement.[137]

III. THE CIRCUIT SPLIT ON *RANDOLPH*'S RULE

Scholars predicted the confusion surrounding lower courts' interpretations of *Randolph*.[138] The most perplexing involve facts similar to Kevin Henderson's: police remove a non-consenting co-occupant, obtain another co-occupant's consent, and gather evidence against the removed, non-consenting party.[139] Removing the non-consenting party thwarts *Randolph* and places the resulting

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133. Ferguson, *supra* note 123, at 638. Abrams, *supra* note 83, at 977, notes that *Matlock* does not allow presence and objection to bar searches because that would mean that rights end when people leave, "an anomaly" the Court would not create. Yet, *Randolph* created that anomaly. *See Randolph*, 547 U.S. at 120-21; *see also*, Scott P. Johnson, *The Judicial Behavior of Justice Souter in Criminal Cases and the Denial of a Conservative Counterrevolution*, 7 PIERCE L. REV. 1, 14 (2008) (noting that "*Randolph* appeared to contradict precedent").

134. *Randolph*, 547 U.S. at 120-21.

135. *See id.* at 128 (Roberts, C.J., dissenting).

136. *Id.* at 142.

137. *See* Godfrey & Levine, *supra* note 12, at 731.

138. *See* George M. Dery, III & Michael J. Hernandez, *Blissful Ignorance? The Supreme Court's Signal to Police in* Georgia v. Randolph *to Avoid Seeking Consent to Search from All Occupants of a Home*, 40 CONN. L. REV. 53, 83 (2007) (concluding that *Randolph* "offered arguments that caused more questions than answers"); Madeline E. McNeeley, Case Note, *Validity of Consent to Warrantless Search of Residence when Co-Occupant Expressly Objects*, 74 TENN. L. REV. 259, 274 (2007) (concluding that *Randolph* abandoned "sound legal theory and reasoning in favor of conjecture and assumptions").

139. United States v. Henderson, 536 F.3d 776, 777-78 (7th Cir. 2008); *see* United States v. Ryerson, 545 F.3d 483, 489 (7th Cir. 2008) (holding that defendant's absence due to an arrest did not place the case under *Randolph* because the police did not arrest him to avoid objections); United States v. Chisholm, CR 07-795 (NGG)(MDG), 2008 U.S. Dist. LEXIS 106474, at *59 (E.D.N.Y. Oct. 29, 2008) (holding that the search of Chisholm's bedroom dressers, after his arrest, was valid because the consenter had authority to consent to search those areas).

search under *Matlock*.[140] This tactic's reasonableness has yet to be determined.[141] At least five justices believe that broadening of the third-party consent doctrine hit a speed bump and perhaps a roadblock.[142] The following three cases present an opportunity to explain how far Fourth Amendment protections extend in contested-consent searches.[143]

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140. Dery & Hernandez, *supra* note 138, at 55 (noting that *Randolph* "sends a signal to police to move people as if they were pieces on a chessboard" by making routine the moving of "persons away from seeing or hearing what occurs at the front door of the home").

141. *Compare Henderson*, 536 F.3d at 785 (limiting *Randolph* to situations where the non-consenting co-occupant is present), *with* United States v. Murphy, 516 F.3d 1117, 1124-25 (9th Cir. 2008) (holding that searches are invalid when a co-occupant objects regardless of location).

142. *See* McAllister, *supra* note 1, at 704; *see also* Zakai, *supra* note 124, at 464-65 (noting that third-party consent search doctrine changed as a result of *Randolph*).

143. The five justices who form *Randolph*'s majority, written by Justice Souter, include the three conventionally liberal justices: Stevens, Ginsburg, and Breyer. Georgia v. Randolph, 547 U.S. 103, 105 (2006); *see* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 327 (2007) (noting that justices Stevens, Souter, Ginsburg, and Breyer are the Court's four liberals "by contemporary standards"). The Court's swing member, Justice Kennedy, *see id.*, joined silently, *Randolph*, 547 U.S. at 105, but it was Justice Breyer's concurrence that drew attention as *Randolph*'s swing vote. *See* Ferguson, *supra* note 123, at 641 (noting that Chief Justice Roberts's dissent suggests "Justice Breyer may have been initially inclined to support" the dissenters because "Roberts states that Justice Breyer, 'joins what becomes the majority opinion'" (quoting *Randolph*, 547 U.S. at 142 (Roberts, C.J., dissenting))).

With the election of Democrat Barack Obama, the Court is poised to shift, but not necessarily in favoring an expansive role for the Court's *Randolph* decision. *See* Adam Liptak, *To Nudge, Shift or Shove the Supreme Court Left*, N.Y. TIMES, Feb. 1, 2009, at WK1 (suggesting that the next justices that are likely to retire after Souter are Stevens and Ginsburg). The author of the *Randolph* opinion retired and was replaced. *See* Michael A. Fletcher & Paul Kane, *Successor to Souter Anticipated by October*, WASH. POST, May 2, 2009, at A01. The two other liberal justices most comfortable with the *Randolph* decision (Justice Stevens's concurrence focused on criticizing Justice Scalia's "originalist" theory of constitutional interpretation, *see Randolph*, 547 U.S. at 123-24 (Stevens, J., concurring)) are predicted to be the next retirees. These predictions make an expansive vision of *Randolph* seem bleak. *See* Godfrey & Levine, *supra* note 12, at 750 (noting that the Court may decide "to emphasize the case-specific nature"). In addition, liberal journalists have cited Justice Sotomayor as having "a troubling record on criminal justice" issues. *See* James Ridgeway, *The Progressive Case Against Sotomayor*, MOTHER JONES (July 16, 2009), *available at* http://www.motherjones.com/politics/2009/07/progressive-case-against-sotomayor.

Yet Chief Justice Roberts indicated that he believed it was time to re-think Fourth Amendment jurisprudence, *Randolph*, 547 U.S. at 137, and Justice Alito, who was "something of a mystery when . . . nominated," Elliott M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 983 (2007), did not participate. *Randolph*, 547 U.S. at 123. A clue to the future of *Randolph* might be found in Justice Alito's 1985 application for a Justice Department promotion, where he wrote that his motivation for attending law school was partially based on his disapproval of the Warren Court. *See Oyez.org*, Samuel A. Alito, Jr., http://www.oyez.org/justices/samuel_a_alito_jr/ (last visited Mar. 1, 2009). During his

A. Randolph *Broadly Interpreted*

In *United States v. Murphy*,[144] police confirmed their suspicion that Stephen Murphy manufactured methamphetamine after detectives observed two individuals purchasing related ingredients and followed them to a storage unit used by Murphy.[145] After the individuals left the storage unit, a narcotics detective observed Murphy closing the unit's roll-up door.[146] When the detective knocked on the door, Murphy pulled the door up, and the detective saw a meth lab.[147] The detective arrested Murphy, read him his *Miranda* rights, conducted a protective sweep of the unit, and, after Murphy refused to consent to a full search of the unit, hauled him to jail.[148] A couple of hours later, narcotics detectives contacted the unit's renter, Dennis Roper, who told the detectives that he did not know about the lab, but permitted Murphy to stay there.[149] After the detectives arrested Roper on outstanding warrants, he signed a consent form for the officers to search the units where the detectives found and seized the lab.[150]

At trial, Murphy contested the validity of Roper's consent on the basis that it could not overrule his refusal to consent.[151] The prediction that officers would adapt to *Randolph* by merely removing the non-consenter proved correct initially.[152] The district court denied Murphy's motion based on *Matlock*'s two prongs: warrantless searches consented to by a co-occupant are reasonable, despite another co-occupant's refusal, because (1) a co-occupant has a right to permit a search and (2) the other co-occupant assumes the risk that the other

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confirmation hearings, Justice Alito maintained that those statements were merely an attempt to get a political job in a conservative administration. *Id.*

If the Court declines to extend the *Randolph* rule, the state high courts are more than capable of establishing an approach to contested third-party consent situations that protects its citizens from intrusive government searches. *See* discussion *infra* Part IV.D.

144. United States v. Murphy, No. CR 04-30057-AA, 2005 WL 2416828 (D. Or. Sept. 30, 2005), *aff'd in part, rev'd in part*, 516 F.3d 1117 (9th Cir. 2008).

145. *Id.* at *1.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at *1-2.

151. *Id.* at *2.

152. *See id.* at *4. *See also* United States v. Penney, No. 05-6821, 2009 U.S. App. LEXIS 17595, at * 26-27 (6th Cir. Aug. 7, 2009); United States v. Weston, No. 08-5094, 2009 CAAF LEXIS 642, at *9-10 (C.A.A.F. June 11, 2009); United States v. Travis, 311 F. App'x 305, 309-10 (11th Cir. 2009); United States v. Williams, 574 F. Supp. 2d 530, 545 (W.D. Pa. 2008) (holding that an objection to a search nullified a co-occupant's consent and that "a contrary reading . . . would allow police . . . to enter a residence to arrest [objecting] co-tenant[s]" on a co-occupant's consent); Eden, *supra* note 132, at 208 (noting that the *Randolph* created incentives for police to change procedures "to elude a defendant's fluctuating constitutional protection").

could consent.[153]

The Ninth Circuit Court of Appeals reversed on the basis that *Randolph* prohibits a co-occupant's consent from trumping another co-occupant's refusal.[154] The panel rejected the argument that *Randolph* was distinguishable because the objecting co-occupant was not present when the other co-occupant consented because there was no reason to allow Murphy's arrest to "vitiate" his objection.[155] The court found support in *Randolph* that a third party's consent is valid only if police do not remove the non-consenting co-occupant for the purpose "'of avoiding a possible objection.'"[156] The panel declared that *Randolph* established:

> that when one co-tenant objects and the other consents, a valid search may occur only with respect to the consenting tenant. It is true that the consent of either co-tenant may be sufficient in the absence of an objection by the other, either because he simply fails to object or because he is not present to do so. Nevertheless, when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him . . . .[157]

In *Martin v. United States*,[158] the District of Columbia Court of Appeals followed *Murphy*,[159] but this seems to be an exception with most courts narrowly interpreting *Randolph*.[160]

B. Randolph *Narrowly Interpreted*

In *United States v. Hudspeth*,[161] Missouri state police encountered Roy Hudspeth at his office while searching (with a warrant) for evidence relating to cold medicine sales.[162] After reading Hudspeth his *Miranda* rights, the officers showed him CDs of child pornography they found on his desk.[163] Hudspeth consented to a search of his office computer but refused to consent to a search of his home computer.[164] After jailing Hudspeth, the officers convinced his wife to

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153. *Murphy*, 2005 WL 2416828, at *4.

154. United States v. Murphy, 516 F.3d 1117, 1124 (9th Cir. 2008).

155. *Id.*

156. *Id.* (quoting Georgia v. Randolph, 547 U.S. 103, 121 (2006)).

157. *Id.* at 1125.

158. 952 A.2d 181 (D.C. Cir. 2008).

159. *Id.* at 187 (holding that after initial refusals, police could only obtain valid consent from the suspect (citing *Murphy*, 516 F.3d at 1125)).

160. McAllister, *supra* note 1, at 704-05 (noting the development of "multiple means of rejecting an otherwise legitimate *Randolph* claim").

161. United States v. Hudspeth, 459 F.3d 922 (8th Cir. 2006), *vacated on reh'g en banc*, No. 05-3316, 2007 U.S. App. LEXIS 16854 (8th Cir. Jan. 4, 2007), *reinstated in part en banc*, 518 F.3d 954 (8th Cir. 2008).

162. *Id.* at 924.

163. *Id.* at 924-25.

164. *Id.* at 925.

consent to the computer's seizure without telling her that he had refused.[165] The computer contained child pornography, including images of Hudspeth's stepdaughter.[166]

Hudspeth, charged with child pornography possession, attempted to suppress the evidence found on his home computer based on his express refusal to consent.[167] Hudspeth argued that his wife's consent could not "overrule" his denial of consent.[168] The district court denied Hudspeth's motion,[169] but an Eighth Circuit Court of Appeals panel reversed on the basis that *Randolph* made clear that police must obtain a warrant if a co-occupant refuses consent.[170]

The Eighth Circuit, sitting en banc, reversed with respect to the warrantless search by focusing on the fact that the case did not present the "'social custom' dilemma" that *Randolph* confronted because Hudspeth was not present when his wife consented.[171] Judge Riley noted for the majority that the reasons behind *Randolph*'s "narrow" holding did not apply because of the absence of Hudspeth's "physical presence *and* immediate objection."[172] Judge Melloy, author of the panel decision, dissented from the en banc decision on the basis that another person could not overrule Hudspeth's refusal to consent.[173]

C. Kevin Henderson and the Meaning of "Get the Fuck Out of My House"[174]

The final case involves Kevin Henderson and his wife's consent to search.[175] After prosecutors charged Henderson, he filed a motion to suppress on the basis that *Randolph* made warrantless searches of homes, over an "'express refusal . . . by a physically present resident,'" unreasonable, regardless of another's consent.[176] The district court found the reasoning of the Eighth Circuit's *Hudspeth* panel decision persuasive, holding that Henderson's "rather indelicate instruction for [the police] to leave his home surely included . . . that they . . .

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165. *Id.*

166. *Id.* at 926.

167. *Id.*

168. *Id.* at 928.

169. *Id.* at 926.

170. *Id.* at 931.

171. United States v. Hudspeth, 518 F.3d 954, 960 (8th Cir. 2008) (en banc).

172. *Id.* (emphasis in original). Judge Riley dissented in the panel decision. *Hudspeth*, 459 F.3d at 932 (Riley, J., dissenting).

173. *Hudspeth*, 518 F.3d at 962 (Melloy, J., dissenting). *See also* Benjamin M. Johnston, Note, *Cotenants Trumping Cotenants: The Eighth Circuit Takes a Diverse Stance on Cotenants' Authority Under the Fourth Amendment*, 73 MO. L. REV. 1327, 1346 (2008) (noting that *Hudspeth* was based on the suspect's "physical location at the time of denial").

174. United States v. Henderson, No. 04 CR 697, 2006 U.S. Dist. LEXIS 88404, at *2 (N.D. Ill. Nov. 29, 2006).

175. *See* discussion *supra* in INTRO.

176. *Henderson*, 2006 U.S. Dist. LEXIS 88404, at *4 (quoting Georgia v. Randolph, 547 U.S. 103, 120 (2006)).

refrain from searching the residence."[177]

The Seventh Circuit Court of Appeals reversed, holding that "*Randolph* left the bulk of third-party consent law in place; its holding applies only when the defendant is both present and objects to the search."[178] Henderson's objection "lost its force" when the police arrested him, and his wife "was free to consent to a search notwithstanding [his] prior objection."[179] The court noted that *Randolph* left unanswered whether "a refusal of consent by a 'present and objecting' resident" bars "the voluntary consent of another resident with authority after the objector is arrested and is therefore no longer 'present and objecting.'"[180] The court noted the circuit split, found the cases "materially indistinguishable," and sided with the Eighth Circuit's en banc holding that a conflict between *present* co-occupants played a key function in *Randolph*'s "social expectations" framework.[181] Drawing on an erroneous baseball saying that a tie goes to the runner,[182] the court noted that "between two present but disagreeing residents with authority, the tie goes to the objector," but "[t]he calculus shifts . . . when the tenant seeking to deny entry is no longer present."[183] The court held that *Randolph* did not give an objector "an absolute veto" and argued that *Murphy* erroneously eliminated the requirement that the objector be present.[184]

IV. A NEW APPROACH TO THIRD-PARTY CONSENT

Co-occupants' Fourth Amendment rights to be free from warrantless searches may now depend, outside the Ninth Circuit and the District of Columbia, on whether the police are able to remove the objector to obtain consent from obliging co-occupants. As demonstrated in the circuit split, *Randolph*'s bright-line rule allows police a straightforward means of getting around the decision's attempt to protect non-consenting co-occupants' liberties.[185] On the other hand, the Ninth Circuit's broad interpretation creates a predictable guideline for police: once a co-occupant objects, another co-occupant cannot override that person's objection regardless of their presence.[186] Courts must recognize the need for a new approach to third-party consent searches, and in doing so, institute sensible,

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177. *Id.* at *7.

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

179. *Id.*

180. *Id.* at 781.

181. *Id.* at 783.

182. *See* Tim McClelland, Ask the Umpire, http://mlb.mlb.com/mlb/official_info/umpires/feature.jsp?feature=mcclellandqa (last visited Mar. 1, 2009) (noting that there is no "tie goes to the runner" rule, however, "the runner must beat the ball to first base, and so if he doesn't beat the ball," he is called out).

183. *Henderson*, 536 F.3d at 783-84.

184. *Id.* at 784.

185. *See* discussion *supra* Part III.B-C.

186. United States v. Murphy, 516 F.3d 1117, 1124-25 (9th Cir. 2008); *see* discussion *supra* Part III.A.

substantive safeguards to protect Fourth Amendment liberties.

A. Adopting a New Approach for Searches Conducted Under Third Party Consent

Randolph seemed to halt the broadening of third-party consent doctrine.[187] Some scholars noted that it was unclear whether courts would use the case "as a tool for strengthening Fourth Amendment privacy protections," and that the holding's narrowness "may compromise the decision's precedential value."[188] Analysis ranges from disparagement, to praise, to confusion.[189] Scholars have classified the Court's decision as: flawed and inherently weak;[190] unnecessarily and imprudently formalistic;[191] insufficient in protecting Fourth Amendment rights;[192] an "abandon[ment] of sound legal theory and reasoning" in favor of "an exceedingly narrow holding of little practical value;"[193] "a signal to police to move people as if they were pieces on a chessboard;"[194] a strengthening of the Fourth Amendment's protection against unreasonable searches;[195] the launch of "a new era;"[196] and the indication of "an important change."[197] The Court's "widely shared social expectations" test and decision have received anything but consensus or consistent application from the courts,[198] indicating the need for a

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187. *See* Fiske, *supra* note 12, at 738 (noting that the *Randolph* decision "comes as an unexpected departure from" the "trend of expanding" consent searches); *see also* Godfrey & Levine, *supra* note 12, at 744 (noting that *Randolph*'s "impact may be lessened because of the specificity of its holding and by the inconsistencies in [its] analytical framework"). *But see* Note, *supra* note 20, at 1726 n. 128 (arguing that *Randolph* "[did] little to impinge on police discretion, as there is no craft in determining whether someone is standing in a doorway").

188. Godfrey & Levine, *supra* note 12, at 731.

189. *See* Black, *supra* note 10, at 334 (noting that although *Randolph* provided a "much needed refinement," the holding "[left] a door open wide enough to drive a squad car through").

190. Alissa C. Wetzel, Comment, Georgia v. Randolph*: A Jealously Guarded Exception—Consent and the Fourth Amendment*, 41 VAL. U. L. REV. 499, 501, 514 (2006).

191. Eden, *supra* note 132, at 171.

192. Adrienne Wineholt, Note, Georgia v. Randolph*: Checking Potential Defendants' Fourth Amendment Rights at the Door*, 66 MD. L. REV. 475, 475 (2007).

193. McNeeley, *supra* note 138, at 274.

194. Dery & Hernandez, *supra* note 138, at 55.

195. Nathan S. Lew, Note, *Nothing to Be Worried About: Consent Searches After* Georgia v. Randolph, 28 WHITTIER L. REV. 1067, 1067 (2007).

196. Ferguson, *supra* note 123, at 605.

197. Maclin, *supra* note 131, at 35.

198. *Compare* United States v. Lopez, 547 F.3d 397, 400 (2d Cir. 2008) (holding that consent by the defendant's girlfriend was reasonable because he failed to object once officers arrested him, and that the officers did not have to seek his consent), *with* United States v. Glover, 583 F. Supp. 2d 5, 18-19 (D.D.C. 2008) (holding that had the defendant objected after arrest, the search would have been unlawful, but the court believed the police that he had not objected), and United States v. Tatman, 615 F. Supp. 2d 664, 678 (S.D. Ohio 2008) (defendant's objection trumped the consent

more robust or at least more particularized approach for third-party consent searches.

Chief Justice Roberts suggested in *Randolph* that the majority's "arbitrary lines" signaled the need to rethink Fourth Amendment jurisprudence.[199] *Randolph* appropriately moved away from the assumption of risk framework, which crippled Fourth Amendment liberty by presuming that co-occupants assume the risk that their shared space may be subject to warrantless searches without their consent.[200] This shift has provided some with "guarded optimism" that the Court is now considering citizens' "actual expectations" when officers request consent.[201]

Yet additional changes are needed. The Court should depart from *Randolph*'s unclear "widely shared social expectations" approach because it provides poor guidance for determining a search's validity and fails to substantively protect Fourth Amendment liberties.[202] The Court also ought to replace assumption of risk with a framework that meaningfully upholds the Fourth Amendment's promise to protect individuals' liberties. The circuit split provides a prime opportunity for the Court to jettison the current doctrinal morass in favor of one that gives meaning to Fourth Amendment liberties and provides clear rules for third-party consent searches.

B. Personal Consent: A Reasonable Approach to Third-Party Consent

Some scholars have called for the complete abolition of consent searches.[203] Others argue for eliminating third-party consent searches.[204] A middle-ground option proposed in 1976 in response to the (accurately) anticipated problems resulting from the Court's *Matlock* decision deserves a re-examination in the wake of the *Randolph* decision.[205]

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of an individual with apparent authority).

199. Georgia v. Randolph, 547 U.S. 103, 137 (2006) (Roberts, C.J., dissenting).

200. *See* Weinreb, *supra* note 57, at 49 (nothing that an "absence of continuously developing rationalization" has resulted in an "unstable and unconvincing" doctrine).

201. John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1131-32 (2007) (discussing how *Randolph* provides "a ray of hope" that the Supreme Court is beginning "to truly reflect the actual voluntariness—or involuntariness—of the questioned consents"). *See also* Matthew W.J. Webb, Note, *Third-Party Consent Searches After* Randolph*: The Circuit Split Over Police Removal of an Objecting Tenant*, 77 FORDHAM L. REV. 3371, 3414 (2009) (applying the "test of generalizability" proposed in Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008), to decide third-party consent searches).

202. Wineholt, *supra* note 192, at 496 (arguing *Randolph* "provides only arbitrary protection" of constitutional rights).

203. Strauss, *supra* note 55, at 258. *But see* Bow, *supra* note 80, at 1113 (noting courts would not likely create a "straightjacket" rule).

204. Comment, *supra* note 75, at 812.

205. Gary K. Matthews, *Third-Party Consent Searches: Some Necessary Safeguards*, 10 VAL. U. L. REV. 29, 37 (1975). *But see* Abrams, *supra* note 83, at 977-79 (arguing against the approach

Existing third-party consent doctrine combines assumption of risk analysis with the co-occupants' right to consent in their own right.[206] But the doctrine fails to explain why one co-occupant's consent should suspend another's rights.[207] The approach re-examined and re-proposed in this Note—referred to here as the "personal consent" approach—attempts to restore meaning to the Supreme Court's early language that the Fourth Amendment's core protection was a "personal right to be free from arbitrary police intrusions into one's privacy."[208]

The personal consent approach is applicable in situations similar to *Randolph*. Police suspect an individual of crime. The level of suspicion is measured similar to the standard used in custodial police interrogations in which *Miranda* is required.[209] In other words, the approach activates when an "investigation is no longer a general inquiry . . . but has begun to focus on a particular suspect."[210] Once the personal consent approach triggers, a warrantless search is valid if: (1) police know the whereabouts of the particular person by means of a reasonable effort and (2) this particular person consents to the search.[211] Under the personal consent approach, all warrantless searches would be invalid when an individual, with authority over the area, refuses to consent, regardless of another co-occupant's consent.[212] As some courts have held,[213] this approach bars a third party's authority to consent when another co-occupant objects.

For example, in applying the approach in *Henderson*, Kevin's statement to police to "get the fuck out" would make any subsequent warrantless searches of his house unreasonable as applied to him.[214] Even if Kevin had failed to announce that he did not want to waive his constitutional rights—either because he failed to express his refusal or because the police did not bother to ask—the police would not be able to conduct a warrantless search unless Kevin consented.[215] The personal consent approach is consistent with the Court's

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proposed by Matthews because it depends upon officer's perceptions).

206. United States v. Matlock, 415 U.S. 164, 172 n.7 (1974).

207. Comment, *supra* note 75, at 807-08 (explaining that although "possession and control" serves a useful "negative function" of excluding individuals from consenting, it does not explain how the "consenter's power should be permitted to be exercised freely" at others' expense); *see* Recent Case, *Evidence Gained from Search to Which Wife Consented is Admissible Against Husband*, State v. Coolidge, *106 N.H. 185, 208 A.2d 322 (1965)*, 79 HARV. L. REV. 1513, 1516 (1966) (questioning soundness of the "possession and control rule").

208. Comment, *supra* note 75, at 808 (citations omitted).

209. Matthews, *supra* note 205, at 37.

210. *Id.* (quoting Escobedo v. Illinois, 378 U.S. 478, 490 (1964) (internal quotations omitted)); *see* Note, *supra* note 70, at 130.

211. Matthews, *supra* note 205, at 37-39.

212. *See id.* at 39-40.

213. *See, e.g.*, Lucero v. Donovan, 354 F.2d 16, 21 (9th Cir. 1965).

214. *See* United States v. Henderson, 536 F.3d 776, 786 (7th Cir. 2008) (Rovner, J., dissenting); discussion *supra* INTRO., Part III.C.

215. *See* discussion *infra* Part IV.C. The good faith exception, expanded in *Herring v. United States*, 129 S. Ct. 695, 703 (2009), could co-exist with this approach. *See generally* Adam Liptak,

declaration "that search and seizure procedures must be easy to administer,"[216] because it merely requires police to have their suspect's consent, but only if that particular suspect is available.

When police target a particular location, rather than a specific person, the personal consent approach would allow the police to conduct a warrantless search when the location's owner consents, so long as another owner does not object. For example, if the police investigate the smell of methamphetamine in a shed, the consent of an individual with authority over the shed validates the warrantless search as long as no one with authority over the shed objects. Some Fourth Amendment protections are sacrificed. But, searches conducted pursuant to the personal consent approach are considerably more reasonable than searches conducted when a suspect was available, but the police merely bypassed, removed, or ignored the protests (or potential protests) in favor of the consenting party who may not suffer any repercussions.

Because the personal consent approach is only applicable in cases in which the police know of the suspect's location, courts must decide when the personal consent approach applies on a case-specific basis.[217] Whether the suspect is in custody, asleep somewhere in his house, or standing at the door, the personal consent approach requires police to receive the suspect's consent to warrantlessly search for evidence implicating the suspect but only if they know his whereabouts.[218] If the police genuinely do not know his whereabouts, his absence nullifies his right to object.[219] Also, if police are present at different locations possessed by the suspect, a refusal to consent to a search at one location would be imputed to all other locations possessed by the suspect because the law enforcement officials know the suspect's location. Of course, police could request the suspect to consent to a warrantless search at other locations owned or possessed by the suspect. If the suspect consented to searches at those other locations, as unlikely as that may seem, the personal consent approach would not bar that search's results. Consent by a third party at a second location would not vitiate the suspect's refusal, regardless of whether the suspect expressly refused to consent to a search at that particular location.[220]

If police obtain a non-suspect's consent for a search but find evidence

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Justices Step Closer to Repeal of Evidence Ruling, N.Y. TIMES, Jan. 31, 2009, at A1 (discussing the moves towards the exclusionary rule's abolition by the U.S. Supreme Court).

216. Cook, *supra* note 94, at 133 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973)).

217. Matthews, *supra* note 205, at 37-40; *see* Johnson, *supra* note 7, at 814 (advocating a "urgency standard" to determine when a third party's consent to a search made a warrantless intrusion reasonable for Fourth Amendment purposes).

218. *See* Bow, *supra* note 80, at 1113; Recent Case, *supra* note 207, at 1519 (arguing that such a rule is the "only satisfactory alternative" to barring third-party consents).

219. *See* Bow, *supra* note 80, at 1115 (noting that the reasonableness requirement would determine whether police made reasonable efforts to get "the consent of all parties").

220. See discussion *supra* Part III.B, where Hudspeth expressly told the police, although at his office, that they could not search his home. *See also* discussion *infra* Part IV.C.

implicating that individual, rather than evidence implicating the original suspect, that search would be reasonable, which is consistent with existing consent search doctrine.[221] The previously unsuspected individual voluntarily made the warrantless search reasonable by consenting.[222] Yet another situation that would allow a search under the personal consent approach is when an officer obtains the consent of a suspected individual, and the evidence discovered implicates a previously unsuspected individual.[223] This warrantless search would be reasonable because an officer took the initial step of receiving consent from their suspect.[224]

The personal consent approach requires courts to consider an officer's subjective motivations whether they suspect an individual and whether or not they genuinely know the suspect's location. Determining an officer's subjective motivation for requesting consent for a warrantless search is not always easy, but as Chief Justice Roberts noted in his *Randolph* dissent, the Court's decision encouraged lower courts to determine an officer's subjective motives in requesting consent.[225] Determining an officer's subjective mindset could be sorted out at a suppression hearing.[226] Two key questions that judges could ask would be whether the suspect provided consent to the warrantless search and, if not, why did the suspect not consent.[227]

The personal consent approach recognizes the police need to search in situations in which an individual suspected of a crime offers cooperation. Under this approach, police do not have to obtain the consent of all unsuspected individuals possessing authority over the area because, if the evidence implicates individuals other than the initial suspect, either their absence or failure to object strengthens the search's reasonableness. Police do not need to hunt down suspects because the consent of an individual with appropriate authority over the area would be sufficient to make the search reasonable if the suspect's location is genuinely unknown. During the search, if police encounter an individual with adequate authority over the area and that individual asks the police to end their warrantless search, absent probable cause for continuing the search or arresting the individual, the search must end.[228]

The Court's well-recognized exigent circumstances exceptions, which allow police to conduct warrantless searches regardless of any individual's consent, militate against the personal consent approach's requirement for officers to obtain the proper consent prior to warrantless searches. Therefore, the personal consent approach does not implicate the *Randolph* Court's concern that officers have the

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221. Matthews, *supra* note 205, at 39.

222. *Id.*

223. *Id.* at 40.

224. *Id.*

225. *See* Georgia v. Randolph, 547 U.S. 103, 138 (2006) (Roberts, C.J., dissenting).

226. Matthews, *supra* note 205, at 41.

227. *Id.*

228. *See supra* text accompanying note 131 (explaining that Rodriguez was sleeping when police entered); *see also* Illinois v. Rodriguez, 497 U.S. 177, 179 (1990).

ability to investigate domestic violence by obtaining the consent of victims.[229] The Court has made it unambiguously clear that certain warrantless searches are reasonable if the facts demonstrate "exigent circumstances."[230]

A predicable reaction to the personal consent approach is that it could allow suspects to break the law without consequence because the exclusionary rule could bar the evidence needed to convict. Yet obtaining a warrant remains a reasonable option,[231] and the inconvenience of a neutral magistrate determining whether the circumstances justify a search based on probable cause would not prevent police from gathering the same evidence they attempt to gather on the basis of a third party's consent. Officers could ask the cooperating co-occupants to deliver the evidence and sign an affidavit to allow the evidence's admission in court.[232] In addition, the cooperating co-occupant could inform the police of the illegal activities, and the police may use that information to obtain a warrant.[233]

The civil libertarian's demand for police officers to "just get a warrant," often rings on deaf ears because the case usually involves whether or not a potentially dangerous person should go free via the exclusionary rule.[234] Yet trial courts would invoke "just get a warrant" more often if Fourth Amendment jurisprudence prevented police officers from approving unreasonable third-party consent searches. Although legal scholars have criticized the exclusionary rule's broad applicability,[235] and the Court may be eroding its protections,[236] the exclusionary

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229. *Randolph*, 547 U.S. at 118-19. Exigent circumstances, which if present, may make reasonable a warrantless search, include, among others, searches incident to an arrest, hot pursuit, imminent danger, police safety, and evidence spoliation. *See* Black, *supra* note 10, at 323-24. See also Godfrey & Levine, *supra* note 12, at 747-48, for how *Randolph* muddied exigent circumstances doctrine.

230. 3 LAFAVE, *supra* note 34, § 6.5.

231. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 888 (1991) (noting that obtaining a warrant takes "a few minutes"). The two-plus hours between Murphy's arrest and Roper's consent provided ample time to obtain a warrant. *See* discussion *supra* Part III.A.

232. Note, *supra* note 70, at 150 (noting that an officer's burden would dissipate if the cooperating co-occupant secured the evidence, or the officer could simply obtain a warrant).

233. Bob Mosteller, Georgia v. Randolph*: The Supreme Court Limits the Fourth Amendment's Consent Doctrine*, SUP. CT. ONLINE, http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/geovran.

234. *But see* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) ("It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. . . . [W]e must deal with [a shabby defrauder's] case in the context of [the Fourth Amendment's great themes.]"), *overruled by* Chimel v. California, 395 U.S. 752, 759 (1969).

235. *See* Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49-53 (1981) (using economics to argue that tort should protect the Fourth Amendment because only criminals receive the benefit of an exclusion). *See generally* 1 LAFAVE, *supra* note 34, § 1.2 (describing the exclusionary rule as "under attack").

236. *See* Herring v. United States, 129 S. Ct. 695, 703 (2009) (holding that exclusionary rule

rule's core purpose—that no one should be convicted on unconstitutionally obtained evidence—remains unassailable because of its basic significance of Fourth Amendment liberties.[237]

Exceptions to the warrant requirement that transform warrantless searches into reasonable searches do not exist to provide police with the path of least resistance. Likewise, Fourth Amendment protections not only guard the rights of suspected criminals, but they also protect law-abiding individuals.[238] An inherently difficult statistic to track would be how often police conduct a warrantless third-party consent searches and find no wrongdoing.[239] The result of such fruitless searches is an intrusion upon an individual that fails in bringing criminal liability upon the consenter, but does successfully bring shame, stigma, and anger.[240] Failing to protect privacy keeps individuals from conducting their lives outside the "public view."[241] Lax standards for consent searches act as "an end-run around of the core meaning of the Fourth Amendment."[242] When consent becomes "too easy," particularly when used for house searches, the doctrine works against the Fourth Amendment's demand for reasonable government searches.[243]

In addition, the Fourth Amendment does not just protect privacy, and if courts wrestled with its additional protections, they would inevitably strengthen its foundations.[244] Professor Rubenfeld argues that the Fourth Amendment text "does not guarantee a right of privacy,"[245] but in attempting to do so, has become a "doctrinal black hole" leading to a "logical dead end."[246] The Fourth Amendment's role as a guard of "a right of security" must be revitalized to prohibit abuses.[247] Relying on privacy for determining a search's reasonableness "weaken[s] the amendment's ability to effectively constrain government," as

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did not apply for a police recordkeeping error); Liptak, *supra* note 215 (analyzing whether the Court's opinion in *Herring* indicated "that the exclusionary rule itself might be at risk").

237. *See* 1 LAFAVE, *supra* note 34, § 1.2.

238. Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1230 (1983) (arguing that the Court should focus on the innocent in developing its Fourth Amendment jurisprudence).

239. *But see* VERNIERO & ZOUBEK, *supra* note 54, at 28 (noting that most consent searches fail to find illegal activity).

240. *See* Strauss, *supra* note 55, at 271.

241. Weinreb, *supra* note 57, at 52-53 ("[Privacy] enables us to do things that we . . . are a bit embarrassed about doing: to meet a friend quietly, to act out love and hate, to do all the things that we should not do in the same way at high noon in Times Square.").

242. Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 98 (1991).

243. *Id.*

244. *See* Comment *supra* note 75, at 798.

245. Rubenfeld, *supra* note 201, at 104.

246. *Id.* 103-05.

247. *Id.* at 105.

privacy tends to fail against police interests when analyzed under a constitutional magnifying glass.[248]

Under the personal consent approach, a refusal to consent would bar law enforcement from searching for evidence. But consent searches must be reasonable to fall out of the Fourth Amendment's warrant requirement. Until the Court announces a precise and predictable reasonableness definition,[249] a rule that balances Fourth Amendment prohibition of unreasonable, warrantless searches with law enforcement's need to investigate is preferable to an arbitrary rule that prohibits searches only when the suspect is present at the door of the house.[250]

C. Application of the Personal Consent Approach to the Circuit Split

The personal consent approach protects the liberty interests of individuals such as Kevin Henderson to be free from unreasonable warrantless searches because police would know a search warrant was necessary once he refused to consent.[251] This additional burden is not de minimis, but other rules protecting constitutional liberties do not prevent police from doing their jobs.[252] With the Court's view of Fourth Amendment liberties as a conflict flanked by privacy and the surrendering of some of those privacy rights by sharing property, an officer's need to investigate suspected criminal activity consistently tips the scales of justice in favor of finding a third party's consent as reasonable.[253] Yet *Randolph* rejected the equation that the suspect's assumption of risk, plus the third party's right to consent, plus a police need to investigate efficiently somehow equals an interest superior to the personal interests safeguarded by the Fourth Amendment.[254] As one scholar noted about *Randolph*, the Court knew that requiring warrantless consensual searches to "be genuinely consensual" meant that criminal evidence "might never come to the attention of the authorities."[255]

Judge Rovner stated at the beginning of her formidable dissenting opinion in *Henderson* that the "one and only one reason that this case is not on all fours with

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248. Castiglione, *supra* note 75, at 661.

249. *Id.* at 656 (noting that the Fourth Amendment's reasonableness standard "is just about the most unhelpful guidepost one could have concocted").

250. *See* Bow, *supra* note 80, at 1116-17.

251. *See* United States v. Henderson, 536 F.3d 776, 777-78 (7th Cir. 2008); Matthews, *supra* note 205, at 37-39.

252. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PRISONERS IN 2007, at 6 (2008) http://www.ojp.gov/bjs/pub/pdf/p07.pdf (noting that U.S. prisons held 2.3 million prisoners at the end of 2007, which was 1.5% increase from the previous year. This rate of growth, however, was lower than the average annual growth rate from 2000-2006 of 2.6%).

253. *See* Comment, *supra* note 75, at 810; *see also* Castiglione, *supra* note 75, at 657.

254. *See* Georgia v. Randolph, 547 U.S. 103, 128 (2006) (Roberts, C.J., dissenting).

255. Burkoff, *supra* note 201, at 1135 (citing *Randolph*, 547 U.S. at 120) (highlighting that Justice Souter stated that searching private areas "in the face of disputed consent" requires "clear justification before the government searches private living quarters over a resident's objection").

Georgia v. Randolph: When Kevin Henderson told the police to 'get the fuck out' of his house, the officers arrested and removed *him* instead."[256] If Henderson had remained at home, the police could not have searched regardless of the consent of his wife until they had obtained a warrant.[257] The *Henderson* majority approach purges the protections *Randolph* attempted to implement because it gives police an opportunity to skirt around its rule. Although *Randolph* may merely mean that a present non-consenting co-occupant's refusal to consent wins, this interpretation permits police to either arrest individuals who refuse to consent or wait for them to leave, emptying the case's force. If the officers in *Randolph* had known this, they would have simply waited for him to leave and would have allowed his wife's consent to waive his rights.

Under personal consent, Hudspeth's express refusal to consent to a search of his home would make any subsequent warrantless search of the home unreasonable regardless of who consented.[258] Circuit Judge Melloy's dissent argued that the Supreme Court's jurisprudence supported the conclusion that an objection to a warrantless search makes law enforcement's reliance on a subsequent consent unreasonable.[259] In *Hudspeth*, the dissent pointed out that the majority focused on the defendant's location when he made his objection as the determining factor.[260] Allowing the Fourth Amendment's "expectation of privacy" to depend "upon a tape measure" would be ludicrous, Melloy argued.[261]

Murphy's holding, that *Randolph* means that "[o]nce a co-tenant has registered his objection, his refusal to grant consent remains effective" even though another co-occupant consents,[262] aligns with the personal consent approach. Once Murphy—the individual suspected by law enforcement—refused to consent, all warrantless searches would be invalid against him regardless of another's consent. The court's interpretation of *Randolph* to mean that police "cannot arrest a co-tenant and then seek to ignore [his] objection[s]" allows officers to search for evidence against the consenting co-occupant.[263] The court's holding also permits a co-occupant's consent to justify a warrantless search in the suspect's absence. Although the Ninth Circuit's reputation for projecting a liberal judicial philosophy is one explanation for its broad *Randolph* interpretation,[264]

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256. *Henderson*, 536 F.3d at 785-86 (Rovner, J., dissenting).

257. *Id.*

258. *See* United States v. Hudspeth, 518 F.3d 954, 955 (8th Cir. 2008) (en banc).

259. *Id.* at 961-62 (Melloy, J., dissenting).

260. *Id.* at 964.

261. *Id.*

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

263. *Id.* at 1124-25 (holding that "a valid search may occur only with respect to the consenting tenant").

264. *But see* Jerome Farris, *Judges on Judging: The Ninth Circuit-Most Maligned Circuit in the Country Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1470-71 (1997) (arguing that the circuit's reversal rate is due to its high case load and willingness to tackle "controversial issues"). The Ninth Circuit limited its *Murphy* holding in *United States v. Brown*, 563 F.3d 410, 417 (9th Cir. 2009), holding that there was no evidence that police arrested Brown to avoid his objections.

another is that the Ninth Circuit correctly interpreted the Supreme Court's signal in *Randolph* that the broadening police powers for warrantless searches and the diminishing of individuals' Fourth Amendment liberties had ended.

Another Seventh Circuit case in which the personal consent approach results in the exclusion of evidence discovered in a third-party consent search after the suspect declined to consent is *United States v. Reed*.[265] Police arrested Terry Reed because he was driving with a suspended driver's license, and during a search of his person, police discovered a baggie of crack cocaine.[266] The officers asked Reed to consent to a search of his home because they suspected he stored guns there.[267] Reed declined and stated that he could not give the officer "permission" because "it's not [his] place." But Reed's girlfriend told the officers that they leased the residence together and consented to a search, which turned up ammunition, cocaine, and documents addressed to Reed at that address in the home's bedroom.[268] The court held that a co-occupant's consent supersedes an objecting party's refusal when the objector is absent.[269]

Under personal consent, Reed in giving a false statement—"Naw, it's not my place. I can't give you permission for that"[270]—did not waive his Fourth Amendment protections to a search of what was in fact his home because Reed's girlfriend corrected Reed's falsehood.[271] Had Reed truthfully told the officers, "Aww, I'd rather you not search my place, but I'll give you permission for that," the police would not be required to get a warrant to search. But if the officers objectively knew or believed that Reed did not have authority to consent to a search, the personal consent approach would allow the warrantless search when an individual with authority over the area, such as his girlfriend, consented.

Adopting this approach forces the Supreme Court to confront the awkward fact that its third-party consent doctrine has significantly eroded Fourth Amendment liberties, particularly for individuals who share property. As Justice Jackson stated, zealous police officers often fail to grasp "[t]he point of the Fourth Amendment," which requires a "neutral and detached magistrate" to decide whether the circumstances justify the invasion of a person's home as opposed to an "officer engaged in the often competitive enterprise of ferreting out crime."[272]

D. State Adoption of the Personal Consent Approach

States are free to impose greater restrictions on police activity than required

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265. 539 F.3d 595, 597 (7th Cir. 2008).

266. *Id.*

267. *Id.*

268. *Id.* Fingerprint tests showed that Reed owned the guns. *Id.*

269. *Id.* at 598-99.

270. *Id.* at 597.

271. *Id.*

272. Johnson v. United States, 333 U.S. 10, 13-14, 16-17 (1948) (holding that a warrantless search violated the Fourth Amendment despite whether the officers' had probable cause).

under the Federal Constitution.[273] Fourth Amendment jurisprudence has been declared "an embarrassment," and the "vast jumble of judicial pronouncements" are "not merely complex and contradictory, but often perverse."[274] Justice Brennan has noted that the Court should not be "dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[275] For example, although the U.S. Supreme Court continues to refuse to require officers to inform individuals of their right to refuse to consent,[276] some states have required officers to inform citizens that they have *state* constitutional rights to refuse.[277] Hawaii, Minnesota, New Jersey, and Rhode Island have outlawed consent-based warrantless searches, and California ended the practice as a condition of settling a lawsuit.[278] This state-based broadening of liberty is an encouraging sign that robust Fourth Amendment protections can serve both liberty and police needs through approaches that deviate from Supreme Court pronouncements.[279]

Indiana courts were "early and noteworthy" participants in interpreting "its bill of rights to defend personal liberty."[280] Although Indiana's constitutional search and seizure clause is nearly identical to the Fourth Amendment, the State must prove the reasonableness of an officer's activity in conducting a warrantless search as opposed to the federal constitutional expectation of privacy test.[281] The court has granted special status to automobiles in examining the totality of the circumstances surrounding police vehicle searches, noting that "Hoosiers regard their automobiles as private and cannot easily abide their uninvited intrusion."[282] For Indiana police to search trash left out for pick-up, an officer must have an "articulable individualized suspicion" that the search's subjects have broken the

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273. Oregon v. Hass, 420 U.S. 714, 728-29 (1975) (Marshall, J., dissenting) (noting that state high courts are particularly capable of deciding whether police should follow stricter rules).

274. Amar, *supra* note 15, at 757-58.

275. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

276. *See* United States v. Drayton, 536 U.S. 194, 206-07 (2002).

277. *See* State v. Ferrier, 960 P.2d 927, 933-34 (Wash. 1998) (holding that a waiver must be an "informed decision"); State v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (holding that the validity of consent searches must be judged in terms of waiver and voluntarily consent).

278. Sylvia Moreno, *Race a Factor in Texas Stops: Study Finds Police More Likely to Pull Over Blacks, Latinos*, WASH. POST, Feb. 25, 2005, at A03.

279. The right to exclude evidence under Pennsylvania's Constitution is more expansive than the Fourth Amendment right. Commonwealth v. Valentin, 2000 PA Super. 63, ¶ 6, 748, A.2d 711, 713 (Pa. Super. Ct. 2000).

280. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 576-77 (1989) (noting that Indiana's constitutional history indicates that the state's constitutional framers intended to entirely prohibit slavery (citing State v. Lasselle, 1 Blackf. 60, 62 (Ind. 1820)).

281. Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005); *see* U.S. CONST. amend. IV; IND. CONST. art. 1, § 11.

282. Brown v. State, 653 N.E.2d 77, 80 (Ind. 1995); *see id.* at 80 n.3 (noting the need, in the Indianapolis 500's host state, "to recognize that cars are sources of pride, status, and identity").

law.[283] For consent searches, police must tell individuals in custody of their right to legal counsel before consent may be granted.[284]

States generally have not developed an independent consent search doctrine.[285] If a preponderance of the evidence demonstrates voluntary consent, state courts generally find that prosecutors have met state constitutional requirements.[286] But some states, such as Hawaii[287] and Oregon,[288] reject the rule that a person with mere apparent authority may consent.[289] In addition, Florida interpreted *Matlock* to mean that if two co-occupants are present, the express refusal of the other invalidates the search.[290] Wyoming and Delaware interpreted *Randolph* to bar the overriding of a refusal to consent.[291] Although the U.S. Supreme Court may end up favoring a narrower interpretation of *Randolph*, state high courts should find broader protections from government searches based on their state constitutions.[292] The personal consent approach provides state courts a framework to decide contested third-party consent searches.

CONCLUSION

Since President Nixon's law-and-order presidential campaign, criminal suspects have received little public sympathy.[293] Unfortunately, although crime

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283. *Litchfield*, 824 N.E.2d at 360-01 (finding that although the U.S. Constitution would not prohibit it, taking a suspected marijuana grower's trash could violate Indiana's Constitution).

284. Pirtle v. State, 323 N.E.2d 634, 640 (Ind. 1975).

285. 2 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES §§ 11.012, 11.01, 11.02 n.12 (4th ed. 2008) (noting that State restraints against government invasions of privacy are similar, but are generally independent from the U.S. Supreme Court "in result" rather in analysis).

286. *Id.* § 11.012.

287. *See* State v. Lopez, 896 P.2d 889, 903 (Haw. 1995) (holding that consenters must have actual authority).

288. State v. Ready, 939 P.2d 117, 120 n.4 (Or. 1997) (rejecting the apparent authority doctrine).

289. FRIESEN, *supra* note 285, § 11.012.

290. Lawton v. State, 320 So. 2d 463, 465 (Fl. Dist. Ct. App. 1975).

291. *See* McAllister, *supra* note 1, at 689-90 & nn.160-61 (citing McClelland v. State, 155 P.3d 1013, 1019 (Wyo. 2007); Donald v. State, 903 A.2d 315, 321 (Del. 2006)).

292. *See* Davis v. United States, 328 U.S. 582, 604 (1946) (Frankfurter, J., dissenting) (noting that all state constitutions limit government searches). See also *State v. Oliver*, No. SD28820, 2008 Mo. App. LEXIS 1756, at *22-23 (Mo. Ct. App. Dec. 16, 2008) (holding that when police waited for a suspect to leave before receiving the wife's consent, *Randolph* did not apply), *superseded by* SC89888, 2009 Mo. LEXIS 374 (2009), and *Payton v. Commonwealth*, No. 2007-CA-001379-MR, 2008 WL 5102130, at *5 (Ky. Ct. App. Dec. 5, 2008) (finding Payton failed to revoke a co-occupant's consent) for cases where states could institute a robust approach to contested third-party consent.

293. On the Media, *Beg Your Pardon?* (WNYC National Public Radio broadcast Dec. 19, 2008), *available at* http://www.onthemedia.org/transcripts/2008/12/19/05 (explaining how

still exists, all Americans, including law-abiding citizens, have lost constitutional liberties because of the Supreme Court's lax treatment of Fourth Amendment liberties, at least until *Randolph*. Kevin Henderson may not seem worthy of strong constitutional protections, but the Fourth Amendment does not make exceptions for individuals suspected of committing crimes. The Court must lift the Fourth Amendment from its degraded status as "a mere script . . . rewritten and conformed to the convenience of law enforcement officials who cannot be burdened with obtaining a warrant prior to a search."[294]

The Court has yet to determine whether a co-occupant's consent to a warrantless search is valid when the non-consenter is absent. But *Randolph* opened the door for a substantive reasonableness standard for third-party consent searches. The Court should use cases such as Kevin Henderson's to revitalize the liberties the Founders intended to protect by adopting the Fourth Amendment. State high courts should do the same. The personal consent approach for determining the constitutionality of third-party consent searches provides substantive Fourth Amendment liberties without placing an unreasonable burden on police. This country's judges "must have heard of the Fourth Amendment" by now because what this Note is saying in proposing to protect the Kevin Hendersons of the world is that "that man had rights."[295]

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presidential pardons act as a "safety valve" against criminal law's rigidity).

294. Kloster, *supra* note 39, at 122.

295. A memorable quote from the 1971 Don Siegel movie "Dirty Harry" starring Clint Eastwood. Here, District Attorney William T. Rothko (Josef Sommer) rebukes Police Inspector Harry Callahan (Eastwood) for his conduct during an arrest:

> Rothko: You're lucky I'm not indicting you for assault with intent to commit murder.
>
> Callahan: What?
>
> Rothko: Where the hell does it say that you've got a right to kick down doors, torture suspects, deny medical attention and legal counsel? Where have you been? Does *Escobedo* ring a bell? *Miranda*? I mean, you must have heard of the Fourth Amendment. What I'm saying is that man had rights.
>
> Callahan: Well, I'm all broken up over that man's rights!

DIRTY HARRY (Warner Bros. 1971).