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## Georgia v. Randolph, the Red-Headed Stepchild of an Ugly Family: Why Third Party Consent Search Doctrine is an Unfortunate Fourth Amendment Development That Should Be Restrained

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**GEORGIA V. RANDOLPH, THE RED-HEADED STEPCHILD OF  
AN UGLY FAMILY: WHY THIRD-PARTY CONSENT SEARCH  
DOCTRINE IS AN UNFORTUNATE FOURTH AMENDMENT  
DEVELOPMENT THAT SHOULD BE RESTRAINED**

Aubrey H. Brown III\*

INTRODUCTION

The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>1</sup> Since 1974, the Supreme Court, utilizing the Fourth Amendment’s reasonableness language, has interpreted the Fourth Amendment to allow third parties validly to consent to police searches that target another individual’s privacy interest.<sup>2</sup> The Court’s third-party consent search rulings essentially allow third parties to waive another person’s constitutional right against unreasonable searches.<sup>3</sup> The practical effect of these Fourth Amendment rulings is to diminish significantly an individual’s right to privacy in his living quarters if that individual takes on a roommate<sup>4</sup> or grants access to someone whom law enforcement officers reasonably could mistake as having authority to consent to a search.<sup>5</sup>

The Supreme Court, in a unique moment of Fourth Amendment clairvoyance, attempted to return some abrogated Fourth Amendment protections when it decided *Georgia v. Randolph*.<sup>6</sup> The problem with the decision, however, is that the Chief Justice’s dissent was the correct analysis of the Court’s precedent, and the majority, in order to reach a desirable result in the case, circumvented existing doctrine and created a new standard by which Fourth Amendment reasonableness is to be measured.<sup>7</sup> This new standard, “widely shared social expectations,”<sup>8</sup> further confuses

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\* J.D., William & Mary School of Law, 2010; B.A., Hampden-Sydney College, 2007. I dedicate my Note to my wife, Valerie, who supports all my endeavors. Special thanks go to my parents, Kathy and Steve, for teaching me the virtues of persistence, discipline, and hard work.

<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> See *United States v. Matlock*, 415 U.S. 164, 171 & n.7 (1974).

<sup>3</sup> See, e.g., *id.* at 171 n.7 (stating that a third party may consent to a search targeting another party when the third party has “joint access or control [of the property] for most purposes”).

<sup>4</sup> See *id.*

<sup>5</sup> *Illinois v. Rodriguez*, 497 U.S. 177, 183–89 (1990).

<sup>6</sup> 547 U.S. 103 (2006).

<sup>7</sup> See *id.* at 120 (holding “that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident”).

<sup>8</sup> *Id.* at 111.

third-party consent doctrine and leaves room for widespread abuses of the *Randolph* decision and the Fourth Amendment.<sup>9</sup>

In many respects, *Randolph* left third-party consent jurisprudence in worse shape than it was before the Court's decision, but the majority's validation of an individual's right against warrantless searches of the home seems to be the correct Fourth Amendment intuition. Frankly, there is something inherently wrong with a warrantless police search of an individual's home when conducted in the face of an express objection by the individual against whom the search is conducted. This type of police action pricks our sense of Fourth Amendment righteousness—and rightly so.<sup>10</sup> Not having the votes necessary to reinvent third-party consent search doctrine, but willing to reinvigorate Fourth Amendment values, Justice Souter crafted a “fine line” opinion capable of jamming *Randolph*'s unique fact pattern into the existing doctrine without disturbing the current framework of third-party consent.<sup>11</sup> Alas, as all children learn at a young age, the square peg may be hammered through the round hole, but both the peg and the hole will get mangled in the process. In this same manner, the Court jammed *Randolph* into the third-party consent framework and as a result both were mangled.

This Note uses *Georgia v. Randolph* as a tool to show why third-party consent doctrine is broken and what can be done to repair it. By tracing the evolution of current third-party consent doctrine, pointing out its flaws, and offering two different proposals that could reinforce our current notions of Fourth Amendment values, this Note attempts to offer a remedy for the doctrinal inconsistencies within third-party consent jurisprudence and vindicate the purpose of the Fourth Amendment.

Part I of this Note recites the current state of third-party consent jurisprudence and points out its inconsistencies and its practical limitations as a safeguard of Fourth Amendment rights against unreasonable searches. Part II explains how third-party consent searches gained constitutional validity by examining three important Fourth Amendment doctrines enabling third-party consent. Part III proposes that the Supreme Court should use *Randolph* as a springboard to reestablish some form of primary party “waiver” standard in third-party consent search jurisprudence in order to lend credibility and give efficacy to the Fourth Amendment's privacy protecting values. The first proposal is to abolish third-party consent as a constitutional doctrine. The

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<sup>9</sup> 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, 74–83 (2007).

<sup>10</sup> We cannot, however, blame law enforcement for encroaching on privacy because their duty is to enforce the law within the liberty-preserving constraints of the Constitution as interpreted by judges.

<sup>11</sup> See *Randolph*, 574 U.S. 103. Justice Kennedy's opinion and questioning at oral argument in *United States v. Drayton*, 536 U.S. 194 (2002), suggest why Kennedy voted with the majority. Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 63–67 (2008) (explaining Justice Kennedy's conception of a valid consent search).

second proposal is less radical: create a first-party primacy standard through which the party targeted by a law enforcement officer for a search receives special considerations before a third-party would be permitted to consent to that search.

### I. THIRD-PARTY CONSENT: STATE OF THE LAW AND ITS FLAWS

A Harvard note writer, summarizing scholars' perception of the Supreme Court's Fourth Amendment jurisprudence, described the Court's work as "'shifting, vague, and anything but transparent'<sup>12</sup> . . . 'a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse'<sup>13</sup> and 'for clarity and consistency . . . not the Supreme Court's most successful product.'"<sup>14</sup> Scholarly commentary on the Supreme Court's jurisprudence is just as unflattering in the specific arena of consent search doctrine.<sup>15</sup> Part I will examine the scholarly criticisms of basic consent search doctrine, recite the state of third-party consent search jurisprudence before *Randolph*, summarize and critique *Randolph*, and discuss *Randolph*'s inability to protect individuals' Fourth Amendment right against unreasonable searches. The doctrinal problems created by *Randolph* will later be used to highlight the fact that significant changes are necessary in third-party consent jurisprudence.<sup>16</sup>

#### A. Scholarly Criticisms of Basic Consent Search Doctrine

Any discussion of third-party consent search jurisprudence must at least briefly point out the scholarly criticisms of basic consent search doctrine for the simple reason that if consent searches are not constitutionally valid, then third-party consent searches are overwhelmingly invalid. Thus, debate over the constitutional validity of consent searches immediately places inherent skepticism into the constitutional validity of third-party consent searches.

There are two major scholarly criticisms of consent search doctrine. First, scholars argue that consent searches are not supported by the Constitution on their

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<sup>12</sup> See Note, *The Fourth Amendment's Third Way*, 120 HARV. L. REV. 1627, 1627 (2007) (quoting Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 SUP. CT. REV. 253, 253).

<sup>13</sup> *Id.* (quoting Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994)).

<sup>14</sup> *Id.* (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974)).

<sup>15</sup> See, e.g., 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, 6 (1991) (arguing that the Supreme Court ignored precedent when it decided *Rodriguez*); Maclin, *supra* note 11, at 27 (suggesting that the "Court's consent search doctrine [is] both straightforward and bewildering at the same time"); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 271–72 (2002) (calling for the abolition of consent searches).

<sup>16</sup> See *infra* Part I.C–D.

face because “reasonable” searches are founded on probable cause, and consent does not, *per se*, provide law enforcement officers with the requisite probable cause to validate a search.<sup>17</sup> Second, condemning the weak standard of “voluntariness” by which courts determine the validity of a person’s consent,<sup>18</sup> scholars question whether an individual’s consent can ever be genuinely voluntary in the face of government authority.<sup>19</sup> If consent cannot possibly be given voluntarily in the face of government authority, then all consents are coerced, which renders all consents constitutionally invalid.<sup>20</sup>

The doctrinal justifications for targeted-party consent searches have been roundly criticized. Keep in mind that third-party consent is a doctrinal offshoot of basic first-party (targeted-party) consent. Any doctrinal weaknesses present in targeted-party search doctrine necessarily exist in third-party consent doctrine. Third-party consent by definition is a weaker doctrine because it not only inherits the weaknesses of targeted-party consent, but it must bear criticism for its own inherent weaknesses, which will be the discussion of the rest of Part I.

### *B. Third-Party Consent Search Jurisprudence Before Randolph*

Three cases define the parameters of third-party consent search jurisprudence: *United States v. Matlock*,<sup>21</sup> *Illinois v. Rodriguez*,<sup>22</sup> and *Georgia v. Randolph*.<sup>23</sup> The bulk of the work in the arena of third-party consent is performed by *Matlock* because it sets the standard by which third-party consent validity is measured.

*Matlock* was the Court’s first case to validate and legitimize third-party consent searches of a defendant’s living quarters.<sup>24</sup> Law enforcement suspected that Matlock had robbed a Wisconsin bank.<sup>25</sup> Police officers came to the home where Matlock lived and arrested him in the front yard.<sup>26</sup> The officers then proceeded to ask another resident of the home, Gayle Graff, if they could search the home, and she consented.<sup>27</sup> The officers searched the home and found \$4,995 in cash in the closet of the bedroom

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<sup>17</sup> See George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 548–49 (2003).

<sup>18</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 223–34 (1973) (defining “voluntary” in consent search context).

<sup>19</sup> See Maclin, *supra* note 11, at 28 & n.6; Strauss, *supra* note 15, at 236–44.

<sup>20</sup> Or at a minimum, informed consent. See Strauss, *supra* note 15, at 236–44, 256–58, 271–72.

<sup>21</sup> 415 U.S. 164 (1974).

<sup>22</sup> 497 U.S. 177 (1990).

<sup>23</sup> 547 U.S. 103 (2006).

<sup>24</sup> See *infra* n.230 and text accompanying notes 194–230. But see *Matlock*, 415 U.S. at 169–71 (stating that the third-party consent issue had been decided previously).

<sup>25</sup> *Matlock*, 415 U.S. at 166.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

that Graff and Matlock jointly occupied.<sup>28</sup> The Court had to determine whether Graff could validly give consent to a search of the bedroom, and the Court ruled that she could.<sup>29</sup>

The Court held that Graff's consent to the search was valid, even though it targeted Matlock.<sup>30</sup> The Court prefaced its ruling on the notion that Graff had actual authority to give consent: "[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."<sup>31</sup> "Common authority" is not established by any law of property; rather, "common authority" is established by "joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that" one of their co-inhabitants will consent to a search.<sup>32</sup> Thus, the right to consent to a search does not lie with the person against whom the search is targeted, but rather lies with any person who has authority to consent by virtue of his relationship to the targeted premises.

The Court extended *Matlock*'s third-party consent search rule in *Rodriguez* to allow for police error in assessing "common authority" in the field by permitting third parties to consent validly to a search if police officers reasonably believe that the third party possesses the authority to permit a search.<sup>33</sup> Gail Fischer had been severely beaten by Edward Rodriguez.<sup>34</sup> She led police officers to Rodriguez's apartment, where she provided them with a key to the apartment and implied joint occupancy when she "referred to the apartment . . . as 'our[s].'"<sup>35</sup> The police, without arrest or search warrants, entered the apartment and saw, in plain view, significant amounts of cocaine and drug paraphernalia.<sup>36</sup> During all of this activity in his apartment, Rodriguez was asleep in his bedroom.<sup>37</sup> The officers arrested Rodriguez and confiscated the drug evidence, which was used to charge him with possession of a controlled substance with intent to deliver.<sup>38</sup>

In circuit court, Rodriguez successfully contested the search in order to suppress the evidence by showing that Fischer did not possess the authority to consent to the search.<sup>39</sup> The Illinois Appellate Court affirmed, and the Illinois Supreme Court denied

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<sup>28</sup> *Id.* at 166–67.

<sup>29</sup> *Id.* at 167, 177.

<sup>30</sup> *See id.* at 171 & n.7.

<sup>31</sup> *Id.* at 170.

<sup>32</sup> *Id.* at 171 n.7.

<sup>33</sup> *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990).

<sup>34</sup> *Id.* at 179.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 180.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

the state's leave to appeal.<sup>40</sup> The United States Supreme Court granted certiorari and reversed the Illinois courts.<sup>41</sup> The Court rested its decision on Fourth Amendment reasonableness by ruling that warrantless police searches are reasonable when law enforcement officers receive consent from a third party, but only if the officers reasonably believe in good faith that the consenting third party has the authority to consent.<sup>42</sup> In *Rodriguez*, the officer's belief that Fischer had the power to consent was reasonable because she had a key to the apartment, referred to the apartment as "our[s]," and told the officers that she had clothes and furniture in the apartment.<sup>43</sup>

Since *Rodriguez*, third-party consent search analysis has contained two tiers. First, a court must determine whether the consenting party possessed common authority over the area subjected to the search.<sup>44</sup> If so, then the search was valid.<sup>45</sup> If not, the court determines whether the law enforcement officers executing the search reasonably believed that the third party possessed common authority over the area subjected to the search.<sup>46</sup> If the answer is yes, then the search is valid.<sup>47</sup> If the answer is no, then the search is invalid.<sup>48</sup>

The first tier of this analysis examines the relationship between the third party and the targeted search area. For example, in *Matlock* the question of the search's validity turned on the relationship between Graff and the home.<sup>49</sup> The second tier of analysis examines the relationship between the third party and the police officer's subjective interpretation of the third party's relationship to the targeted search area. For example, in *Rodriguez* the question of the search's validity turned on whether the police officers believed the third party had the power to consent.<sup>50</sup> Neither of these tiers of analysis considers the defendant's ability or opportunity to invoke his Fourth Amendment rights. Neither *Matlock* nor *Rodriguez* was asked whether they would permit a police search despite the fact that both were on their respective premises and easily accessible to the officers.<sup>51</sup> Ultimately, the defendant is the target of the search

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<sup>40</sup> *Id.* at 180–81.

<sup>41</sup> *Id.* at 181, 189.

<sup>42</sup> *Id.* at 185–86.

<sup>43</sup> *Id.* at 179.

<sup>44</sup> *United States v. Matlock*, 415 U.S. 164, 171 & n.7 (1974).

<sup>45</sup> *See, e.g., id.*

<sup>46</sup> *Rodriguez*, 497 U.S. at 183–89.

<sup>47</sup> *See, e.g., United States v. Janis*, 387 F.3d 682, 686–87 (8th Cir. 2004) (ruling that evidence was sufficient for trial court to hold that police reasonably believed the third party had common authority and thus power to consent to a search).

<sup>48</sup> *See, e.g., United States v. Jaras*, 86 F.3d 383, 388–89 (5th Cir. 1996) (ruling that search was invalid because officer could not have reasonably believed the third party had power to consent).

<sup>49</sup> *See Matlock*, 415 U.S. at 168.

<sup>50</sup> *Rodriguez*, 497 U.S. at 183–89.

<sup>51</sup> *Rodriguez* was asleep on his bed, *id.* at 180, and *Matlock* was outside in a police car, *Matlock*, 415 U.S. at 166.

and has everything to lose by exposing his privacy, but his fate lies in the hands of another who presumably has no interest in opposing the search.

A good pre-*Randolph* criminal procedure exam question might try to provoke students by asking “what happens when two people, each with equal authority to consent to a search, stand at the threshold of a residence and give opposite answers to a search request made by a police officer?” An astute answer would point out that the question is novel because *Matlock* only controls when the defendant is not present, but the student, by extending *Matlock*’s logic, may conclude that the search was valid because the consenting party’s power to consent is not a waiver of the objecting party’s Fourth Amendment rights. The consenting party’s power to consent derives from that party’s “own right” stemming from her joint access and control over the property subject to the search, and the objecting party assumed the risk that the consenting party would consent to a search. The answer would go on to conclude that the objecting party had no right to stop the consenting party from consenting.<sup>52</sup> The circuit courts that answered this hypothetical exam question before *Randolph* answered the same way as the astute student.<sup>53</sup> The Georgia courts and a majority of the Supreme Court saw the issue differently and attempted to restrict the scope of third-party consent in *Randolph*.<sup>54</sup>

### C. Summary and Critique of *Georgia v. Randolph*

Janet Randolph had been living with her parents for several weeks when she returned with her son to the marital home.<sup>55</sup> Scott Randolph, Janet’s husband, took the child to a neighbor’s house following a domestic dispute, which prompted Janet to call the police.<sup>56</sup> When officers arrived, Janet claimed that Scott used cocaine.<sup>57</sup> The officer asked Scott if he could search the home and Scott “unequivocally refused.”<sup>58</sup> The officer then asked Janet, and she consented.<sup>59</sup> Janet led the officers to Scott’s bedroom where they seized a cocaine-laden drinking straw, which was used to obtain a search warrant.<sup>60</sup> The subsequent search turned up more evidence of cocaine use.<sup>61</sup> Scott was indicted for possession of cocaine, but he moved to suppress

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<sup>52</sup> See *Georgia v. Randolph*, 547 U.S. 103, 128 (2006) (Roberts, C.J., dissenting).

<sup>53</sup> *United States v. Morning*, 64 F.3d 531, 534–36 (9th Cir. 1995), *cert. denied*, 516 U.S. 1152 (1996); *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979); *United States v. Sumlin*, 567 F.2d 684, 687–88 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978).

<sup>54</sup> See *Randolph*, 547 U.S. at 122–23; *State v. Randolph*, 604 S.E.2d 835 (Ga. 2004), *aff’d*, 547 U.S. 103 (2006).

<sup>55</sup> *Randolph*, 547 U.S. at 106.

<sup>56</sup> *Id.* at 107.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*



the evidence based on the warrantless search.<sup>62</sup> The trial court denied Scott's suppression motion by finding that Janet possessed common authority over the area searched.<sup>63</sup> The court of appeals reversed and the Georgia Supreme Court affirmed by distinguishing *Matlock* as applicable only when the defendant is absent.<sup>64</sup>

Rejecting the Georgia Supreme Court's simple and effective differentiation strategy, the U.S. Supreme Court took a different approach by analyzing the facts against the backdrop of Fourth Amendment reasonableness and creating a "widely shared social expectations" standard to evaluate reasonableness.<sup>65</sup> Under the social expectations standard, it was unreasonable for the police to search the home because no regular house guest would feel comfortable entering the home when one tenant welcomed the guest and the other asked the guest to leave.<sup>66</sup> The Court did not overrule *Matlock* or *Rodriguez*; the Court admittedly drew a "fine line"<sup>67</sup> in order to give efficacy to an individual's assertion of his right, while simultaneously preserving the current framework of third-party consent search doctrine and servicing pragmatism in real-world police investigations.<sup>68</sup>

The Court's essential ruling—a tie goes to the objector, so long as the objector is "at the door" and "objecting"<sup>69</sup>—is odd given the doctrinal rationale for third-party consent.<sup>70</sup> *Matlock* teaches that a person with joint access and control of a common area may permit the police to search that area.<sup>71</sup> The validity of third-party consent arises from the relationship between the consenting third party and the targeted search area or, in a case like *Rodriguez*, the relationship between the third party and the third party's relationship to the targeted search area as determined by a police officer's subjective analysis.<sup>72</sup> In either circumstance under the pre-*Randolph* precedent, the defendant had no ability to overcome the third party's right to admit the police. Whether the defendant was present or absent, he had no objection because he had "assumed the risk" that his co-tenant would admit the police.<sup>73</sup> In order for the *Randolph* majority to invalidate the search, the Court had to ignore precedent and come up with a

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 107–08.

<sup>64</sup> *Id.* at 108.

<sup>65</sup> *Id.* at 111.

<sup>66</sup> *Id.* at 113–14.

<sup>67</sup> *Id.* at 121.

<sup>68</sup> *Id.* at 121–22.

<sup>69</sup> *Id.* at 121.

<sup>70</sup> *See id.* at 137 (Roberts, C.J., dissenting) (calling the majority's rule arbitrary and obscure).

<sup>71</sup> *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

<sup>72</sup> *See Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990).

<sup>73</sup> *Matlock*, 415 U.S. at 171 n.7. In many pre-*Randolph* third-party consent cases the defendant was present in the normal sense of the word, yet the defendant's presence never made any difference in the outcome of the case. *See, e.g., Rodriguez*, 497 U.S. at 180 (defendant asleep in bedroom); *Matlock*, 415 U.S. at 166 (defendant arrested and placed in squad car).

different mode of analysis for situations where the defendant is present and objecting—enter “widely shared social expectations” analysis.<sup>74</sup>

The “widely shared social expectations” standard of evaluating third-party consent situations is weak to say the least. The social expectations standard for determining the reasonableness of a search cheapens the Fourth Amendment’s value as a liberty-preserving device by allowing judges to make bold assumptions about relationships between co-inhabitants and their individual privacy expectations.<sup>75</sup> The social expectations standard of review strips the Fourth Amendment of any real protection in the arena of third-party consent searches.

This point is made perfectly clear in the Chief Justice’s dissent.<sup>76</sup> Chief Justice Roberts simply argues that there are social situations where a guest, such as a good friend or an out-of-town visitor, would enter the home of disputing residents.<sup>77</sup> Analyzing the facts of *Randolph* under any of these examples could lead to an opposite ruling in a case with identical facts to *Randolph*. Chief Justice Roberts’s argument shows that the “widely shared social expectations” standard is no standard at all because of the complexities of human relationships and social expectations.<sup>78</sup> Any judge could easily dispense with a challenge to a third-party consent search by juxtaposing the facts of the case with some socially acceptable situation in which a guest would enter: any social expectation becomes “widely shared” when a judge puts pen to paper.

Furthermore, the “widely shared social expectations” standard of reasonableness and the theory that co-tenants “assume the risk” that the other co-tenant may permit a search do not necessarily coexist in harmony. For example, suppose that Anne and Bob are married, reside in an apartment, and sleep in the same bedroom. Anne and Bob mutually share the social expectation that either of them might rifle through the other’s things or enter any room in the apartment, and that is a risk they understand and are willing to take. If, however, Anne has friends over for tea and crumpets, Bob has the social expectation that Anne will not parade the guests around the whole apartment, and Anne’s friends certainly do not expect to have the opportunity to rifle through Bob’s personal things. Rather, the occasion will be contained in the living room, dining room, kitchen, or some other appropriate room for the event.

The widely shared social expectation is that co-tenants will not let outsiders rifle through their roommate’s personal things. Anyone who has cohabitated with another person understands that there has to be mutual trust and respect between the co-tenants as to their individual privacy and personal belongings. If guests were to come

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<sup>74</sup> *Randolph*, 547 U.S. at 111.

<sup>75</sup> See Monique N. Bhargava, Note, *Protecting Privacy in a Shared Castle: The Implications of Georgia v. Randolph for the Third-Party Consent Doctrine*, 2008 U. ILL. L. REV. 1009, 1021–22 (2008).

<sup>76</sup> *Randolph*, 547 U.S. at 129–30 (Roberts, C.J., dissenting).

<sup>77</sup> *Id.* (mentioning good friends, out-of-town visitors, layout of the property, and ratio of objectors to willing hosts as examples of social situations where different standards should apply).

<sup>78</sup> See *id.*

to the apartment and ask Anne if they could rifle through Bob's things, Bob's social expectation is that Anne will refuse, and Anne, one could argue, has a social duty to protect Bob's privacy interest while he is away. Because of their shared social expectation of privacy, the only risk Bob thinks he has assumed is the risk as to Anne, not as to other house guests or certainly not as to the police. Bob would expect Anne to vindicate his Fourth Amendment right and protect his privacy against any visitor to the apartment because he would do the same thing for Anne, or at least she would have the expectation that he would defend her privacy. No cohabitant has the social expectation that his roommate will let others search through his personal things.

Of course, if a reader disagrees with this analysis of what constitutes "widely shared social expectations," then he has proven the first, and more important, point: the "widely shared social expectations" standard is no standard at all because its definition changes depending on who you ask. Furthermore, no surefire method exists to objectively and accurately determine which social expectations are widely shared.<sup>79</sup>

Notwithstanding its faults, the great success of *Randolph* is that it exposes the inequity of third-party consent doctrine. Before *Randolph*, a defendant, the person whose privacy, liberty, and literal freedom were at stake, received no consideration in the determination of whether a police search was valid.<sup>80</sup> Rather, a third party with no skin in the game could decide the fate of the defendant by deciding whether to preserve or waive the defendant's Fourth Amendment right against unreasonable searches. Should not the defendant make that important decision to consent? *Randolph* takes the first step toward answering "yes" by saying that when the defendant is present, the defendant gets the opportunity to object to a law enforcement officer's request for consent to search.<sup>81</sup>

The fact that the *Randolph* decision flies in the face of third-party consent doctrine shows that a defendant's autonomy to waive a right and third-party consent doctrine cannot logically coexist. Again, Chief Justice Roberts explained this incongruence when he wrote that "the majority's rule protects . . . not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive."<sup>82</sup> Basically, the Chief Justice highlighted the fact that the Court has never considered the defendant's Fourth Amendment right in a third-party consent context, and there is no reason to start considering it now.<sup>83</sup> Either the Fourth Amendment should be considered from the defendant's perspective or it should not, but it is arbitrary to consider the defendant's interests at some times and not at others. When confronted with the prospect of completely eliminating a defendant's right to object to a search when he shares his privacy with another, the Court could not follow its precedent to its

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<sup>79</sup> There is also the question of how widely a social expectation must be shared before it is "widely shared."

<sup>80</sup> See discussion *supra* Part I.B.

<sup>81</sup> *Randolph*, 547 U.S. at 121.

<sup>82</sup> *Id.* at 137 (Roberts, C.J., dissenting).

<sup>83</sup> *Id.* at 127–28.

logical conclusion. This failure to logically extend *Matlock*'s doctrinal rationale forces the consideration of this question: can third-party consent, as it is currently administered, comport with the Fourth Amendment, whose purpose is to protect the people's privacy from government intrusion?

Even though the *Randolph* majority failed to create a meaningful standard and write an opinion cohesive with precedent, they should be applauded for their attempt to constrain third-party consent. Despite the Court's noble efforts to restrain *Matlock* and *Rodriguez*, *Randolph*'s "fine line" proved to be too fine in subsequent appellate court decisions.<sup>84</sup> However, *Randolph* highlights the inherent problems with third-party consent and may be used as a springboard to restrain that line of Fourth Amendment doctrine.

#### D. *Randolph's Practical Limitations in Protecting Fourth Amendment Rights*

Ultimately, *Randolph* has added little, if any, Fourth Amendment protection.<sup>85</sup> Practically speaking, *Randolph* resembles an invisible line rather than a fine line because only the Ninth Circuit has buttressed the decision with some real enforceability.<sup>86</sup> Strict interpretation of *Randolph* in other circuits has allowed law enforcement officers to avoid its mandates.<sup>87</sup>

The *Randolph* majority sent a warning to law enforcement officers looking to game the "present and objecting" criteria of *Randolph*:

So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.<sup>88</sup>

Unfortunately for the Fourth Amendment, the majority of lower courts have read the "present and objecting" criteria very narrowly.<sup>89</sup> This trend allows police officers

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<sup>84</sup> See *infra* notes 85–90 and accompanying text.

<sup>85</sup> See Dery & Hernandez, *supra* note 9, at 83–84.

<sup>86</sup> See *United States v. Murphy*, 516 F.3d 1117, 1124–25 (9th Cir. 2008) (holding that an objection to a search is infinite unless waived).

<sup>87</sup> See discussion *infra* Part I.D.

<sup>88</sup> *Randolph*, 547 U.S. at 121–22.

<sup>89</sup> See, e.g., *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008) (holding search valid despite fact that police arrested defendant after he had expressly objected to the search and obtained consent from his wife); *United States v. Groves*, 530 F.3d 506 (7th Cir. 2008) (holding search valid despite defendant's present objection to same search two weeks earlier because defendant was not present or objecting when police returned), *cert. denied*, 129 S.Ct. 1312

to employ tactics to avoid *Randolph*'s mandate. Officers may avoid asking a present defendant for permission to search and instead ask a third party.<sup>90</sup> Officers may ask for defendant's consent, but then arrest the defendant when he refuses, ask the third party, and carry out the search anyway.<sup>91</sup> Officers may wait until they know that the defendant will not be home, and then ask the present third party.<sup>92</sup> All of these tactics fly in the face of the Fourth Amendment and highlight the weakness of the "fine line" rule of *Randolph*.<sup>93</sup>

The Seventh Circuit has been particularly brazen with its narrow reading of *Randolph*. In an opinion by Judge Rovner, the Seventh Circuit ruled in *United States v. Groves* that a search was valid when the defendant unequivocally refused several requests by police officers to search his home in connection with reported gunfire in his neighborhood.<sup>94</sup> The officers even requested a warrant from the magistrate, which the magistrate denied.<sup>95</sup> But these officers would not be deterred; they waited several weeks and returned to Groves's home when they knew he would be at work.<sup>96</sup> They asked Groves's girlfriend, Foster, if they could search the home.<sup>97</sup> Foster testified that the officers threatened to remove her child to Child Protective Services if she did not consent, but the district court refused to accept her testimony as fact.<sup>98</sup> Foster consented to the search, and the police found the evidence they were looking for and used it to convict the defendant of certain gun charges.<sup>99</sup> It seems unjust on its face to circumvent the defendant's express objection to a search of his home by waiting for him to go to work and ambush his girlfriend, particularly when a magistrate agreed that there was no probable cause. The Seventh Circuit had no problem refusing to invoke *Randolph*:

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(2009); *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) (holding search valid despite the fact that defendant objected because defendant was not present at search location when he objected); *United States v. McKerrell*, 491 F.3d 1221 (10th Cir. 2007) (holding that the defendant did not object despite the fact that he barricaded himself in his home denying police entry), *cert. denied*, 128 S.Ct. 553 (2007). *But see Murphy*, 516 F.3d 1117 (holding search invalid because objection was registered prior to third-party's consent).

<sup>90</sup> See, e.g., *United States v. Lopez*, 547 F.3d 397 (2d Cir. 2008) (holding search valid where defendant's girlfriend consented to search after defendant's arrest).

<sup>91</sup> See, e.g., *Henderson*, 536 F.3d at 777–78, 785 (holding search valid despite defendant's express objection and subsequent removal by arrest).

<sup>92</sup> See, e.g., *Groves*, 530 F.3d at 508, 511–12 (holding search valid when police officers returned two weeks later when defendant, who had expressly objected to the same search earlier, was not home).

<sup>93</sup> *Randolph*, 547 U.S. at 121.

<sup>94</sup> *Groves*, 530 F.3d at 508.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 508–09.

<sup>99</sup> *Id.* at 509.

Groves was not objecting at the door, as *Randolph* requires. Indeed, a few weeks had passed since he had refused the officers' first attempts to obtain his consent. Moreover, that the government agents waited until Groves was at work to seek Foster's consent did not undermine the validity of the search because they had no active role in securing Groves' absence.<sup>100</sup>

The Seventh Circuit reached this result by diminishing the significance of Groves's previous objection and narrowly construing both the "present and objecting" criteria and the rule against procuring the absence of the defendant.

The Seventh Circuit's interpretation of third-party consent jurisprudence is clear: if you want to vindicate your Fourth Amendment right against unreasonable searches, do not cohabit, and if you do, never leave home or always take your roommate with you. The fact that the officer played no active role in securing Groves's absence should not be dispositive if the officer intentionally approached the home knowing he was at work. The officers constructively removed the defendant from the entrance by intentionally timing their intrusion with his absence. This is the failure of an analysis based on the "social expectations" test. If one of Foster's friends came over for some afternoon tea and crumpets, despite the express objection of Groves on a previous occasion, Foster's friend would still feel welcome if Groves was not present; thus, the police, like the friend, can gain access despite a previous express objection because there are no social mores forbidding the intrusion.

Even *Groves*'s author, Judge Rovner, could not approve of the Seventh Circuit's decision in *United States v. Henderson*.<sup>101</sup> Officers responded to a call of domestic violence at the Henderson home.<sup>102</sup> Patricia Henderson had been choked and locked out of the house before the police arrived.<sup>103</sup> Patricia's son arrived with a key and the police used it to enter the home.<sup>104</sup> Officers found Kevin Henderson sitting in his living room and, "[a]fter a brief exchange, Henderson told the officers to '[g]et the [expletive] out of my house.'"<sup>105</sup> The officers arrested Henderson for domestic battery and took him to the police station.<sup>106</sup> Meanwhile, an officer asked Patricia if they could search the home.<sup>107</sup> She consented and the police conducted a search that turned up "crack cocaine and drug-dealing paraphernalia, four handguns, a shotgun, a rifle,

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<sup>100</sup> *Id.* at 512.

<sup>101</sup> *United States v. Henderson*, 536 F.3d 776, 785–88 (7th Cir. 2008) (Rovner, J., dissenting).

<sup>102</sup> *Id.* at 777 (majority opinion).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 777–78.

<sup>106</sup> *Id.* at 778.

<sup>107</sup> *Id.*

a machine gun, and live rounds of ammunition . . . a machete, a crossbow, and . . . an M-1000 explosive device.”<sup>108</sup>

The court interpreted the brief dialogue between Henderson and the officers as an objection to a search, so the court had to determine whether *Randolph* applied.<sup>109</sup> The majority ruled that *Randolph* did not apply because Henderson was not “present” and “his objection lost its force” when police received consent from Patricia.<sup>110</sup> Based on the “social expectations” analysis of *Randolph*, the search in *Henderson* was reasonable because once Henderson was gone, there was no reason why it would not be socially acceptable for Patricia to welcome in a guest.<sup>111</sup> Furthermore, after Henderson was arrested and removed, he was no longer present and objecting at the threshold of the home.<sup>112</sup>

The practical effect of this decision is that a defendant’s objection to a warrantless search is effective only if he is not arrested and removed. In other words, if a defendant can be legally arrested, he has no Fourth Amendment right to object to the search of his home. If the police can legally remove the objecting party from the threshold, then they may act upon the consent of the third party despite a previous objection. Judge Rovner pointed this out in his dissent: “There is one and only one reason that this case is not on all fours with *Georgia v. Randolph*: When Kevin Henderson told the police to ‘get the fuck out’ of his house, the officers arrested and removed *him* instead.”<sup>113</sup> Rovner went on to say, “I would hold that Henderson’s objection survived his involuntary removal from the home, thus precluding the search in the absence of a warrant.”<sup>114</sup> Rovner’s dissent is consistent with *Randolph*’s preclusion of police action that is intended to remove the targeted party from the threshold.<sup>115</sup>

Judge Rovner’s dissent in *Henderson* mirrored what the Ninth Circuit had ruled a few months earlier in *United States v. Murphy*.<sup>116</sup> Wayne Murphy was a methamphetamine manufacturer living and working out of a storage unit, which he had permission to use from Dennis Roper, whose name was on the lease and who paid the rent.<sup>117</sup> Police officers came to the storage units and confronted Murphy, who objected to a search of the unit.<sup>118</sup> The officers arrested Murphy and took him to jail.<sup>119</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 779–85.

<sup>110</sup> *Id.* at 785.

<sup>111</sup> *Id.* at 783–84.

<sup>112</sup> *Id.* at 785.

<sup>113</sup> *Id.* at 785–86 (Rovner, J., dissenting).

<sup>114</sup> *Id.* at 786.

<sup>115</sup> *Id.* at 787–88; see *Georgia v. Randolph*, 547 U.S. 103, 121 (2006).

<sup>116</sup> Compare *Henderson*, 536 F.3d at 786 (Rovner, J., dissenting), with *United States v. Murphy*, 516 F.3d 1117, 1124–25 (9th Cir. 2008).

<sup>117</sup> *Murphy*, 516 F.3d at 1119.

<sup>118</sup> *Id.* at 1119–20.

<sup>119</sup> *Id.* at 1120.

Two hours later, Roper arrived at the unit, and officers asked him if they could search the unit.<sup>120</sup> Roper consented and the police found an operational methamphetamine lab inside.<sup>121</sup> Murphy filed a motion to suppress the evidence based on an illegal search.<sup>122</sup> The district court denied the motion, but the Ninth Circuit, using *Randolph* as its justification, reversed.<sup>123</sup>

The Ninth Circuit interpreted broadly the Supreme Court's warning to police about avoiding objections:

If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Nor, more generally, do we see any reason to limit the *Randolph* rule to an objecting tenant's removal by police. Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects.<sup>124</sup>

This broad interpretation of *Randolph* provides more Fourth Amendment protection.<sup>125</sup> The broad interpretation can easily be circumvented if police officers avoid asking defendants for consent by simply arresting them first and asking for the co-tenant's consent or arriving at the targeted residence knowing that the suspect will not be home. These types of tactics have proven successful in several circuits.<sup>126</sup>

Even though *Randolph* recognizes that defendants should have some capacity to successfully object to a search, *Randolph* does little to give defendants the practical legal tools necessary to enforce that right without broad interpretation by circuit courts. Frankly, if the police can legally arrest the defendant and the defendant has a co-tenant willing to consent to a search, the defendant loses his Fourth Amendment right against searches. Similarly, if the defendant has registered his objection to a search, the police can circumvent that objection simply by waiting until the defendant is not home and asking the defendant's roommate for consent. Even more simply, law enforcement officers may not ask the defendant at all despite the fact that he is the target of the search.

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1119.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1124–25.

<sup>125</sup> For further analysis of the narrow vs. broad interpretation of *Randolph*, see Renee E. Williams, Note, *Third Party Consent Searches After Georgia v. Randolph: Dueling Approaches to the Dueling Roommates*, 87 B.U. L. REV. 937, 952–57 (2007).

<sup>126</sup> See *supra* Part I.D.



*E. Summary*

*Randolph* created a useless standard to reach a result that did not follow the Supreme Court's precedent. Despite its failures, the Court's decision as to the outcome of the case has opened the door for welcome restraint on third-party consent.<sup>127</sup> The Ninth Circuit has shown how lower courts, and eventually the Supreme Court, can use *Randolph* as a springboard to further restrain third-party consent.<sup>128</sup>

The remainder of this Note focuses on how and why third-party consent gained validity, why third-party consent does not comport with our current understanding of the right to privacy, and what courts can do to rectify these injustices.

## II. DOCTRINES ENABLING THIRD-PARTY CONSENT

The government's revenue officers arrived at the defendant's home and place of business while he was away.<sup>129</sup> The defendant's wife answered the door, whereupon the officers informed her that they had come to search the residence for "violations of the revenue law."<sup>130</sup> The defendant's wife allowed the warrantless officers to enter the residence and conduct their search against the defendant-husband.<sup>131</sup> The revenue officers found the incriminating evidence they were looking for and later used it to convict the defendant at trial.<sup>132</sup> The Supreme Court addressed these events in 1921, eighty-five years before *Randolph*, and the Court, avoiding the question of whether a wife could "waive" her husband's Fourth and Fifth Amendment rights, found the search to be invalid and ordered the return of the defendant's illegally distilled whiskey because of the "implied coercion" used by the officers against the wife to gain entry into the home.<sup>133</sup> Because of the implied coercion, the Court determined that "no . . . waiver was intended or effected."<sup>134</sup>

In 1974, the Court in *United States v. Matlock* returned to the question it left open in *Amos*: "The question now before us is whether the evidence presented by the United States with respect to the voluntary consent of a third party to search the living quarters of the respondent was legally sufficient to render the seized materials admissible in evidence at the respondent's criminal trial."<sup>135</sup> The Court answered in the affirmative,<sup>136</sup> but in the years between *Amos* and *Matlock*, the Court's Fourth

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<sup>127</sup> See Maclin, *supra* note 11, at 67–82.

<sup>128</sup> See *Murphy*, 536 F.3d at 1124–25.

<sup>129</sup> *Amos v. United States*, 255 U.S. 313, 315 (1921).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 317.

<sup>134</sup> *Id.*

<sup>135</sup> *United States v. Matlock*, 415 U.S. 164, 166 (1974).

<sup>136</sup> See *id.* at 169–72.

Amendment doctrine had changed significantly.<sup>137</sup> Three shifts in Fourth Amendment doctrine enabled the Court to validate third-party consent searches: a shift from protecting an individual's interests in property to protecting an individual's "right to privacy";<sup>138</sup> a shift from "warrant preference" theory to a more "generalized reasonableness" theory;<sup>139</sup> and the demotion of Fourth Amendment rights to a lower tier of protection by the elimination of "waiver" from the Fourth Amendment lexicon.<sup>140</sup>

#### A. Property vs. Privacy

The first shift in Fourth Amendment doctrine that enabled the creation of third-party consent occurred in 1967 when "the Fourth Amendment's concern with privacy . . . achieved preeminence in Justice Harlan's concurrence in *Katz v. United States*."<sup>141</sup> Prior to *Katz*, the Court decided search cases based on property interests.<sup>142</sup> *Olmstead v. United States* is an example of such a case.<sup>143</sup> The Court upheld a government wire tap because there was no government trespass to the defendant's personal property.<sup>144</sup> Dissenting in *Olmstead*, Justice Brandeis expressed his concern that the majority was not taking into account the characteristics of the blossoming telecommunications era and that a doctrine limiting the Fourth Amendment to property interests was not broad enough to provide individuals with the privacy the Founders intended to enshrine in the amendment.<sup>145</sup> The Court adopted the notion of privacy in subsequent

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<sup>137</sup> See Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 725–37, 745–48 (2007); Maclin, *supra* note 11, at 35–63.

<sup>138</sup> See Bascuas, *supra* note 137, at 733–37; compare *Olmstead v. United States*, 277 U.S. 438 (1928) (holding the Fourth Amendment only protects an individual's property rights), with *Katz v. United States*, 389 U.S. 347 (1967) (holding the Fourth Amendment also protects an individual's privacy interest).

<sup>139</sup> See Bascuas, *supra* note 137, at 745–57; compare *Weeks v. United States*, 232 U.S. 383 (1914) (holding that every search must be authorized by a warrant), with *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (holding that a warrantless search can be valid if police officers have a reasonable belief a third party has given consent).

<sup>140</sup> See *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (holding that the State need not prove that a person giving consent to search knew he had a right to withhold consent); Davies, *supra* note 15, at 31.

<sup>141</sup> Bascuas, *supra* note 137, 735–36; see *Katz*, 389 U.S. at 360–62 (1967) (Harlan, J., concurring).

<sup>142</sup> See Bascuas, *supra* note 137, at 733–34.

<sup>143</sup> 277 U.S. 438 (1928) (holding no search occurred when law enforcement officers eavesdropped on a phone conversation because there was no trespass to property).

<sup>144</sup> *Id.* at 455.

<sup>145</sup> *Id.* at 478 (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred,

decisions, culminating with the *Katz* decision.<sup>146</sup> Presently, the Fourth Amendment is interpreted primarily as protecting the right to privacy rather than property.<sup>147</sup>

The caveat to the argument that the shift from property to privacy allows for third-party consent is that third-party consent is possible in a property regime. In a property regime, third-party consent would be valid when the consenting individual has some current possessory ownership interest in the property subject to a search. The difference between third-party consent searches in a privacy rather than property regime is that the universe of individuals capable of consenting to a search is broader in a privacy regime. To exemplify the difference between the universe of valid consenters in property and privacy regimes, it may be helpful to look at cases decided before *Katz* and imagine possible third-party consenters in a post-*Katz* privacy regime based on a broad assumption of the risk analysis.

*Stoner v. California*, decided before *Katz*, involved a robbery suspect, Stoner, whom police believed to be residing in a hotel room.<sup>148</sup> The police arrived at the hotel without a warrant and made a request of the night clerk to search Stoner's room.<sup>149</sup> The night clerk obliged the officer's request, and the officers found seven items of incriminating evidence, which were used to convict Stoner.<sup>150</sup> The Supreme Court, rejecting the State's arguments attempting to show that an exception to the warrant requirement existed, reversed the conviction—the most important argument rejected being the argument that the night clerk could validly consent to the officer's search.<sup>151</sup> The Court acknowledged that hotel room renters understand that some hotel employees may access rooms in order to fulfill their duties of employment, but the Court rejected any “strained applications of the law of agency or [any] unrealistic doctrines of ‘apparent authority.’”<sup>152</sup> Instead, the Court applied a strict waiver standard.<sup>153</sup>

By straining assumption of the risk analysis, however, the housekeeping staff could become valid consenters in a privacy regime. Interpreting assumption of the

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as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”).

<sup>146</sup> *Katz*, 389 U.S. at 355; see Bascuas, *supra* note 137, at 736 (“*Katz* expressly overruled *Olmstead* and entrenched the right to privacy as the [Fourth] Amendment’s chief concern.”).

<sup>147</sup> 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3, at 554–55 (4th ed. 2004). This Note does not propose returning to a property regime. See *infra* Part III. But see Bascuas, *supra* note 137, at 769–75 (suggesting a return to stronger property protections).

<sup>148</sup> 376 U.S. 483, 484–85 (1964).

<sup>149</sup> *Id.* at 485.

<sup>150</sup> *Id.* at 485–86.

<sup>151</sup> *Id.* at 489 (“It is important to bear in mind that it was the petitioner’s constitutional right which was at stake here, and not the night clerk’s nor the hotel’s. It was a right, therefore, which only the petitioner could waive.”).

<sup>152</sup> *Id.* at 488.

<sup>153</sup> *Id.*

risk analysis liberally, a court could validate the search because the defendant exposed his privacy to the housekeeping staff and assumed the risk that the housekeeping staff would rifle through his things or invite others to his room when he refrained from placing a “Do Not Disturb” sign on his room’s doorknob. A member of the housekeeping staff could transfer his access rights to the police just as easily as he could report contraband to the police if he saw it in the room. Although this construction of assumption of the risk analysis strains credulity, the point is that members of the housekeeping staff could never be valid consenters in a property regime because they have no property interest in the hotel room. Only the owner of the hotel could be a potential consentor, and his right to consent would be constrained by property and contract law.

Another case, *Chapman v. United States*, involved a landlord-tenant relationship.<sup>154</sup> The landlord suspected that his new tenants were illegally distilling whiskey.<sup>155</sup> The landlord called the police, who entered the home through an unlocked window.<sup>156</sup> The officers discovered the illegal distillery, contacted federal agents, and arrested Chapman when he returned.<sup>157</sup> Chapman successfully argued that the search was invalid because it was warrantless, and the landlord could not have given consent to the search.<sup>158</sup> The government argued that the landlord had the right, which was transferable to the police, to enter the leasehold based on a Georgia statute that allowed landlords to re-enter the property if it was being used for distilling whiskey.<sup>159</sup> The Court disagreed because the landlord had only a suspicion, not actual knowledge of the distillery’s presence, so the statute did not apply.<sup>160</sup> Thus, the decision rested on property law, which removed the landlord from the universe of consenters even though he was the owner of the property.

If the decision was made in a privacy regime and decided by a court that construed assumption of the risk liberally, then that court may have upheld the search. Because landlords typically reserve the right of occasional inspection, the government could argue that the renter had assumed the risk that the landlord would bring the police along to one of these inspections. The tenant would not be able to object because he assumed the risk that the landlord would take such action. This is the theory, taken to extremes, enunciated by the Court in *Matlock*: once A shares his privacy with B, A assumes the risk that B will expose A’s privacy to whomever B might choose.<sup>161</sup> One’s privacy rights are compromised once the privacy is shared with a third party. The Court has given the effect of law to the old axiom “the best kept secrets are those kept by one person.”

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<sup>154</sup> 365 U.S. 610 (1961).

<sup>155</sup> *Id.* at 611–12.

<sup>156</sup> *Id.* at 612.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 616–18.

<sup>159</sup> *Id.* at 616–17.

<sup>160</sup> *Id.* at 617.

<sup>161</sup> *See United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

These examples, though extreme, show that, in the third-party consent context, Fourth Amendment rights in a privacy regime are fragile and easily shattered when compared to Fourth Amendment rights in a property regime. Property rights are well-defined and not up for interpretation by the Supreme Court, or at least not nearly to the extent of privacy rights. Privacy rights in third-party consent context are defined by how far the Court is willing to take the assumption of the risk doctrine in the future.

When Justice Brandeis espoused his view of privacy in *Olmstead*, he envisioned a broader Fourth Amendment.<sup>162</sup> Generally speaking, the Court's shift from a Fourth Amendment property regime to a Fourth Amendment privacy regime has expanded the Fourth Amendment's protections. However, in the context of third-party consent, the privacy regime reduces the protections of the Fourth Amendment because assumption of the risk analysis creates a broad universe of potential consenters. When coupled with the reasoning in *Rodriguez*—allowing for police error—the universe of consenters is potentially anyone.<sup>163</sup> Because the Court adopted the privacy regime to broaden the Fourth Amendment's protections, the Court should place limits on the extent to which privacy can erode Fourth Amendment protections in the third-party consent context in order to preserve the Fourth Amendment's privacy protecting purpose.

#### *B. Warrant Requirement vs. "Reasonable" Exceptions (Excuses)*

The second shift in Fourth Amendment doctrine that enables constitutional validation of third-party consent searches is a shift in the interpretation of Fourth Amendment reasonableness. The Fourth Amendment protects "the people" from "unreasonable searches."<sup>164</sup> Unreasonable searches are constitutionally invalid and evidence seized from such a search is excluded from evidence at trial.<sup>165</sup> In the days of *Amos*, virtually all warrantless searches were considered unreasonable and invalid.<sup>166</sup> "During the heyday of the warrant requirement, the Court repeatedly insisted 'that [warrantless] searches . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"<sup>167</sup> Searches with a warrant satisfied the reasonableness requirement, and warrantless searches typically did not satisfy the reasonableness requirement.<sup>168</sup> Reasonableness was not defined by judges analyzing the facts of a given situation; rather, reasonableness was defined within the strict parameters of the warrant requirement.<sup>169</sup>

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<sup>162</sup> *Olmstead v. United States*, 277 U.S. 438, 474–75 (1928) (Brandeis, J., dissenting).

<sup>163</sup> *See Illinois v. Rodriguez*, 497 U.S. 177 (1990).

<sup>164</sup> U.S. CONST. amend. IV.

<sup>165</sup> *See Weeks v. United States*, 232 U.S. 383 (1914).

<sup>166</sup> *See Amos v. United States*, 255 U.S. 313 (1921); *Weeks*, 232 U.S. at 393–94.

<sup>167</sup> *Maclin*, *supra* note 11, at 32 (quoting *Katz v. United States*, 389 U.S. 437, 357 (1967)).

<sup>168</sup> *See, e.g., Weeks*, 232 U.S. 383.

<sup>169</sup> *See, e.g., id.*

Today, “the ‘warrant requirement’ [has] become so riddled with exceptions that it [is] basically unrecognizable.”<sup>170</sup> Furthermore, “the Court has become increasingly deferential to government interests.”<sup>171</sup> As mentioned in Part II.A, the Court’s current Fourth Amendment framework emerged from Justice Harlan’s concurrence in *Katz*: “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>172</sup> Justice Harlan’s analysis gave rise to what is known as the reasonable expectation of privacy test. The test is used to determine whether a Fourth Amendment search has taken place, which is not an inconsequential determination because where there is no search, there is no Fourth Amendment application.<sup>173</sup>

The devil in warrant requirement degradation is the Court’s current predilection to analyze Fourth Amendment “reasonableness” in light of specific case facts and concerns with practicality.<sup>174</sup> Justice Scalia admitted the role of reasonableness in breaking down the warrant requirement in *California v. Acevedo*: “Our intricate body of law regarding ‘reasonable expectation of privacy’ has been developed largely as a means of creating these exceptions [to the warrant requirement], enabling a search to be denominated not a Fourth Amendment ‘search’ and therefore not subject to the general warrant requirement.”<sup>175</sup> If the Court can come up with a reason that justifies a warrantless search as reasonable, then the search is valid.

Built into Harlan’s test is the notion that an individual’s privacy exists only insofar as society is willing to acknowledge that the individual’s privacy expectation is reasonable. “[I]t is clear that social convention has become the defining ideal of the Fourth Amendment—the source of authority that gives reasonableness its shape.”<sup>176</sup> The problem with reasonableness defined by social convention is that its shape is amorphous, not easily predictable, and changes over time with the rotation of the Justices and their current predilections. The very reasonableness that enables the viability of third-party consent also justifies the limits to third-party consent enunciated in *Randolph*.<sup>177</sup> Furthermore, the social expectations test’s lack of definitional certainty can be seen in Chief Justice Robert’s use of his own views of social expectations in his *Randolph* dissent to give reasonableness a radically different definition.<sup>178</sup>

<sup>170</sup> *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment); see Note, *supra* note 12, at 1628.

<sup>171</sup> Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2198 (2006).

<sup>172</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>173</sup> Note, *supra* note 12, at 1628 (“[T]he central question in the context of any warrantless search is whether a search occurred at all.”).

<sup>174</sup> See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177 (1990); see also Davies, *supra* note 15, at 45–69.

<sup>175</sup> 500 U.S. at 583 (Scalia, J., concurring in the judgment).

<sup>176</sup> Note, *supra* note 12, at 1628.

<sup>177</sup> See *Georgia v. Randolph*, 547 U.S. 103, 111–12 (2006).

<sup>178</sup> See *id.* at 129–30 (Roberts, C.J., dissenting).

The combination of defining reasonableness with social convention and using reasonableness to erode the warrant requirement enables the constitutional validity of third-party consent. First, erosion of the warrant requirement enables the Court to determine that warrantless searches conducted with consent are not unreasonable and may not even be characterized as a Fourth Amendment search. Second, the Court interprets reasonableness to allow law enforcement officers to validly search a person's living quarters when a third party in his own right consents to a search based on the assumption of the risk doctrine.<sup>179</sup> Today, a warrant is not a requirement, but rather one method of making a search reasonable, and individual rights against unreasonable searches are subject to change, for better or worse.<sup>180</sup>

The Court's doctrine on Fourth Amendment reasonableness weakens the Fourth Amendment by incentivizing police tactics designed to circumvent the Fourth Amendment.<sup>181</sup> These tactics are exemplified by the cases cited in Part I. The Court should reinvigorate the Fourth Amendment by taking positive steps to remove incentives for police officers who presume to dodge the Fourth Amendment's proscriptions.

### *C. Demotion of Fourth Amendment Rights: "Waiver's" Disappearing Act*

Perhaps the most significant development that enabled the Court to approve third-party consent searches was the demotion of Fourth Amendment rights from the top tier of constitutional protections.<sup>182</sup> The Court effected this change in *Schneckloth v. Bustamonte*.<sup>183</sup> "*Schneckloth* edited 'waiver' out of the Court's vocabulary of synonyms for consent to avoid any suggestion that consent required a warning of the right to withhold consent."<sup>184</sup> The significance of this development for third-party consent jurisprudence cannot be understated: without waiver's disappearance from the Fourth Amendment lexicon, third-party consent is not possible. If consent searches were considered a waiver of an individual's Fourth Amendment rights, third parties could never waive the rights of the targeted party because individuals can only waive their own rights, not the rights of others.<sup>185</sup>

If consent is not a waiver, then the question, "who consented?" is of no import. The question becomes, "did the person who gave consent have the power to do so?" The suspect's rights get lost in the analysis when the question is not, "who consented?" but, "is the power valid?" The third party's valid consent circumvents the suspect's interest in protecting his privacy, weakening the Fourth Amendment. This Fourth

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<sup>179</sup> *Id.* at 111–12 (majority opinion).

<sup>180</sup> See Davies, *supra* note 15, at 36–40; Thomas, *supra* note 17, at 544.

<sup>181</sup> See Dery & Hernandez, *supra* note 9, at 83–84; Maclin, *supra* note 11, at 81–82; Strauss, *supra* note 15, at 236–44.

<sup>182</sup> See Davies, *supra* note 15, at 46.

<sup>183</sup> 412 U.S. 218 (1973).

<sup>184</sup> Davies, *supra* note 15, at 31.

<sup>185</sup> *Id.* at 26–30.

Amendment weakening is enhanced because the third-party in many cases will have no motive to object to a search targeting another person because the third party presumably has nothing to hide. These circumstances lead to affirmative answers in response to third-party search requests, which can partly explain why police officers prefer consent searches to all other forms of Fourth Amendment search validation methods: it's quick, easy, and sure to work.<sup>186</sup> The targeted party always has a keen interest in objecting to the search, but without a strict waiver standard, the primary party will never get the opportunity to object if law enforcement officers are well-trained.

How did the Court in *Schneckloth* make waiver disappear before our very eyes? *Schneckloth* involved the search of a car during a routine police stop.<sup>187</sup> One of the passengers consented to a general search of the car.<sup>188</sup> The search uncovered stolen checks, and those checks were used to convict another passenger, Bustamonte.<sup>189</sup> The main question facing the Court was whether consent, in the Fourth Amendment context, is a waiver in the strict sense of the word, requiring "'knowing' and 'intelligent' waiver,"<sup>190</sup> or whether consent should be judged by a different standard.<sup>191</sup> The implication of deciding that consent was, in fact, a waiver in the strict sense of the term was that the Court would have been forced to write another *Miranda*-like opinion, requiring officers to inform individuals of their right to refuse a request to search.<sup>192</sup> The Court was unwilling to make that move, so it swept the term "waiver" out of the Fourth Amendment lexicon and iterated the voluntariness standard.<sup>193</sup>

The Court accomplished this by distinguishing the Fourth Amendment from other amendments.<sup>194</sup> The "rejection of the formal concept of waiver for Fourth Amendment consent rests on a premise that Fourth Amendment rights are of a different, and lower, order than those rights set out in other provisions of the Bill of Rights."<sup>195</sup> The *Schneckloth* majority determined that the Fourth Amendment did not deserve a strict waiver standard because it was not a trial right, and only trial rights had received a strict waiver standard.<sup>196</sup> Thus, the Fourth Amendment was undeserving of heightened protections granted to the Fifth and Sixth Amendments in *Miranda*.<sup>197</sup>

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<sup>186</sup> See Maclin, *supra* note 11, at 31–32, 81–82.

<sup>187</sup> *Schneckloth*, 412 U.S. at 220–21.

<sup>188</sup> *Id.* at 220.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 236.

<sup>191</sup> *Id.* at 222.

<sup>192</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966); Maclin, *supra* note 11, at 54–55.

<sup>193</sup> See *Schneckloth*, 412 U.S. 218; see also Maclin, *supra* note 11, at 54–55. For the purposes of this Note, the Court's choice to implement the voluntariness standard is immaterial. What is important is that consent is *not* a waiver.

<sup>194</sup> *Schneckloth*, 412 U.S. at 235–46.

<sup>195</sup> Davies, *supra* note 15, at 31 n.114.

<sup>196</sup> *Schneckloth*, 412 U.S. at 236–37.

<sup>197</sup> *Id.* at 241 ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."); see also *Miranda*, 384 U.S. 436.



How the Court can conclude that the Fourth Amendment has “*nothing whatever* to do with promoting the fair ascertainment of truth at a criminal trial”<sup>198</sup> is bizarre. Like a confession or other admission by a defendant, evidence seized during a police search can be used against a defendant at his trial. The defendant can challenge evidence by challenging the validity of the search that produced such evidence. These objections occur at trial. The Fourth Amendment in this respect protects elements of the defendant’s privacy from being revealed at trial unless the search was valid. The entire reason why seized evidence is used is to ascertain the truth. The Fourth Amendment has a direct effect on the outcome of a trial. When third parties consent to a search, that consent abrogates the defendant’s ability to challenge the search at trial, which directly results in admissible evidence against the defendant.

Aside from demoting the Fourth Amendment, the Court used another tactic to complete waiver’s disappearing act: the misinterpretation of precedent. In *Schneckloth*, the Court reasoned that the Fourth Amendment contained no waiver requirement because holding so would directly contravene the Court’s third-party consent decisions.<sup>199</sup> The Court’s analysis of its own precedent is far too sweeping and broad because no case had been decided before *Schneckloth* strictly on third-party consent grounds.<sup>200</sup> The Court cited *Frazier v. Cupp*,<sup>201</sup> *Coolidge v. New Hampshire*,<sup>202</sup> *Abel v. United States*,<sup>203</sup> and *Hill v. California*<sup>204</sup> to show that the Court had previously sanctioned third-party consent searches.<sup>205</sup> The problem is that none of these cases are third-party consent cases in the strict meaning of the term.<sup>206</sup> The Court also ignored cases such as *Stoner*, which assert that there is some form of waiver standard in the Fourth Amendment.<sup>207</sup>

The search in *Abel* took place in a hotel room that had been rented by the defendant.<sup>208</sup> The police requested permission from hotel management to search the defendant’s room.<sup>209</sup> The Court upheld the search because the defendant had already checked out of the room, abandoning his right to privacy, and the evidence was found in the trash can, which meant the property seized was abandoned.<sup>210</sup> The search was not a third-party consent search; the search was a first-party consent search because

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<sup>198</sup> *Schneckloth*, 412 U.S. at 242 (emphasis added).

<sup>199</sup> *Id.* at 245–46.

<sup>200</sup> *Id.*

<sup>201</sup> 394 U.S. 731 (1969).

<sup>202</sup> 403 U.S. 443 (1971).

<sup>203</sup> 362 U.S. 217 (1960).

<sup>204</sup> 401 U.S. 797 (1971).

<sup>205</sup> *Schneckloth*, 412 U.S. at 245–46.

<sup>206</sup> “[T]he typical third party consent case, [is] where the police solicit the consent of *A* in order to search an area in which *B* has a privacy interest for the express purpose of finding evidence against *B*.” 4 LAFAVE, *supra* note 147, § 8.3(a), at 147.

<sup>207</sup> See, e.g., *Stoner v. California*, 376 U.S. 483, 489 (1964).

<sup>208</sup> *Abel*, 362 U.S. at 241.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

the hotel had acquired complete access and control of the room.<sup>211</sup> Defendant had no expectation of privacy in the room he no longer rented, and the defendant no longer had any property interest in the evidence he discarded because it was abandoned property. *Abel* is not a third-party consent case.

*Coolidge* expressly declares itself not to be a consent search case in the opinion: “we need not consider the petitioner’s . . . argument that Mrs. Coolidge could not or did not ‘waive’ her husband’s constitutional protection against unreasonable searches and seizures.”<sup>212</sup> During an interview with police officers in her home, Mrs. Coolidge, in order to exonerate her husband the murder suspect, delivered evidence to the police on her own volition.<sup>213</sup> The Court likened the case to a situation where someone, on their own accord, brings evidence forward to the police.<sup>214</sup> Using this reasoning, the Court determined that there was no search.<sup>215</sup> *Coolidge*, therefore, is not a third-party consent case.<sup>216</sup>

*Hill* is not a consent case either. Police officers mistakenly arrested someone whom they believed to be the defendant, and the police conducted a search incident to arrest.<sup>217</sup> The Court ruled that the police could validly search the apartment as if they had arrested the correct person.<sup>218</sup> *Hill* is an incident to arrest case with a touch of police mistake; in fact, the word “consent” does not appear anywhere in the opinion.<sup>219</sup>

*Frazier* is the case that comes closest to validating a third-party consent search. There is a subtle difference, however, between the search conducted in *Frazier* and a true third-party consent search.<sup>220</sup> The police officers in *Frazier* were conducting an investigation against the defendant’s cousin, Rawls.<sup>221</sup> Rawls gave the police his consent to search a bag owned by the defendant, but Rawls was also using the bag and the bag was at Rawls’s house.<sup>222</sup> The officers found the defendant’s clothes in

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<sup>211</sup> *See id.*

<sup>212</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

<sup>213</sup> *Id.* at 446, 487.

<sup>214</sup> *Id.* at 487 (“Had Mrs. Coolidge, wholly on her own initiative, sought out her husband’s guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence.”).

<sup>215</sup> *Id.* at 487–90.

<sup>216</sup> Interestingly, Justice Thomas, in his separate *Randolph* dissent, expressed his opinion that the case should have been controlled by *Coolidge* because *Randolph*’s wife basically gave the evidence to the police when she led them straight to the bedroom. *Georgia v. Randolph*, 547 U.S. 103, 145–48 (2006) (Thomas, J., dissenting). The general search occurred only after a warrant was obtained based on the evidence presented to the police by *Randolph*’s wife. *Id.* at 107 (majority opinion).

<sup>217</sup> *Hill v. California*, 401 U.S. 797, 799 (1971).

<sup>218</sup> *Id.* at 802.

<sup>219</sup> *See id. passim.*

<sup>220</sup> *See Maclin, supra* note 11, at 45.

<sup>221</sup> *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

<sup>222</sup> *Id.*

the bag as well, and they seized them.<sup>223</sup> The seizure was lawful because the search was lawful, and the search was lawful because the police officers had consent from the person targeted by the search.<sup>224</sup> Furthermore, the search could have been ruled incident to a valid arrest, relegating the consent issue moot. The consent in *Frazier* is distinguishable from typical third-party consent because the consent in *Frazier* came from the person targeted by the search.<sup>225</sup> *Frazier* is a consent case, but not a third-party consent case.

*Schneckloth* itself is not a third-party consent case for the same reason as *Frazier*: the person who gave consent was a target of the search.<sup>226</sup> When a consenting party is also a target of the search, no third-party consent has been rendered. Because *Abel*, *Frazier*, *Coolidge*, *Hill* and *Schneckloth* can each be distinguished from a true third-party consent search, as occurred in *Matlock*, the Court's use of these cases is inappropriate to show that a Fourth Amendment waiver standard never existed.

The Court also ignores cases like *Stoner* that explicitly state that a Fourth Amendment waiver standard exists.<sup>227</sup> The *Stoner* Court ruled that "it was the petitioner's constitutional right which was at stake here, and not the night clerk's . . . . It was a right, therefore, which only the petitioner could waive."<sup>228</sup> Clearly, some form of waiver standard applied to the Fourth Amendment.

The demotion of the Fourth Amendment and the inappropriate application of precedent, combined with the disregard for cases that did apply a waiver standard to the Fourth Amendment, allowed the Court to make waiver disappear. Because the Court abandoned a waiver standard by misconstruing precedent, the *Matlock* Court had little trouble rationalizing the validity of third-party consent in the first case actually raising and resolving the issue first raised in *Amos*.<sup>229</sup> The *Matlock* Court acted as if the issue had already been decided by simply citing *Frazier*, *Schneckloth*, and *Coolidge* for the proposition that third-party consent had already been validated.<sup>230</sup>

#### D. Summary

In its first decision truly validating third-party consent, the Supreme Court in *Matlock* had no trouble because *Schneckloth* had eliminated waiver from the Fourth

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See Maclin, *supra* note 11, at 44–45.

<sup>226</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973).

<sup>227</sup> See, e.g., *Stoner v. California*, 376 U.S. 483, 489 (1964).

<sup>228</sup> *Id.*

<sup>229</sup> *United States v. Matlock*, 415 U.S. 164, 170–71 (1974).

<sup>230</sup> In fact neither party brought up the issue during litigation. *Id.* at 169 ("It has been assumed by the parties and the courts below that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant."). Everyone assumed that third-party consent was valid. *Id.* Presumably the Court mentioned *Amos* in order to tidy up the case law and close the door on any future arguments against third-party consent legitimacy. See *id.* at 169–71.

Amendment lexicon and had inaccurately claimed that third-party consent had already been validated in cases like *Coolidge* and *Frazier*. Furthermore, the police officers did not need a warrant because the warrant requirement had disintegrated in favor of a general reasonableness model of Fourth Amendment jurisprudence in which third-party consent is a reasonable type of search. The result is a weaker Fourth Amendment for any person who shares his privacy. The current privacy regime and the *Rodriguez* decision exacerbate the weakening of the Fourth Amendment because they create a broad universe of potential third-party consenters. In light of the weaker Fourth Amendment generated by the Court's decisions in the third-party consent context, the Court should take steps to rehabilitate the Fourth Amendment to give efficacy to its privacy protecting values.

### III. SUGGESTED SOLUTIONS

Typically, when one searches for solutions to doctrinal problems, a dichotomy of choices emerge: nuclear options and pragmatic options.<sup>231</sup> Nuclear options achieve goals by making wholesale changes in doctrine, whereas pragmatic options achieve goals by working within existing doctrine. Nuclear options make themselves useful by showing a design for an ideal world and shedding light on what may otherwise be opaque goals. Nuclear options are not practical and they inevitably fail because they are radical departures from existing law and express the ideal world as seen by only a few people. Ultimately, too few people are willing to turn the key and push the big red button on any one nuclear option. Pragmatic options, however, are practical because they can garner wide support by not ruffling too many feathers. Offered below are two options: one nuclear, to clarify this Note's goals for Fourth Amendment third-party consent search jurisprudence, and the other pragmatic, to offer a practical solution to solve some of the inequities of third-party consent searches.

#### *A. Nuclear Option: The Abolition of Third-Party Consent*

To suggest that third-party consent should be eliminated is not too overreaching considering that scholars have suggested the elimination of consent searches generally.<sup>232</sup> The doctrinal justifications are different for eliminating third-party consent while preserving consent generally. The obvious distinction between consent generally and third-party consent is the relationship between the consenting party and the consequences of a search. When a targeted party consents, he is waiving his *own* Fourth Amendment right and subjecting *himself* to potential criminal consequences. When a third party consents, he is waiving *another's* Fourth Amendment right and subjecting *someone else* to potential criminal consequences.

<sup>231</sup> Of course, in the first instance, not everyone will see a problem, and even if they do, they may not want to fix it.

<sup>232</sup> See, e.g., Maclin, *supra* note 11, at 78–80; Strauss, *supra* note 15, at 271–72.

In reality, to say that a third-party consents in his “own right” is a matter of semantics. The *Matlock* rationale is that police officers are breaching the third party’s privacy, which happens to be shared by another. In practice, the police officer’s objective is to breach the targeted party’s privacy with the permission of the third party in order to gather evidence to be used at trial against the targeted party. The third party has no skin in the game and, therefore, should not be permitted to play—or, in other words, consent.

This reality is particularly acute given the fact that the Supreme Court purposefully shifted the Fourth Amendment’s focus from property to privacy to increase Fourth Amendment protections.<sup>233</sup> In a property regime, one would expect that the relationship of the consenter to the targeted property would be the appropriate point of analysis because a property interest is being protected. In a privacy regime, where the individual’s privacy is the interest being protected, the Court’s analysis should focus on the privacy interest targeted by the police, meaning the targeted party’s interest in keeping private what the police intend to find. To allow a third party to consent to an intrusion on another’s privacy is to ignore police objectives in obtaining consent, which are to avoid Fourth Amendment warrant implications and to find incriminating evidence for use at trial.

The drafters of the Fourth Amendment intended an uninterested objective party—the magistrate or some other judicial officer—to sanction by warrant invasions into a citizen’s property (now privacy) interest because police officers, given their enthusiasm for crime-solving, cannot fully be trusted to adhere to the amendment’s values.<sup>234</sup> The purpose of the Fourth Amendment is to blunt police efforts to invade privacy. Targeted party consent can exist in harmony with the Fourth Amendment’s purpose of restraining police enthusiasm because the targeted party will be equally enthused over keeping the police out as the police are about getting in. But, because the third party has no apparent interest in refusing consent, the third party has less incentive and enthusiasm for objecting to a search request. Third parties cannot perform the Fourth Amendment duties of the magistrate or the targeted party as combatants to police enthusiasm.

By no means does the elimination of third-party consent require police to obtain the consent of every targeted party of a search. In cases where there are many targets with common authority over the area to be searched, any one targeted party could consent to a search of the areas over which he has common authority. Other Fourth Amendment doctrines, such as the plain view doctrine, would allow police officers to seize items of evidence so long as those items were not discovered by an officer’s unauthorized entering of an area over which the consenting party had no common authority.<sup>235</sup> For example, if the targeted party had common authority to a hallway

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<sup>233</sup> See Bascuas, *supra* note 137, at 733–37.

<sup>234</sup> See Strauss, *supra* note 15, at 244–53.

<sup>235</sup> For a discussion of *Randolph*’s implications on the plain view doctrine, see Stephanie M. Godfrey & Kay Levine, *Much Ado About Randolph: The Supreme Court Revisits Third Party Consent*, 42 TULSA L. REV. 731, 748–49 (2007).

to which the other targets' bedrooms were connected and the doors to those rooms were open with drugs in plain view, then the police could enter the room and seize those drugs. This outcome is consistent with the Fourth Amendment because a targeted party was given the opportunity to protect his interests and object to a search but chose to waive his own right. The fact that police found incriminating evidence against another party is incidental to a valid search. In this respect, abolishing third-party consent does not hinder police efforts to curb group criminality.

The implication of abolishing third-party consent, while allowing evidence against a non-consenter to be validly seized during a general consent search, would be that the defendant who did not consent to the search that produced the evidence being used against him could challenge that evidence on the grounds that the person who consented was not the target of the search. How would courts determine whether the consenting party was in fact the target of the search? The court would analyze the totality of the circumstances to determine whether the police reasonably believed they would find incriminating evidence to be used against the consenting party. This standard is lower than probable cause—and must be—because requiring the police to have probable cause before requesting consent would render moot the purpose of a consent search: to search without a warrant in circumstances where a warrant is unlikely to issue because the police have no probable cause.<sup>236</sup> Once probable cause is established, consent is unnecessary.

Even though third parties would not be able to consent to police searches targeting their roommates, the abolition of third-party consent does not change the holding of cases like *Coolidge*. Third parties with the desire to snitch on their law-breaking roommates could simply deliver incriminating evidence directly to police or cooperate with police officers in their efforts to obtain a warrant.

Abolishing third-party consent would reestablish waiver as a meaningful Fourth Amendment principle. Reestablishing waiver by abolishing third-party consent would not require the Court to write another *Miranda*-like opinion. The Court's elimination of waiver in *Schneckloth* enabled the Court to easily validate third-party consent in *Matlock*, but overruling *Matlock* and its progeny would not affect *Schneckloth*'s "voluntariness" standard for Fourth Amendment consent. Abolishing third-party consent would simply require a targeted party to give "voluntary" consent while rendering invalid any third-party consent. Abolishing third-party consent would also go a long way to strengthening the Fourth Amendment and the right to privacy, vindicating a citizen's ability to keep the government out of his business, even if he takes on a roommate.

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<sup>236</sup> Probable cause must "amount[] to more than a bare suspicion," but the standard just iterated would permit a "bare suspicion." BLACK'S LAW DICTIONARY 1321 (9th ed. 2009). But see, Bascuas, *supra* note 137, at 775–80 (suggesting probable cause be strictly enforced). Again, this Note does not look to curtail basic consent search doctrine because individuals should have a right to waive their rights.

*B. Pragmatic Option: Randolph Refined, Targeted Party Primacy*

The pragmatic option requires courts to use *Randolph* as a springboard for re-straining, if not abolishing, third-party consent search doctrine. The Ninth Circuit took the first major step in accomplishing this goal in *Murphy*, and some of the steps taken by the Ninth Circuit are reflected in this discussion.<sup>237</sup>

The major doctrinal step the Court needs to take is to eliminate the widely shared social expectations test. The test's use of reasonableness is misplaced, brings confusion to the Fourth Amendment, and is subject to innumerable interpretations, which renders it useless as an adequate protector of privacy interests.<sup>238</sup> *Randolph* correctly assumes that something is different when the targeted party is present. The difference is the risk assumed by the targeted party. By adjusting the assumption of the risk doctrine and abandoning widely shared social expectations, the Court can easily strengthen the Fourth Amendment by limiting third-party consent searches, and thus reconciling problems in third-party consent doctrine created in *Randolph*.

This adjustment would require the Court to rule that no assumption of the risk is taken when the target of the search is present at the location to be searched.<sup>239</sup> This step makes sense because it is difficult to assume a risk when you are present to prevent the harm the risk entails. When roommate A is home, he can prevent roommate B from invading his privacy or allowing others to invade his privacy. No risk exists for A when he is home because he is there to thwart the harm potentially realized from taking the risk. Establishing that no assumption of the risk is taken when the target of a search is present at the targeted search area when police arrive to search would create a targeted party primacy standard where police officers would be required to obtain consent from a targeted party but could obtain consent from a third party if the targeted party is not "present."

To give efficacy to the targeted party primacy standard, the definition of "present" would need to be broad in order to avoid decisions like *Henderson*, *Rodriguez*, and *Matlock* where a present targeted party is ignored.<sup>240</sup> The definition of "present" would include any location on the property subjected to the search. This would mean that police officers would be required to obtain consent from a targeted party when that

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<sup>237</sup> United States v. Murphy, 516 F.3d 1117 (2008).

<sup>238</sup> See Adrienne Wineholt, Note, *Georgia v. Randolph: Checking Potential Defendants' Fourth Amendment Rights at the Door*, 66 MD. L. REV. 475, 491–93 (2007). For a good critique of the social expectations test, see Alissa C. Wetzel, Comment, *Georgia v. Randolph: A Jealously Guarded Exception—Consent and the Fourth Amendment*, 41 VAL. U. L. REV. 499, 511–14 (2006).

<sup>239</sup> See C. Dan Black, Note, *Georgia v. Randolph: A Murky Refinement of the Fourth Amendment Third-Party Consent Doctrine*, 42 GONZ. L. REV. 321, 331, 333 (2007); Wineholt, *supra* note 238, at 491–93.

<sup>240</sup> See *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008); Jason E. Zakai, *You Say Yes, But Can I Say No? The Future of Third-Party Consent Searches After Georgia v. Randolph*, 73 BROOK. L. REV. 421, 455–58 (2007).

party is located anywhere on the property, inside or out. The effect of such a targeted party primacy standard, had it been applied in *Matlock*, *Rodriguez*, or *Henderson*, would have been a search request by police officers to the targeted party.

The definition of “present” would also need to include police custody under any circumstances. One of the concerns the Court has had with requiring targeted party consent is that the Court does not want to unduly burden the police officers in the field by requiring them to find a non-present defendant, wherever he is in the world.<sup>241</sup> Requiring officers to request consent from a targeted party in custody does not invoke this concern because the police know exactly where to find a targeted party in custody. Including police custody in the definition of “present” removes all concerns about police tactics designed to remove the defendant from the targeted search area.

One safeguard that would need to be implemented to prevent removal by police officers would be that police officers may not validly perform a third-party consent search when they have actual knowledge that the defendant would not be present at the time of their arrival. Actual knowledge regarding the absence of the targeted party amounts to constructive removal. At trial, the burden should belong to the defendant to prove actual knowledge so as not to burden the police officers into explaining at every trial why they did not know the defendant would not be present. This rule would overrule cases like *Groves* where the defendant expressly objects only to have his objection become irrelevant when law enforcement officers come back later.<sup>242</sup>

Another safeguard that would need to be implemented to blunt police enthusiasm would be to strengthen the effect of an objection to a request to consent.<sup>243</sup> The Ninth Circuit took this step in *Murphy*, holding that an express objection renders a subsequent search invalid as to the objecting party.<sup>244</sup> No must mean no the first time. Police officers should not be allowed to cajole and badger a person into consent or circumvent a previous objection by finding a more willing resident.<sup>245</sup> Once an express objection is given, police officers would need a warrant to perform a search with regard to the subject matter of the denied consent search. This bar on asking for consent after an objection would last infinitely for that subject matter.

Establishing a targeted party primacy standard for third-party consent searches would vindicate the targeted party’s Fourth Amendment rights while not overburdening law enforcement officers in the field by allowing them to obtain consent from a third party when they had no knowledge that the targeted party would be absent. This arrangement can align with the assumption of the risk doctrine if that doctrine is adjusted to reflect the fact that the targeted party assumes the risk only when he is not

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<sup>241</sup> *Georgia v. Randolph*, 547 U.S. 103, 122 (2006).

<sup>242</sup> *See United States v. Groves*, 530 F.3d 506 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

<sup>243</sup> *United States v. Murphy*, 516 F.3d 1117, 1124–25 (2008); *see Maclin*, *supra* note 11, at 80–81 (“I propose that whenever a person objects or refuses to provide consent, as *Randolph* did, that refusal should bar further attempts by the police to seek consent.”).

<sup>244</sup> *Murphy*, 516 U.S. at 1124–25.

<sup>245</sup> *See Maclin*, *supra* note 11, at 81–82.



“present.” “Present” would be defined broadly to include any location on the targeted property and police custody in order to give the targeted party a meaningful right and prevent police tactics designed to circumvent the targeted party’s Fourth Amendment right. Requiring that police officers not have actual knowledge that the targeted party will be absent when they arrive and request third-party consent also would prevent police tactics designed to circumvent the Fourth Amendment. Preventing police cajoling and badgering by infusing objections with infinite utility and finality would prevent police abuse.

### CONCLUSION

When the Court first validated third-party consent searches in *Matlock*, it acted as if nothing momentous had occurred. To the contrary, the Court substantively changed the guarantees of the Fourth Amendment by confirming with little discussion what the lower courts had assumed: true third-party consent is constitutionally valid. Third-party consent does not comport with our current notions of Fourth Amendment values because individuals may be subjected to searches authorized by uninterested third parties, circumventing the targeted party’s expectation of privacy. *Georgia v. Randolph* can be a springboard to attain a better Fourth Amendment, one that does not recognize or, alternatively, severely restricts third-party consent. But, the widely shared social expectations test is unlikely to do the bulk of the work, and if it does, the weakness of the test will make the protections gained tenuous at best.

Some form of waiver standard is necessary to protect Fourth Amendment rights. Abolishing third-party consent would establish the strictest form of waiver standard; however, the prospects of such a result in the Supreme Court are highly unlikely. A more likely alternative to the abolition of third-party consent is a targeted-party primacy standard, under which first priority to object to a search belongs to the target of the search if the target is “present.”

A targeted-party primacy standard would rationalize third-party consent doctrine and repair *Randolph*’s doctrinal damage by adjusting the assumption of the risk doctrine to account for the difference in assumed risk between a present and nonpresent defendant. Because a targeted party’s interest in avoiding a search is directly adverse to the government’s interest in searching, and is stronger than a third-party’s similar interest in avoiding a search, a targeted-party primacy standard would enhance the efficacy of Fourth Amendment values by more adequately balancing the government enthusiasm for crime solving, with the consequences of relinquishing privacy by requiring a targeted party, when present, to make the weighty decision to consent. A targeted-party primacy standard would be a bright line rather than a “fine line” rule, easily applied by lower courts and easily understood by law enforcement officers and citizens alike. A targeted-party primacy standard would provide law enforcement officers in the field, without overburdening them, the tools they need to solve crimes while eliminating the incentives they may have had to employ tactics designed to circumvent the Fourth Amendment.