Casenote

Georgia v. Randolph: What to do With a Yes from One but not from Two?

In *Georgia v. Randolph*,[1] the United States Supreme Court held that when an officer asks two physically present occupants of the same shared residence for permission to search, that search is unreasonable under the Fourth Amendment[2] to the United States Constitution when one occupant denies permission to search, though the other consents.[3] In so holding, the Court created a new standard in which "widely held social expectations" dictate whether it is reasonable to assume an occupant has the authority to consent to a search.[4]

I. FACTUAL BACKGROUND

Scott and Janet Randolph just could not get along. On the morning of July 6, 2001, Janet Randolph called the police and complained that her husband had taken their son away. When the police arrived on the scene, she also complained that her husband's cocaine habit was causing them financial troubles. When Scott Randolph returned shortly

1. 126 S. Ct. 1515 (2006).
2. U.S. CONST. amend. IV.
3. *Randolph*, 126 S. Ct. at 1526.
4. *Id.* at 1521.

thereafter, he had a different story. He told the police that he and Janet had separated a few weeks prior to this incident and that she had taken their son to Canada for more than a month. He further explained that he only took their son to a neighbor's house for fear that she would take him out of the country again. He also denied using cocaine and accused Janet of drug abuse.[5]

One of the officers then accompanied Janet Randolph to retrieve the child, and upon their return, she again complained that her husband was abusing drugs. However, this time, she mentioned that there was evidence of drug-use in the house. At this point, the officer asked Scott Randolph if he could search the house. Scott Randolph plainly refused. The officer then asked Janet Randolph for permission to search, and she readily consented.[6]

Janet Randolph then led the police upstairs, and while searching in Scott Randolph's bedroom, the officer noticed a section of a drinking straw with a powdery residue on it. Suspecting the residue was cocaine, the officer went to his car to get an evidence bag and to call the district attorney's office. When the officer called, the district attorney said to stop the search and get a warrant. The officer then returned to the house, at which time Janet Randolph withdrew her consent to the search. At that point, the police took both the straw and the Randolphs to the police station. Later, the police obtained a warrant and returned to the house where they found further evidence of drug-use. Scott Randolph was subsequently indicted for possession of cocaine.[7]

Randolph moved to suppress the evidence, arguing that in light of his express refusal, his wife's consent could not authorize the warrantless search of his house.[8] The trial court denied the motion, finding that Janet Randolph had "common authority" to allow the search.[9] On appeal, the Georgia Court of Appeals reversed, and the Georgia Supreme Court sustained the reversal.[10] The United States Supreme Court "granted certiorari to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search."[11]

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5. *Id.* at 1519.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1520 (overruling the following courts of appeals decisions that held that consent of one occupant is effective in the face of an express objection from another: United States v. Morning, 64 F.3d 531, 533-36 (1995); United States v. Donlin, 982 F.2d 31, 33

II. LEGAL BACKGROUND

A. Overview

One of the fundamental protections afforded by the United States Constitution, the Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[12] In interpreting the Fourth Amendment, the Supreme Court has determined that as a general rule, a warrantless search of a person's home carries the presumption of unreasonableness.[13] There are, however, a few "jealously and carefully drawn" exceptions to this rule.[14] One such exception is that police may search a suspect's house if they receive voluntary consent from either the suspect himself[15] or, in his absence, a third-party occupant who has common authority over the residence.[16] The validity of these third-party consents has been the subject of controversy among legal commentators and lower courts, but it has not been extensively analyzed by the Supreme Court.[17] Prior to the case at bar, the Supreme Court had fleshed out only a modest amount of analysis on the subject in a handful of cases.[18]

B. Early Cases: An Absence of Judicial Analysis on Third-Party Consent

Prior to the 1960s, the Supreme Court heard very few cases involving a third-party's consent to a warrantless search, and in these cases, it only inferentially broached the subject without much analysis, if any.[19] For example, in *Weeks v. United States*,[20] the Court seemed to imply that a warrantless search could not be made reasonable by consent from a neighbor or a boarder.[21] In *Weeks* the police went to search a defen-

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(1992); United States v. Hendrix, 595 F.2d 883, 885 (1979) (per curiam); United States v. Sumlin, 567 F.2d 684, 687-88 (1977)).

12. U.S. CONST. amend. IV.

13. Payton v. New York, 445 U.S. 573, 586 (1980) (citing Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971)).

14. Jones v. United States, 357 U.S. 493, 499 (1958).

15. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

16. United States v. Matlock, 415 U.S. 164, 170 (1974).

17. 3 WAYNE R. LAFAVE, SEARCH AND SEZIURE: A TREATISE ON THE FOURTH AMENDMENT § 8.3 (3d ed. 1996).

18. *Id.*

19. *Id.*

20. 232 U.S. 383 (1914).

21. *See id.* at 398.

dant's home and were told by a neighbor where the key was. Finding the key, the police entered, searched the defendant's home, and found evidence against him. Later that same day, the police returned to search for more evidence against the defendant and were admitted by a boarder. In both searches, the police entered without a warrant.[22] The Court held that the searches violated the Constitution, but in so holding, the Court did not mention the consent given by the neighbor or the boarder.[23] It seems obvious that neither a neighbor nor a boarder would have authority to consent to the search of another person's house, and perhaps that is why the Court did not address these third-party consents in its analysis. Consequently, it can only be assumed that the Court determined that neither the neighbor nor the boarder had authority to consent to the searches.

In *Amos v. United States*,[24] the Court again skirted the issue of whether and in what circumstances a third party can give valid consent to a search.[25] In *Amos* two deputy tax-collectors went to the defendant's house to search for evidence of untaxed whiskey sales. When the collectors arrived, they met the defendant's wife at the door and told her they had come to search for evidence. She then opened the door for the collectors and allowed them to search. Neither of the collectors had a warrant at the time of the search.[26] Holding the search to be invalid on other grounds, the Court reserved the question of whether the wife could consent to a search that would be valid against her husband.[27] In fact, the Supreme Court would not examine the issue of third-party consent with any real scrutiny for another forty years.[28]

C. The Beginnings of a Third-Party Consent Analysis

The Supreme Court first shed some light on its views of third-party consent in the 1961 case of *Chapman v. United States*.[29] In *Chapman* police responded to a call from a landlord who smelled an "'odor of mash'" (a smell associated with distilling alcohol) emanating from the house he was renting to the defendant.[30] The police and the landlord knocked on the door and heard no response. Subsequently, at the

22. *Id.* at 386.
23. *Id.* at 398.
24. 255 U.S. 313 (1921).
25. *Id.* at 317.
26. *Id.* at 315.
27. *Id.* at 317.
28. LAFAVE, *supra* note 17, at § 8.3.
29. 365 U.S. 610 (1961).
30. *Id.* at 611.

direction of the landlord, the police entered through an unlocked window and found evidence of an illegal distillery in the house. The police had no warrant at the time of the search.[31] Arguing that the search was valid, the Government contended that property law granted the landlord the right to bring police officers and enter the house in order to "'view waste.'"[32] In response, the Court held that the search was unreasonable, stating that "subtle distinctions" in property law should not be the sole controlling force in Fourth Amendment analysis.[33] The landlord, therefore, could not give a valid consent to search his tenant's home without some further consent from the tenant himself.[34] While "subtle distinctions" in property law were not dispositive in this case, it seems the distinction between a landlord-tenant relationship and a co-occupant relationship determined whether the consent was valid. Essentially, this holding reveals that property law does not control but may influence whether or not a third-party validly consented to a search.

Three years after *Chapman* was decided, in *Stoner v. California*[35] the Supreme Court held that consent from a hotel manager was not sufficient to allow a search of a hotel guest's room.[36] In *Stoner* the police were searching for the defendant on the suspicion that he had robbed a food market. Following a lead but without a warrant, they approached the night clerk of a hotel and asked if Joey L. Stoner was staying there. The clerk answered yes but said that he was not in at the time. Then, the police explained to the clerk why they were looking for Stoner and asked for permission to search his room. The clerk courteously obliged and unlocked Stoner's door for the police to search. Upon thoroughly searching the room, they found evidence of the food market robbery, which was used against Stoner at trial.[37] The Court determined that this search was unreasonable, holding that the clerk had no authority to consent to a search of the defendant's room because the clerk was not an agent that could waive the defendant's constitutional right against warrantless searches for him.[38]

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31. *Id.* at 611-12.
32. *Id.* at 616.
33. *Id.* at 617 (quoting Jones v. United States, 362 U.S. 257, 266-67 (1960)).
34. *Id.* at 616-17.
35. 376 U.S. 483 (1964).
36. *Id.* at 490.
37. *Id.* at 484-86.
38. *Id.* at 488-89.

D. Third-Party Consent Examined Fully

In the 1971 case of *Coolidge v. New Hampshire,*[39] the Supreme Court briefly examined the validity of a third-party's consent and touched on policy supporting the conclusion that such consent is valid.[40] In *Coolidge* the police suspected the defendant of murdering a young girl. In response to a tip from a neighbor that Coolidge had been out on the night of the girl's murder, the police visited him at his house. They questioned him and asked if he owned any guns, and in what appeared to be a show of complete cooperation, he brought out three guns. The next day, he went with the police to take a lie detector test, and while he was there, other police officers visited the Coolidge's household. When they reached the door, Mrs. Coolidge answered, and they asked her if her husband owned any guns; they were not the officers who first interviewed Coolidge, and they did not know that he had previously produced three guns.[41] In response to the police's inquiry, she said her husband did have some guns and led the officers up to their bedroom where she showed them four guns and some of his clothes.[42] The clothes and the fourth gun, a 22-caliber Mossberg rifle, were later used by the prosecution as evidence against the defendant. The defendant moved to suppress this evidence.[43] The Court observed that the crux of the defendant's argument was that the police should have either (1) asked Mrs. Coolidge if she had her husband's authorization to give up the clothes and guns or (2) called Coolidge himself and asked for his permission to take them.[44] The Court disagreed with this argument and held that the evidence was admissible.[45] Consequently, Mrs. Coolidge's consent was valid against the defendant. Touching on the rationale behind this holding, the Court noted that "it is no part of the policy underlying the Fourth . . . [Amendment] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."[46]

In the 1974 case of *United States v. Matlock,*[47] the Supreme Court directly addressed whether a third-party may consent to a search of a

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39. 403 U.S. 443 (1971).
40. *Id.* at 488-90.
41. *Id.* at 445-46.
42. *Id.* at 486.
43. *Id.* at 448.
44. *Id.* at 489.
45. *Id.* at 489-90.
46. *Id.* at 488.
47. 415 U.S. 164 (1974).

suspect's residence in his absence.[48] In *Matlock* the defendant was arrested in the front yard of a residence he shared with a second occupant, Mrs. Graff. After the police put the defendant in a patrol car, they knocked on the door of the residence, seeking permission to search the house. Mrs. Graff, the suspect's co-occupant, answered the door with a child at her hip and consented to the search. Thereafter, the police entered and discovered evidence of the suspect's criminal activities.[49]

Despite the defendant's objections, the Court held that consent from a co-occupant who "possesses common authority over premises or effects" is sufficient to allow a search when the other occupant is absent.[50] The Court further explained that this "common authority" is influenced by, but not dependent on, property law rights.[51] Indeed, a co-occupant need not have a legal property interest in the residence in order to exercise authority over it.[52] On the contrary, according to the Court, this authority stems from the occupants' "mutual use," "joint access," or "control [of the premises] for most purposes."[53] The Court further noted that by sharing control of the premises, such occupants run the risk that one of them might allow a search of the common area.[54]

Affirming *Matlock* sixteen years later in *Illinois v. Rodriguez*,[55] the Court considered whether a third-party must *actually* have authority over a residence in order to consent to its search.[56] In *Rodriguez* the police responded to a call from Gail Fischer, a woman who claimed that the defendant had beaten her. She and the defendant had been living together in the same apartment for several months. Ms. Fischer said that the defendant was asleep in the apartment, and she consented to let the police in so they could arrest him. When they entered, they saw evidence of drugs and drug paraphernalia in plain view. The police then arrested the defendant, though they had no warrant. Later, testimony revealed that Mrs. Fischer had actually moved out weeks prior to the arrest. Consequently, the defendant moved to suppress the drug-evidence on the basis that Ms. Fischer had no authority to consent to a search of the apartment.[57] The Court held that the search was reasonable and that police need only have a *reasonable belief* that the

48. *See id.* at 170-72.
49. *Id.* at 166-67.
50. *Id.* at 170.
51. *Id.* at 172 n.7.
52. *See id.*
53. *Id.*
54. *Id.* at 171.
55. 497 U.S. 177, 185, 188 (1990).
56. *Id.* at 179.
57. *Id.* at 179-80.

consenting third party has the authority to consent to a search over the premises.[58]

III. COURT'S RATIONALE

In *Randolph* the Supreme Court granted certiorari to settle whether a warrantless search is reasonable under the Fourth Amendment when one co-occupant consents to a police search but another physically present co-occupant refuses.[59] The Court held that in such circumstances, a warrantless search is unreasonable.[60]

A. *The Majority Opinion*

Delivering the opinion of the Court, Justice Souter explained the Court's reasoning in roughly five stages. First, the majority briefly recapped applicable rules from relevant co-occupant consent-to-search cases.[61] Second, from a detailed discussion of *United States v. Matlock*,[62] the majority distilled the "widely shared social expectations" standard.[63] The Court created this standard to determine whether it is reasonable to expect an occupant to have the authority to grant an inspection.[64] Third, the majority illustrated the "widely shared social expectations" standard by applying it to *Matlock*, a handful of other cases, and finally the case at bar.[65] Fourth, the majority addressed potential counterarguments and countervailing interests in conflict with its holding.[66] Fifth and finally, the majority ended by tying up "two loose ends" in its reasoning.[67]

The first stage of the majority opinion began by briefly revisiting Fourth Amendment consent-to-search case law.[68] Noting the development of this area of the law through several cases, the majority recognized that voluntary consent to a search of a resident's home can make a warrantless search reasonable under the Fourth Amendment.[69]

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58. *Id.* at 186.
59. Randolph v. Georgia, 126 S. Ct. 1515, 1520 (2006).
60. *Id.* at 1519.
61. *Id.* at 1520.
62. 415 U.S. 164 (1974).
63. *Randolph*, 126 S. Ct. at 1520-21.
64. *Id.* at 1521.
65. *Id.* at 1521-23; *see* United States v. Matlock, 415 U.S. 164 (1974); Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1961).
66. *Randolph*, 126 S. Ct. at 1523-26.
67. *Id.* at 1527-28.
68. *Id.* at 1520.
69. *Id.* (citing Jones v. United States, 357 U.S. 493, 499 (1958); Payton v. New York, 445 U.S. 573, 586 (1980); Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)).

The majority further noted that this consent may come from either the suspect himself or, when the suspect is absent, a fellow resident who shares common authority over property.[70] Despite this body of law, the majority observed that the Supreme Court had not yet heard a case where one co-occupant consented to a search while another physically present occupant objected.[71] To determine the effect of such a refusal, the majority turned to the "underpinnings of the co-occupant consent rule, as recognized since *Matlock*" to frame its reasoning.[72]

In the second stage of its opinion, the majority drew from *Matlock* to explain the reasoning behind the co-occupant consent rule.[73] Recalling the ruling from *Matlock*, the majority affirmed that a search of a shared residence is reasonable when a co-occupant with "common authority" over that shared residence consents, even if the other occupant is absent.[74] The majority further explained that the "common authority" that allows a co-occupant to consent to the search does not stem from property rights alone, but rather from "mutual use," "joint access," and "control for most purposes."[75] To clarify, the majority explained that a co-occupant's "common authority" to allow a search comes from a common social understanding about the rights an occupant has over a shared residence.[76] The majority phrased this social understanding in terms of "widely shared social expectations" and explained that although these shared social expectations are sometimes reflected in property law, they are not dependent on it.[77] In sum, the court explained that a co-occupant's consent makes a warrantless search reasonable provided that "widely shared social expectations" indicate that the co-occupant has the authority to give consent.[78]

In the third stage of its opinion, the majority illustrated the "widely shared social expectations" standard.[79] To demonstrate the viability of its new standard, the majority applied it to the facts of *Matlock* and

70. *Id.* (citing Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); *Matlock*, 415 U.S. at 170).
71. *Id.*
72. *Id.*
73. *Id.* at 1520-21.
74. *Id.* at 1521 (citing *Matlock*, 415 U.S. at 170).
75. *Id.* (quoting *Matlock*, 415 U.S. at 172 & n.7).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

other cases.[80] Then, the majority applied the standard to the facts of the case at bar.[81]

Starting with *Matlock*, the majority reasoned that when a person like Mrs. Graff comes to the door of a residence with a child in tow, it is reasonable to expect her to be able to allow visitors.[82] The "widely shared social expectation" is that if she lives there, she probably has the common authority to permit visitors like most typical tenant arrangements usually allow.[83] Moreover, the majority reasoned that if one tenant is absent, it is commonly understood that the other tenant has the authority to admit guests whom the absent tenant may not like.[84]

To further demonstrate this standard, the majority examined the outcomes of *United States v. Chapman*[85] and *Stoner v. California*.[86] The majority observed that no property right or typical contract agreement points to a common understanding that landlords and hotel managers have the authority to allow visitors without the occupant's consent.[87]

When applying the standard to the case at bar, the majority observed that no visitor would normally feel comfortable entering a shared residence when one occupant permits entry while the other objects.[88] Under these circumstances, the majority reasoned, a visitor would not feel comfortable entering because there is no societally recognized hierarchy of authority among co-occupants of a shared residence.[89] In other words, as the majority explained, there is no common understanding that one co-occupant's invitation prevails over another occupant's refusal to permit entry.[90] In fact, according to the majority, domestic property law reflects the absence of a recognized hierarchy of authority because in cotenancy arrangements, each cotenant has the right to enjoy the property as if he or she is the sole owner.[91] Hence, the majority concluded that no "widely shared social expectation" suggests that one

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80. *Id.* at 1521-22.
81. *Id.* at 1522-23.
82. *Id.* at 1521.
83. *Id.*
84. *Id.* at 1521-22.
85. 365 U.S. 610 (1961).
86. 376 U.S. 483 (1964).
87. *Randolph*, 126 S. Ct. at 1522.
88. *Id.* at 1522-23.
89. *Id.* at 1523.
90. *Id.*
91. *Id.* (citing 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY® § 50.03[1] (Michael Allan Wolf ed., Matthew Bender 2005)).

co-occupant generally has the authority to permit visitors to enter when another occupant objects.[92]

In the fourth stage of its opinion, the majority addressed some potentially conflicting interests, including those mentioned by the dissents.[93] First, the majority noted that citizens have an interest in exposing criminal activities.[94] More specifically, the majority observed that cotenants who share a residence with criminals have a significant interest in deflecting suspicion from themselves.[95] However, the majority reasoned that the interest in exposing criminal activity does not require "a theory of consent that ignores an inhabitant's refusal to allow a warrantless search."[96] The majority further reasoned that cotenants may deflect suspicion from themselves in other ways, such as bringing evidence of their co-occupant's criminal activities to the police.[97]

Next, the majority addressed the dissent's contention that this holding traps the victims of spousal abuse in that spousal abusers can simply refuse to allow police to enter despite the invitation of the abused spouse.[98] In response, the majority reasoned that "this case has no bearing on the capacity of the police to protect domestic victims."[99] The majority explained that if a domestic dispute occurred and two occupants disagreed about letting the police in, there would be no question that the police could enter the dwelling to protect one of the occupants from the other.[100] The police would only need to have good reason to believe such a threat exists.[101] However, as the majority explained, the police's right to enter to protect a victim was not the issue in this case.[102] The issue was whether a search *for evidence* is reasonable when one co-occupant consents and the other objects—to which the majority's answer was no.[103]

In the fifth and final stage of its opinion, the majority addressed what it called "two loose ends."[104] First, the majority addressed an issue with language in *Matlock* that mentioned that a co-inhabitant has "'the

92. *Id.*
93. *Id.* at 1524-26.
94. *Id.* at 1524 (citing Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1525 (referring to *Randolph*, 126 S. Ct. at 1537 (Roberts, C.J., dissenting)).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1526.
104. *Id.* at 1527.

right to permit [an] inspection in his own right.'"[105] The majority noted that *Matlock's* "right" to permit an inspection left the question of how one co-occupant's objection to a visitor's entry can eliminate another's right to permit it.[106] The majority answered by holding that this "right" to permit entry is not a property right in the legal sense, but it is the authority a co-occupant is generally understood to have over the residence.[107] To clarify, the majority explained that asking whether one occupant may divest another occupant of his right to permit entry is really a question of whether it is commonly understood that the consenting co-occupant has the authority to prevail over the objecting co-occupant.[108]

The second loose end addressed by the majority concerned the significance of *Matlock* and *Rodriguez* after its decision.[109] The majority noted that in *Matlock* and *Rodriguez*, the defendants did not have the opportunity to object because they were not physically present, though they were nearby.[110] The loose end, according to the majority, was whether police must seek out other nearby potentially objecting co-occupants in order to perform a reasonable warrantless search when they already have the consent of one co-occupant.[111] To resolve this concern, the majority drew a fine line by holding that a defendant must be physically present and objecting in order to overcome a co-occupant's consent to a warrantless search.[112] Further explaining its holding, the majority determined if the defendant was in another room or asleep on the couch, then he would be considered absent, and he would miss the opportunity to object to a search.[113] Concerned with the police's ability to actually perform consentual searches, the majority concluded that this formalism was justified.[114] The majority closed its opinion by reiterating its holding that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."[115]

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105. *Id.* (quoting *Matlock*, 415 U.S. at 172 n.7).
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* (referring to *Matlock*, 415 U.S. at 179 (Douglas J., dissenting); *Rodriguez*, 497 U.S. at 180).
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 1528.

B. Concurrences

Justices Stevens and Breyer both filed brief concurring opinions. Justice Stevens noted that the social changes evidenced by this case illustrate the inadequacy of a strict originalist interpretation of the Constitution.[116] An originalist approach, which seeks to ascertain an original understanding of the Constitution, would be inappropriate under these circumstances, according to Justice Stevens, because unlike the social climate at the time of the Fourth Amendment's ratification, today's society recognizes that men and women have equal authority over the household.[117] During the era in which the Fourth Amendment was ratified, husbands were masters of the household and their decision to permit or deny entry was all that mattered.[118] Justice Stevens explained that in today's society, neither man nor woman is master of the house, and consequently, neither one has authority to overcome the other's constitutional right to deny a warrantless search.[119]

Justice Breyer agreed with the result in this case but expressed concern about its effect on domestic abuse and also noted with some concern the fact-specific nature of the majority's holding.[120] Focusing on the totality of the circumstances, Breyer noted that (1) the search was solely for evidence, (2) Mr. Randolph was physically present and unequivocally objecting to the search, and (3) the officers did not express concerns about possible evidence destruction.[121] In light of these circumstances, Breyer agreed with the court's decision, but if the circumstances were different, he would not have agreed.[122] If the police were responding to the invitation of a possible abuse victim, then Breyer would have ruled that the police could reasonably enter despite the objection of another occupant.[123]

C. Dissents

Justices Roberts, Scalia, and Thomas each wrote dissenting opinions. In his first written dissent since being confirmed to the Court, Justice Roberts objected to the majority's reasoning on roughly four grounds: (1)

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116. *Id.* (Stevens, J., concurring).
117. *Id.* at 1529.
118. *Id.*
119. *Id.*
120. *Id.* at 1529-31 (Breyer, J., concurring).
121. *Id.* at 1530.
122. *Id.*
123. *Id.*

"widely shared social expectations" are too imprecise to form the basis of an adequate rule; (2) the majority's analysis of social expectations departs from the Court's traditional analysis of privacy expectations; (3) the application of this rule is arbitrary and formalistic; and (4) the majority's holding is in conflict with domestic abuse problems.[124]

According to Chief Justice Roberts, the "widely shared social expectations" standard is the wrong analytical tool to use when examining Fourth Amendment reasonableness.[125] Chief Justice Roberts rejected the conclusion that a visitor would automatically feel compelled to leave when co-occupants disagree about allowing him to enter.[126] According to Chief Justice Roberts, the visitor's social expectation is dependent on a variety of different factors.[127] For example, if the visitor were a relative, he might have felt comfortable entering despite the co-occupants' disagreement.[128] In another instance, a visitor might have felt comfortable entering if two of three occupants consented, while the third occupant objected.[129] Thus, social expectations shift with each different factual scenario, and Chief Justice Roberts accordingly reasoned that such expectations "are not a promising foundation on which to ground a constitutional rule."[130]

Chief Justice Roberts further noted that the majority was mistaken in its conclusion that "widely shared social expectations" were the common thread in deciding questions of consent in prior consent-to-search cases.[131] To the contrary, Chief Justice Roberts asserted that before this case, the Court only examined Fourth Amendment reasonableness in terms of the individual's subjective expectation of privacy.[132] He further pointed out that traditionally, the Court only analyzed social expectations to determine (1) whether a search occurred at all and (2) if an occupant had standing to object to a search.[133] According to Chief Justice Roberts's assessment of prior case law, if a person's subjective expectation of privacy was objectively reasonable, then police could not search without a warrant or that person's consent.[134] He further

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124. *See id.* at 1531-32 (Roberts, C.J., dissenting, joined by Scalia, J.).
125. *See id.*
126. *Id.* at 1532.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* (citing Katz v. United States, 389 U.S. 347, 361 (1967); Minnesota v. Olson, 495 U.S. 91, 95-96 (1990)).
133. *Id.*
134. *See id.* (citing *Katz*, 389 U.S. at 361).

explained that an individual's expectation of absolute privacy is not reasonable when the individual shares information, papers, or places with another person because the individual assumes the risk that the other person will share access to those things.[135] As an example, Chief Justice Roberts reasoned that if two friends shared a locker and one of them kept contraband inside, the other friend might have expected his locker-mate to keep it a secret, but such an expectation would not be reasonable because his privacy had "'already been frustrated'" by sharing the locker-space.[136] Chief Justice Roberts also determined that the same analysis applied to shared living-space.[137] As an example, he explained that contrary to the majority's analysis, the search in *Matlock* was reasonable because the defendant assumed the risk that Mrs. Graff might allow a search of their shared residence.[138]

Chief Justice Roberts also criticized the majority's holding for its arbitrary application and admitted formalism.[139] He concluded that it was arbitrary because under this rule, an objecting occupant is only protected from a search if the objecting occupant happens to be at the door when the police ask for consent.[140] Otherwise, if the occupant was asleep on the couch or a room away when the co-occupant answered the door and gave consent, then the occupant has no protection from a warrantless search.[141] Consequently, Chief Justice Roberts contended that the majority's formalistic holding really only protects the occupant's good fortune of being at the door when the police ask for consent.[142]

Finally, Chief Justice Roberts argued that the majority dismissed the negative impact its holding will have on domestic abuse.[143] He noted that the question in this case, whether one occupant's consent to a search may overcome another's objection, often arises as a result of domestic abuse.[144] According to Chief Justice Roberts, under the majority's ruling, the police would not be able to assist in the domestic dispute if the abuser objects.[145]

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135. *See id.* at 1533.
136. *Id.* (citing United States v. Jacobsen, 466 U.S. 109, 117 (1984)).
137. *Id.* at 1534 (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)).
138. *Id.* (citing *Matlock*, 415 U.S. at 166).
139. *Id.* at 1536.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 1537-38.
144. *Id.*
145. *Id.* at 1538.

Though he joined Chief Justice Roberts's dissent, Justice Scalia wrote separately to respond to Justice Stevens's critique of originalism.[146] Justice Scalia criticized Justice Stevens's critique for confusing the original meaning of the Fourth Amendment with the "background sources of law to which the Amendment, on its original meaning, referred."[147] Observing that the Fourth Amendment was originally tied to common-law trespass, Justice Scalia noted that the issue of who could consent to a search was not dependent on the meaning of the Fourth Amendment itself but on changes in property law.[148] As Justice Scalia further explained, under the Fourth Amendment, the reasonableness of a consent-search is contingent on the authority granted to the consenting occupant by property law.[149] Accordingly, Justice Scalia concluded that an originalist approach would have no trouble recognizing that men and women have equal authority over premises because today's property law acknowledges such equality of the sexes.[150] Justice Scalia closed his dissent by criticizing Justice Stevens's celebration of the progress of women's equality.[151] Noting that domestic abuse problems most often involve an abusive man and an abused woman, Justice Scalia remarked that the majority's decision actually empowers abusive husbands to stop women from allowing police to enter.[152]

In the third and final dissent, Justice Thomas concluded that *Coolidge v. New Hampshire*[153] controlled in this case and asserted that *general* searches were not at issue.[154] According to Justice Thomas, *Coolidge* stands for the proposition that when a suspect's spouse voluntarily leads the police to evidence of the suspect's criminal activities, no unreasonable search occurs.[155] Accordingly, Justice Thomas asserted that no unreasonable search occurred here because Mrs. Randolph led the police to specific evidence of cocaine abuse as opposed to consenting to a general search.[156]

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146. *Id.* at 1539 (Scalia, J., dissenting).
147. *Id.* at 1540.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 1541.
152. *Id.*
153. 403 U.S. 443 (1971).
154. *Randolph*, 126 S. Ct. at 1541 (Thomas, J., dissenting).
155. *Id.*
156. *Id.*

IV. IMPLICATIONS

Georgia v. Randolph,[157] with its very fact-specific restriction on the police's ability to search residences, is somewhat of an anomaly in the line of third-party consent cases. Prior Supreme Court decisions, such as *Coolidge, Matlock,* and *Rodriguez*, have granted police more flexibility in searching residences as opposed to constraining those searches. Consequently, by prohibiting police to conduct a warrantless search of a home without the consent of both physically present co-occupants, *Georgia* is a bit of a deviation from that trend. However, since this holding seems to render a third-party consent-based search unreasonable only when the defendant is physically present and objecting, the cases that will be affected will be relatively few. As a result, in practical application, this holding may not impact police procedure or attorney practice in an especially noticeable way.

When police ask to search a home, they will have to obtain the consent of both occupants if they are both present when an officer asks for permission to enter. If one of the occupants objects, the police will have to obtain a warrant unless they have probable cause. It is important to note, however, that the police will not be able to get around this obstacle by removing an occupant for the sake of avoiding a possible objection, as this was specifically prohibited by the Court.[158] Though police will have to comply with the requirements laid out by *Randolph*, such a specific situation will probably not occur every day in the life of the average police officer or with any great deal of frequency.

Criminal defense attorneys will similarly find few opportunities in which to cite the holding of this case. Indeed, for *Randolph* to be of any use to a defendant on a motion to suppress, the evidence would have to show that (1) the defendant was present at the time the police asked to search the house and (2) that the defendant objected despite another occupant's consent. In that limited circumstance, a defendant would succeed on his motion to suppress. Again, because these circumstances are unlikely to appear in all consent-based searches, a criminal defense attorney will have little occasion to cite this case.

Overall, this case is problematic because instead of providing more guidance and clarity on the validity of a third-party's consent to a search, it actually creates more uncertainty for the following two reasons: (1) the "widely shared social expectations" standard is based on the social expectations of the co-residents, and (2) the court was split 5-3

157. 126 S. Ct. 1515 (2006).
158. *Id.* at 1527.

with Justice Alito absent and Justice Breyer hesitantly concurring. First, this holding is unstable because it is based on social expectations that are unique to each factual scenario. For example, as mentioned by Chief Justice Roberts, a visiting aunt would not simply leave a residence because one occupant invited her in and the other refused to permit entry. It is not exactly clear that the "widely shared social expectation" is that the aunt would leave in that situation. Since these social expectations change so easily in different circumstances, the holding lends little certainty to police-work or notice to citizens.

Second, Justice Alito was absent, and Justice Breyer only concurred in this opinion because he based his reasoning on the totality of the circumstances. If a very similar case came before the Court again, it is not clear that Justices Alito and Breyer would both follow this line of reasoning. Consequently, the 5-3 majority in a similar case might change to 5-4 in favor of a different decision in a later case.

Finally, *Randolph* leaves several other questions unanswered, as well. For example, what would happen if there were three occupants, and one objected while the other two consented? What exactly do "widely shared social expectations" tell us about that situation? We can infer from the holding of this case that the objecting occupant will prevail over the two consenting occupants, but this holding does not specifically address this issue. The same could be said about several other questions. For example, does the order in which the police receive the consent and refusal matter? What if the consent came before the refusal? Moreover, what do "widely shared social expectations" suggest if the objecting occupant came in right after the police asked for permission to enter? These questions remain unanswered by *Randolph*, and ultimately, they will have to be answered in another case.

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