Third-Party Consent to Search: Analyzing Triangular Relations

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How does the law construct consent? This Article explores this question in the context of Supreme Court decisions regarding third-party consent to searches of dwellings. Using textual analysis, a method rarely used in Fourth Amendment law, this Article argues that the Supreme Court employs an a-contextual and gender-blind analysis of consent that is insensitive to power dynamics. Using the feminist scholarship on consent, this Article critiques the notion of consent as developed by the Supreme Court. At the same time it rejects the feminist redefinition of consent as vague and unclear.

This Article proposes that the third-party consent to search doctrine involves a triangular relation between the police officer, the consenting third-party, and the suspect. Accordingly, this Article explores each edge of the triangle. This triangular relation analysis shows that the problematic notion of consent is more acute in third-party consent cases than in other consensual search cases. Thus, this Article proposes the abolition of the third-party consent to search doctrine.

I. INTRODUCTION

Cases of third-party consent to search of the home are a drama with three participants: the police officer, the consenting third-party, and the suspect or defendant. Consider, for example, the facts of the Supreme Court case, *Georgia v. Randolph*.[1] Janet Randolph called the police to complain about a domestic

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1. 547 U.S. 103 (2006). For literature on this case, see Monique N. Bhargava, *Protecting Privacy in a Shared Castle: The Implications of* Georgia v. Randolph *for the Third-Party Consent Doctrine*, 2008 U. ILL. L. REV. 1009 (2008); James M. Binnall, *He's on Parole . . . But You Still Can't Come In: A Parolee's Reaction to* Georgia v. Randolph, 13 GEO. J. ON POVERTY L. & POL'Y, 341 (2006); C. Dan Black, Georgia v. Randolph*: A Murky Refinement of the Fourth Amendment Third-Party Consent Doctrine*, 42 GONZ. L. REV. 321 (2006); Jeremy A. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay 'Expectations of Privacy*,' 11 U. PA. J. CONST. L. 331 (2009); Joshua Brannon, Georgia v. Randolph*: An Exception to Co-Occupant Consent Under the Fourth Amendment*, 31 OKLA. CITY U. L. REV. 531 (2006); Tim Buskirk, *Constitutional Law: The Reasonableness Requirement and Fourth Amendment Boundaries to Co-Occupant Consent:* Georgia v. Randolph, *547 U.S. 103 (2006),* 18 U. FLA. J.L. & PUB. POL'Y 475 (2007); 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 (2007); Shane E. Eden, *Picking the Matlock:* Georgia v. Randolph *and the U.S.*

dispute she had with her husband.[2] When Sergeant Murray came to the Randolphs' home, Ms. Randolph told him that Mr. Randolph was a drug user.[3] Sergeant Murray also learned that Ms. Randolph had returned to the family's dwelling after taking their son to her parents' home in Canada.[4] After their return, Mr. Randolph took their son to their neighbors' house to prevent Ms. Randolph from taking him away again.[5] Sergeant Murray asked Mr. Randolph's permission to search the Randolphs' house and Mr. Randolph refused.[6] After Mr. Randolph's refusal, Ms. Randolph readily gave her consent to search the house.[7] Evidence of drug abuse was found in the search and was later used against Mr. Randolph in a court of law.[8]

This scenario was full of dramatic tensions: first was the tension between Mr. Randolph and Ms. Randolph. The couple had a domestic dispute so severe that Ms. Randolph felt the need for police intervention.[9] They disagreed about whether to let the police search the house.[10] They also had conflicting interests: Mr. Randolph had an interest in hiding evidence of his drug use from the police while Ms. Randolph had an interest in having the police intervene in the domestic dispute she had with her husband.[11] Second, there was a tension

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Supreme Court's Re-Examination of Third-Party-Consent Authority in Light of Social Expectations, 52 S.D. L. REV. 171 (2007); Kyle Evans, *There Is No Place Like Home: The Supreme Court's Refusal to Allow Searches of the Home Based on Disputed Consent in* Georgia v. Randolph, 60 OKLA. L. REV. 627 (Fall 2007); Jason M. Ferguson, Randolph v. Georgia*: The Beginning of a New Era in Third-Party Consent Cases*, 31 NOVA L. REV. 605 (2007); Stephanie M. Godfrey & Kay Levine, *Supreme Court Review Much Ado About* Randolph*: The Supreme Court Revisits Third Party Consent*, 42 TULSA L. REV. 731 (Spring 2007); Nicholas S. Hines, *The Fourth Amendment's Consent to Entry Exception: Protecting the Castle from the Co-Tenant's Consent*, 11 JONES L. REV. 117 (2007); Nathan S. Lew, *Nothing to be Worried About: Consent Searches After* Georgia v. Randolph, 28 WHITTIER L. REV. 1067 (Spring 2007); Marc McAllister, *What The High Court Giveth The Lower Courts Taketh Away: How to Prevent Undue Scrutiny of Police Officer Motivations Without Eroding* Randolph*'s Heightened Fourth Amendment Protections*, 56 CLEV. ST. L. REV. 663 (2008); Lesley McCall, Georgia v. Randolph*: Whose Castle Is It, Anyway?*, 41 U. RICH. L. REV. 589 (2007); Madeline E. McNeeley, *Constitutional Law–Search and Seizure–Validity of Consent to Warrantless Search of Residence When Co-Occupant Expressly Objects*, 74 TENN. L. REV. 259 (Winter 2007); Daniel E. Pulliam, *Post-*Georgia v. Randolph*: An Opportunity to Rethink the Reasonableness of Third-Party Consent Searches Under the Fourth Amendment*, 43 IND. L. REV. 237 (2009); Matthew W. J. Webb, *Third-Party Consent Searches After* Randolph*: The Circuit Split Over Police Removal of an Objecting Tenant*, 77 FORDHAM L. REV. 3371 (2009); Alissa C. Wetzel, Georgia v. Randolph*: A Jealously Guarded Exception—Consent and the Fourth Amendment*, 41 VAL. U. L. REV. 499 (Fall 2006); Adrienne Wineholt, Georgia v. Randolph*: Checking Potential Defendants' Fourth Amendment Rights at the Door*, 66 MD. L. REV. 475 (2007); Nathan A. Wood, Georgia v. Randolph*: What to do With a Yes from One but not from Two?*, 58 MERCER L. REV. 1429 (2007); 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 (2007).

2. 547 U.S. at 107.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.*
10. *See id.*
11. *See id.*

between Ms. Randolph and Sergeant Murray. The police officer was in a position of authority relative to Ms. Randolph, and he requested to intrude into the privacy of Ms. Randolph's home.[12] Even though she called the police, Ms. Randolph's permission was required for a state representative to enter her home.[13] Third, there was a tension between Mr. Randolph and Sergeant Murray. In contrast to other cases where the objecting suspect was absent from the home, Mr. Randolph was physically present and voiced his objection to the search.[14] Sergeant Murray faced a disputed consent where one occupant invited him into the house and the other did not allow the search.[15] At the same time, Mr. Randolph had an interest in overriding his wife's permission to the search.[16]

This Article puts this triangular drama at the center of it's analysis of third-party consent to search doctrine. Following a brief description of this area of Fourth Amendment law in Part II, this Article argues that this doctrine involves a triangular relation between the police officer and the two co-occupants.[17] In order to better understand these situations, this Article analyzes each edge of the triangle and explores the dynamics between the three players. The relational dynamics between the two co-occupants are examined in Part III. The relational dynamics between the police officer and the consenting occupant (the third-party) are examined in Part IV. The relational dynamics between the police officer and the suspect (or defendant) are examined in Part V.

Applying this triangular relation analysis, this Article critiques the way the Supreme Court constructs the notion of consent. It raises multiple questions. How does the Supreme Court examine consent? What elements of consent are relevant to such an examination? What other elements are excluded from such consideration? What constitutes consent according to the Supreme Court? To answer these questions I engage in textual analysis of Supreme Court cases, a method rarely applied in Fourth Amendment law.[18]

Concentrating on the Supreme Court's rhetoric and its analysis of consent, this Article argues that the Supreme Court's analysis of consent is a-contextual and neutral in its language, assumptions, and implications. It disregards power dynamics between the occupant and the police and between the two occupants. The Court's analysis also overlooks gender, race, and other social aspects of consent. Additionally, this Article argues that the Supreme Court views consent

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. There can be more than three people involved in a police search of a home when there are three or more roommates. For the sake of simplicity, I focus on the typical case of two occupants. In addition, I use the word "occupant" because this Article focuses on searches of the home, but my analysis is also relevant to a search of other property like cars, bags, or computers.

18. For rhetoric analysis of Fourth Amendment law, see M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557 (2008); M. Isabel Medina, *Ruminations on the Fourth Amendment: Case Law, Commentary, and the Word "Citizen"*, 11 HARV. LATINO L. REV. 189 (2008); David E. Steinberg, *Zealous Officers and Neutral Magistrates: The Rhetoric of the Fourth Amendment*, 43 CREIGHTON L. REV. 1019 (2010).

as: (i) an individualized process, meaning consent is unaffected by its circumstances and divorced from its societal context; (ii) a legitimating factor, meaning consent justifies the search notwithstanding the power dynamics between the three parties; and (iii) a private decision, meaning consent has no constitutional, political, or public concerns. The Supreme Court's analysis of consent revolves around three dichotomies: individual-social, equality-hierarchy, and private-public. For each duality, the Supreme Court chooses the first category in its analysis.

The Article's analysis of consent relies on feminist literature on consent. Though feminist scholarly work on consent focuses on consent to sex,[19] this Article finds it applicable to the issue of consent to search. The consent to sex/consent to search analogy, which is rarely used,[20] will not only further our understanding of consent in the Fourth Amendment context, but will also expand the feminist analysis of consent to new territories.

As the critical analysis of third-party consent to search in Parts III–V shows, the Supreme Court has developed a simplistic and problematic notion of consent. However, it also shows that the feminists' proposals to redefine or reconstruct consent are also problematic and vague.[21] Consequently, Part VI supports abolition of this doctrine. As the triangular relation analysis highlights, third-party consent to search cases are different than other cases of consensual searches. This uniqueness makes the problematic notion of consent even more acute in third-party consent cases. Thus, though eliminating all consent searches is radical and impractical, this article proposes a new rationale for third-party consent to search abolition.[22]

II. THIRD-PARTY CONSENT TO SEARCH DOCTRINE

This Part briefly outlines Fourth Amendment law as it relates to third-party consent to search. Since Fourth Amendment law is an area of enormous breadth, this Article limits its focus in two ways. First, the Article only deals with search of the home cases.[23] Second, the Article looks only to Supreme Court cases.[24] The textual analysis of these cases frequently cites to the *Randolph* decision.[25] The

19. *See, e.g.*, Cheryl Hanna, *Rethinking Consent in a Big Love Way*, 17 MICH. J. GENDER & L. 111 (2010).

20. For the analogy between consent to search and sex, see Josephine Ross, *Blaming the Victim: "Consent" Within the Fourth Amendment and Rape Law*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 1 (2010).

21. *See* discussion *infra* notes 294–304 and accompanying text.

22. For abolishing third-party consent to search doctrine, see Aubrey H. Brown III, 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*, 18 WM. & MARY BILL RTS. J. 471 (2009). *See also* Gary K. Matthews, *Third-Party Consent Searches: Some Necessary Safeguards*, 10 VAL. U. L. REV. 29 (1976).

23. Though this Article focuses on searches of a home, its analysis may also be applied to government's access to information and to other property such as cars, bags, and computers.

24. Since I limit my analysis to Supreme Court cases, I will not cite lower federal court decisions or state court decisions. I rely in my analysis on the Fourth Amendment to the U.S. Constitution and not on states' constitutions.

25. 547 U.S. 103 (2006).

reliance on this case is for two reasons: first, *Randolph* is the most recent Supreme Court third-party consent to search decision; second, in *that case* the suspect was physically present during the search and objected to it, while in previous cases the suspect was absent.[26] This difference makes the triangular relation more readily apparent. However, even when the suspect is absent, the relation between the suspect and the other occupant and between the suspect and the police officer is still relevant. Thus, the analysis here applies not only to *Randolph* but also to the other Supreme Court cases addressing third-party consent to search.

Under Fourth Amendment law,[27] consent is the most common exception to the general rule that the police need a search warrant or probable cause for a search to be reasonable and valid.[28] Accordingly, a governmental agent may conduct a warrantless search with an individual's consent as long as the consent is voluntarily given by a person authorized to give it.[29] To determine whether consent has been voluntarily given, courts examine the totality of the circumstances surrounding the consent.[30] These circumstances may include such factors as the youth of the consenter, lack of education, low intelligence, and lack of any advisement to the consenter of his constitutional rights.[31] However, gender and race are not considered by the courts.

Consent to a search, according to Fourth Amendment law, may be given not only by the suspect but also by a third-party.[32] Until *Randolph* the Supreme Court only dealt with third-party consent to search cases where the suspect was absent from the home during the search. Accordingly, the Supreme Court held that a search of a home pursuant to the voluntary consent of an occupant who shares common authority over the property is valid against any absent non-consenting co-occupant.[33] The common authority rule is not based on property interests in the home but rather on mutual use, joint access, and control of the property. According to the Supreme Court's rationale, in a search of a dwelling the co-occupant's mutual use of the property through joint access or control will,

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26. *See id.*

27. For Fourth Amendment law, see generally WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (4th ed., 2004); Joseph D. Robinson, *Who's That Knocking at Your Door?: Third Party Consents to Police Entry*, 77 FLA. BAR J. 24 (2003).

28. Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005) (stating: "Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment").

29. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

30. For the totality of the circumstances test, see David John Housholder, *Reconciling Consent Searches and Fourth Amendment Jurisprudence: Incorporating Privacy into the Test for Valid Consent Searches*, 58 VAND. L. REV. 1279 (2005) (proposing including the expectation of privacy as a factor in the totality of the circumstances analysis in order to examine the validity of the consent to search).

31. *Schneckloth*, 412 U.S. at 226.

32. United States v. Matlock, 415 U.S. 164 (1974); Frazier v. Cupp, 394 U.S. 731 (1969). *See also* Robert Deschene, *The Problem of Third-Party Consent in Fourth Amendment Searches: Toward a "Conservative" Reading of the* Matlock *Decision*, 42 ME. L. REV. 159 (1990).

33. *See* Amos v. United States, 255 U.S. 313, 317 (1921) (leaving open the question whether a wife can consent to a search of the home she shares with her husband).

for most purposes, render a search pursuant to one co-occupant's consent reasonable: each has assumed the risk that the other might permit a search, and each has the right to give such permission.[34] A person voluntarily relinquishes a portion of his or her expectation of privacy by sharing access or control over his or her property with another person. Hence, third-party consent makes the search reasonable. For example, in *United States v. Matlock* the Supreme Court considered a search of a bedroom during which $4,995 in cash was found in a diaper bag in a closet.[35] Mr. Matlock was arrested in the yard at the time the police officers conducted the search pursuant to the consent of Ms. Graff, an individual with whom Mr. Matlock lived. At his trial Mr. Matlock asked the court to suppress the money found in the search, which was used to convict him of robbery.[36] The Supreme Court held that the search was legal.[37] Because Ms. Graff jointly occupied a bedroom with Mr. Matlock, she had the authority to give consent to a police search of the bedroom.[38] The Court emphasized the following additional facts: Ms. Graff admitted the police officers while dressed in her robe and holding her son in her hands; it was obvious that the couple shared the bedroom; and Ms. Graff and Mr. Matlock presented themselves as husband and wife.[39] Based on these facts, the Supreme Court concluded that Ms. Graff was authorized to give consent and that the police officers conducted a reasonable and valid search.[40]

The doctrine of third-party consent also applies to persons the police officer reasonably believes share common authority over the property but in fact do not. For example, in *Illinois v. Rodriguez* the Supreme Court considered a search of a house during which evidence of drug possession was sought and later used against Edward Rodriguez.[41] The search was triggered by a domestic violence complaint made by Ms. Fischer to the police.[42] She agreed to let the police into the house where Mr. Rodriguez was asleep.[43] The Supreme Court held that Ms. Fischer's consent was invalid since she did not have common authority over Mr.

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34. *But see* Elizabeth A. Wright, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841, 1857 (2005) (stating that common authority rather than assumption of risk is the rational for third-party consent to search, though the author admits the two rationales are related).

35. United States v. Matlock, 415 U.S. 164, at 166-67.

36. *Id.* at 136.

37. *Id.* at 138.

38. *Id.*

39. *Id.* at 176.

40. *Id.* at 177.

41. Illinois v. Rodriguez, 497 U.S. 177, 180 (1990). *See* Tammy Campbell, Illinois v. Rodriguez*: Should Apparent Authority Validate Third-Party Consent Searches?*, 63 U. COLO. L. REV. 481 (1992); 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 (Fall 1991); Michael C. Wieber, *The Theory and Practice of* Illinois v. Rodriguez*: Why an Officer's Reasonable Belief About a Third Party's Authority to Consent Does Not Protect a Criminal Suspect's Rights*, 84 J. CRIM. L. & CRIMINOLOGY 604 (1993).

42. *Id.* at 179.

43. *Id.*

Rodriguez's apartment.[44] Though she used to live with Mr. Rodriguez, she moved out of the apartment with her children, taking her clothes and the children's clothes with her (but leaving some furniture).[45] At the time of the search she lived with her mother and only spent some nights with Mr. Rodriguez at his apartment.[46] Her name was not on the lease nor did she contribute to the rent.[47] She did have a key to the apartment, but she had taken it without Mr. Rodriguez's knowledge.[48] Based on these facts, the Supreme Court concluded that she was not authorized to consent to the search of Mr. Rodriguez's apartment.[49] However, if the police reasonably believed that Ms. Fischer had authority to consent to the search, then the search would have been valid even if the police's belief turned out to be incorrect.[50]

In *Randolph*, the Supreme Court held 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.[51] The majority opinion, written by Justice Souter, applied a social expectations standard. According to this standard, no one will enter a home when one tenant welcomes him and the other resists his entry to the house. Thus, a police search in such circumstances is unreasonable.[52] Each occupant has authority to let the police into the house.[53] However, in a case of disagreement between the occupants, the consenting occupant has no authority to prevail over the other present and objecting occupant.[54] Thus, the disputed invitation makes the search unreasonable, similar to a case of a search absent consent at all.[55] The Supreme Court distinguished this case from previous cases based on the fact that in *Randolph* the suspect was physically present, while

44. *Id.* at 181–82.

45. *Id.* at 181.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 181–82.

50. *Id.* at 183.

51. Georgia v. Randolph, 547 U.S. 103, 122–23 (2006). For the facts of *Randolph*, see *supra* notes 2–8 and accompanying text.

52. For a psychological study of societal expectations of privacy in the home in a case of disputed permission to enter among the residents, see Dorothy K. Kagehiro, Ralph B. Taylor & Alan T. Harland, *Reasonable Expectation of Privacy and Third-Party Consent Searches*, 15 L. & HUM. BEHAV. 121 (1991). For a general critique of the reasonable expectations test, see Donald L. Doernberg, *"Can You Hear Me Now?": Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's Fourth Amendment Jurisprudence*, 39 IND. L. REV. 253 (2006); William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1 (2001); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051 (2004); James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645 (1985). For a suggestion of incorporating a least intrusive alternative component into the reasonableness test, see Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988).

53. *Randolph*, 547 U.S. at 109.

54. *Id.* at 114.

55. *Id.*

in *Matlock* and *Rodriguez* he was absent.[56] The dissent, written by Chief Justice Roberts, critiqued this distinction as arbitrary.[57] Based on *Matlock* and *Rodriguez*, the dissent argued that Ms. Randolph had authority to consent to the search of the house since she and the suspect lived in it together and Mr. Randolph thus assumed the risk she would let in the police.[58] Thus, according to the dissenting opinion, the search would be valid based on Ms. Randolph's consent, Mr. Randolph's objection notwithstanding.[59]

Third-party consent to search doctrine has been heavily critiqued,[60] as was the consent to search exception.[61] Scholars have argued that the doctrine goes against reasonable expectations of privacy.[62] Based on their notion of reasonable expectations of privacy, scholars doubt whether third-party consent is truly voluntary due to police authority.[63] Other scholars have argued that this doctrine gives police too much power to harass individuals in bad faith and pressure them to consent.[64] Consequently, some scholars have suggested limiting the scope of this doctrine.[65] Others have suggested abolishing it altogether.[66]

After this brief layout of Fourth Amendment law as it relates to third-party consent to search, this Article turns to examine this doctrine by viewing it as a triangular relationship in which the dynamics between three people intersect with one another. The three Parts that follow examine the relational dynamics between each edge of the triangle described.

The importance of these relations are inspired by feminist literature, mainly cultural feminism.[67] The relational view of people as connected to one another, and the understanding that people are influencing each other and at the same time are influenced by one another, is relevant to all cases of consensual search.

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56. *Id.* at 121.

57. *Id.* at 137 (Roberts, C.J., dissenting).

58. *Id.* at 128 (Roberts, C.J., dissenting).

59. *Id.*

60. For a review of the critique, see Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

61. Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983); Ross, *supra* note 20, at 5.

62. *See* Kerr, *supra* note 60, at 590.

63. *See id.*

64. *See id.*

65. Virginia Lee Cook, *Third-Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121 (1973); Andrew J. DeFilippis, *Securing Informationships: Recognizing a Right to Privity in Fourth Amendment Jurisprudence*, 115 YALE L.J. 1086 (2006); George C. Thomas III, *The Short, Unhappy Life of Consent Searches in New Jersey*, 36 RUTGERS L. REC. 1 (Fall 2009); Michael J. Ticcioni, United States v. Andrus*: Does the Apparent Authority Doctrine Allow Circumvention of Fourth Amendment Protection in the Warrantless Search of a Password-Protected Computer?*, 43 NEW ENG. L. REV. 339 (Winter 2009); Elizabeth A. Wright, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH & LEE L. REV. 1841 (Fall 2005).

66. *See* Brown, *supra* note 22, at 473. *See also* Matthews, *supra* note 22.

67. *See, e.g.*, ROBIN WEST, CARING FOR JUSTICE (1997); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

Think for example of the *Randolph* decision:[68] suppose Ms. Randolph had given her consent to search the house and evidence of her drug use (rather than Mr. Randolph's) had been found and used against her. Though this would not be a third-party consent to search case because the defendant would have given her own consent to the search, no doubt Mr. Randolph would have been affected as her spouse. However, in third-party consent to search cases, the relational dynamics between the three participants is more acute. In these cases the relations and tensions between the three actors are inherent. Based on the consent of one occupant to police search, evidence found is used against the other occupant. Though the relational theme applies to consensual searches in general, it is of utmost importance in cases of third-party consent to search. Yet, this dimension has not been addressed in the Fourth Amendment literature concerning third-party consent to search. This Article now turns to filling this gap.

III. THE DYNAMIC BETWEEN THE CO-OCCUPANTS

This Part explores the dynamics between the co-occupants. Of course, this relationship is unique to the case of third-party consent to search and is absent from other cases of consensual searches. In *Georgia v. Randolph*, Ms. Randolph consented to the search after Mr. Randolph objected to it.[69] Mr. Randolph, the objecting occupant and eventual defendant, was physically present and opposed the search.[70] By contrast, in other cases the defendant was not present in the home or was otherwise not aware of the search when the search took place. In *United States v. Matlock*, Ms. Graff allowed the police to search the house after Mr. Matlock was arrested and put in a squad car outside the house.[71] In *Illinois v. Rodriguez*, the police obtained Ms. Fischer's consent to search while Mr. Rodriguez was asleep in the other room.[72] All these cases involved cohabitating couples and married couples. In each of these cases, the relationship between the two occupants is important to understanding whether valid consent was given.

Examining the relation between the co-occupants using textual analysis and feminist literature on consent, this Part makes two interrelated claims. First, in its analysis the Supreme Court's rhetoric is gender neutral. The Supreme Court assumes equality between the two occupants and disregards the power dynamics between opposite-sex couples. Second, the Supreme Court constructs consent as an individualized process, unaffected by and divorced from its context. The Court analyzes consent with no regard to the circumstances in which it was given or to the social settings, background, or consequences of the consent. Most importantly, the opinion of the non-consenting occupant does not affect the consenting occupant and is considered irrelevant to the assessment of the consent's validity.

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

69. *Id.* at 107.

70. *Id.*

71. United States v. Matlock, 415 U.S. 164, 166 (1974).

72. Illinois v. Rodriguez, 497 U.S. 177, 179–80 (1990).

A. Gender Neutral Analysis of Consent

Fourth Amendment law, as stated by the Supreme Court, is gender neutral in that either occupant (man as well as woman) can withhold consent to search.[73] The Supreme Court assumes equality between the occupants: neither occupant can consent to a search under the protest of the physically present other. The *Randolph* holding is neutral in that it does not favor the man over the woman or vice versa.[74]

The *Randolph* dissent is also gender neutral, stating that the police may search based on the occupant's consent over the objection of the other physically present occupant.[75] While the majority ruled in favor of the objecting occupant (because his objection made the warrantless search illegal), the dissent preferred the consenting occupant (because her consent made the warrantless search legal).[76] Though all the opinions differentiate between the consenting occupant and the objecting occupant, they do not differentiate between the husband and the wife.[77]As Justice Scalia explains in his dissenting opinion:

> The issue at hand is what to do when there is a *conflict* between two equals. Now that women have authority to consent, as Justice Stevens claims men alone once did, it does not follow that the spouse who *refuses* consent should be the winner of the contest. Justice Stevens could just as well have followed the same historical developments to the opposite conclusion: Now that "the male and the female are equal partners," and women can consent to a search of their property, men can no longer obstruct their wishes. Men and women are no more "equal" in the majority's regime, where both sexes can veto each other's consent, than on the dissent's view, where both sexes cannot.[78]

Furthermore, Justice Souter, delivering the opinion of the Court, emphasized that Fourth Amendment rights are not limited by the law of property but are instead based on a broader common authority rule.[79] Thus, not only can the man give consent as an owner of the house, but each spouse who generally uses the house and has joint access or control of the house may consent because they share common authority. As Justice Stevens notes:

> In the 18th century, when the Fourth Amendment was adopted, the advice

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73. *See Randolph*, 547 U.S. at 114.

74. *See id.*

75. *See id.* at 128.

76. No opinion suggests a rule according to which the first occupant to be approached by police will prevail. Here the sergeant first asked Mr. Randolph's permission to search the home (and he refused), and then he asked Ms. Randolph for her permission (which she readily gave). Also, no opinion suggests a rule according to which the police need to attain the consent of all occupants to a warrantless search.

77. While Justice Souter's opinion differentiates between a situation where the objecting occupant is physically present (and his refusal trumps the consent of the other occupant) and a situation where the objecting occupant is absent (and the consent of the occupant physically present prevails over his objection), the dissent treats both situations the same (since in both cases the warrantless search is legal upon the occupant's consent). *See generally Randolph*, 547 U.S. 103.

78. *Id.* at 144 (Scalia, J., dissenting) (emphasis in original).

79. *Id.* at 110.

> would have been quite different from what is appropriate today. Given the then-prevailing dramatic differences between the property rights of the husband and the far lesser rights of the wife, only the consent of the husband would matter. Whether "the master of the house" consented or objected, his decision would control. Thus if "original understanding" were to govern the outcome of this case, the search was clearly invalid because the husband did not consent. History, however, is not dispositive because it is now clear, as a matter of constitutional law, that the male and the female are equal partners.[80]

Justice Souter also emphasized the equality between the co-occupants, saying: "There is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."[81] Further,

> [W]hen people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority. Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior.[82]

Similarly, Chief Justice Roberts's dissent acknowledges that "[t]he majority's assumption about voluntary accommodation simply leads to the common stalemate of two gentlemen insisting that the other enter a room first."[83]

Justice Scalia criticized the majority's rule for not treating men and women equally and for giving power to men over women.[84] However, his critique is only relevant to extreme cases of domestic violence, and he does not refer to other situations:

> [I] must express grave doubt that today's decision deserves Justice Stevens' celebration as part of the forward march of women's equality. Given the usual patterns of domestic violence, how often can police be expected to encounter the situation in which a man urges them to enter the home while a woman simultaneously demands that they stay out? The most common practical effect of today's decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes—which is, curiously enough, precisely the power that Justice Stevens disapprovingly presumes men had in 1791.[85]

In cases where the consenting third-party was a landlord[86] or hotel manager,[87] the common authority rule does not apply and they cannot admit a

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80. *Id*. at 124–25 (Stevens, J., concurring). *But see* Justice Scalia's dissent where he questions this historical description. *Id*. at 143 (Scalia, J., dissenting).

81. *Id*. at 114.

82. *Id*. at 113–4.

83. *Id*. at 129 (Roberts, C.J., dissenting).

84. *Id*. at 145 (Scalia, J., dissenting).

85. *Id*.

86. Chapman v. United States, 365 U.S. 610 (1961).

87. Stoner v. California, 376 U.S. 483 (1964).

person without the consent of the current tenant.[88] Similarly, an overnight guest has a reasonable expectation of privacy in his host's home.[89] Last, in cases of hierarchy, as between parent and child[90] or in the army,[91] the common authority rule is not applicable.[92] But in all other cases of shared occupancy, the Supreme Court's rule will apply no matter what the relationship between the two occupants. Thus, the Supreme Court does not distinguish between spouses, roommates, cousins, or any other co-tenants.

The legal question in *Randolph* is termed in gender-neutral language: does the consent of one occupant trump the objection of the other occupant or vice versa?[93] In a case of disagreement between two co-habitants over whether to let the police in, which occupant should prevail?[94] Phrasing the question this way ignores the fact that in *Randolph*, as in other third-party consent Supreme Court cases, the objecting occupant is a man and the consenting occupant is a woman.

According to the Supreme Court, either spouse can give consent.[95] Men and women are equal and thus either has the authority to consent to a search. But is the gender of the two occupants truly irrelevant? In *Randolph*, as in other third-party consent cases, the woman rather than the man consented to the search.[96] Despite this consistency, the Supreme Court does not take this fact into account.[97] *Randolph* is a typical case where an accused man is challenging the admission of evidence secured by the police after getting the consent of his wife or girlfriend.[98] Sergeant Murray asked Ms. Randolph's permission to search the house after Mr. Randolph refused to give such permission.[99] In *Matlock*, Ms. Graff agreed to the police house search after Mr. Matlock was arrested and put in a squad car outside the house.[100] Similarly, in *Rodriguez* the police obtained Ms. Fischer's consent to search when Mr. Rodriguez was asleep.[101] However, in all these cases, the gender of the consenting party is not considered. Though Chief Justice Roberts' dissent in *Randolph* criticized the majority's rule for being arbitrary, it

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88. *See Stoner*, 376 U.S. at 490; *Chapman*, 365 U.S. at 616–17.

89. Minnesota v. Carter, 525 U.S. 83 (1998); Minnesota v. Olson, 495 U.S. 91 (1990). *See also* Gregory J. Wartman, *Is This Reasonable?: The Supreme Court's Inconsistent Treatment of House Guests*, 62 U. PITT. L. REV. 387 (2000); Joseph Williams, Minnesota v. Carter*: The Fourth Amendment Implications of Inviting Guests into the Home*, 26 OKLA. CITY U. L. REV. 797 (2001).

90. *See* Matt McCaughey, *And a Child Shall Lead Them: The Validity of Children's Consent to Warrantless Searches of the Family Home*, 34 U. LOUISVILLE J. FAM. L. 747 (1995). *See also* Jason C. Miller, *When Is a Parent's Authority Apparent? Reconsidering Third-Party Consent Searches of an Adult Child's Private Bedroom and Property*, 24 CRIM. JUST. 34 (2010).

91. Justin Holbrook, *Communications Privacy in the Military*, 25 BERKELEY TECH. L.J. 831 (2010).

92. *See* McCaughey, *supra* note 90; Miller, *supra* note 90; Holbrook, *supra* note 91.

93. Georgia v. Randolph, 547 U.S. 103, 106, 108 (2006).

94. *See, e.g.*, *id.*

95. *See id.* at 114.

96. *Id.* at 107.

97. *See id.* at 114.

98. *See id.* at 107.

99. *Id.*

100. United States v. Matlock, 415 U.S. 164, 166 (1974).

101. Illinois v. Rodriguez, 497 U.S. 177, 179 (1990).

did not raise its gendered implications.[102] Treating the gender of the consenter as relevant raises the question of whether the police target the women and not the men for a reason. Perhaps the police intentionally approach the woman rather than the man because they suspected they had a better chance of getting her agreement; perhaps the police approach the woman specifically when her husband was away because they thought she would probably let them in while the man would probably not. Will the Supreme Court's ruling lead to more of this sexist behavior? The Supreme Court did not reflect on these questions, and its gender-neutral analysis ignores the power inequities of the co-occupants.

According to the Supreme Court, consent needs to be voluntary;[103] however, the Court's analysis assumes that social constraints due to patriarchy and racism are irrelevant. Nonetheless, scholars have argued that race and gender affect consent. The *Randolph* decision addressed the issue of battered women where gender clearly impacts cases in which violent men do not let the police into the house to aid their domestic violence victim wives and girlfriends. Gender has a broader reach, though.[104] Feminist scholars argue that the power dynamic between the police officer and the consenting individual is always gendered.[105] However, the Supreme Court and feminist literature address only the relations between the police officer and the consenting occupant[106] and neglect the dynamic between the co-occupants. The co-tenants might have conflicting interests or they might cooperate with one another to withhold information or evidence from the police. For example, in *Randolph* Mr. and Ms. Randolph had a domestic dispute that led Ms. Randolph to call the police.[107] She had an interest in having Mr. Randolph arrested for using drugs.[108] In *Rodriguez*, Ms. Fischer also wanted the police to arrest Mr. Rodriguez, who had severely beaten her.[109] On the other hand, in *Matlock,* Ms. Graff's cooperation with the police probably resulted from her belief that such cooperation would be in Mr. Matlock's best interest.[110] A person might also cooperate with the police to suggest that she is innocent and not involved in the other occupant's illegal activities; she might wish to distance herself from the incriminating evidence belonging to the other occupant. A person might wish to help the police fight crime, even to the detriment of her co-occupant. Additionally, a third-party might yield to police authority or choose to cooperate even if cooperation means betraying a co-occupant and delivering evidence that incriminates the co-occupant. Conversely,

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102. *See Randolph*, 547 U.S at 127–42 (Roberts, C.J., dissenting).

103. *See, e.g.*, *Matlock,* 415 U.S. at 171; Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973); Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L. J. 37 (2004).

104. Raigrodski, *Consent Engendered*, supra note 103, at 61.

105. *See* Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153 (2008); Ross, *supra* note 20.

106. *See, e.g.,* Raigrodski, *Consent Engendered*, *supra* note 103; Raigrodski, *Reasonableness and Objectivity*, supra note 105; Ross, supra note 20.

107. *Randolph,* 547 U.S. at 107.

108. *Id.*

109. *See* Illinois v. Rodriguez, 497 U.S. 117 (1990).

110. *See* United States v. Matlock, 415 U.S. 164 (1974).

the third-party may be committed to her co-occupant and refuse to cooperate with the police even to her own detriment. In some cases, the level of loyalty between two roommates might be lower than in the case of a married couple; in other cases, good friends or family members might have a stronger connection than an estranged couple. Even though the co-occupants' relations affect the decision to give or withhold consent, this edge of the triangle is missing from Fourth Amendment analysis.

The only specific situation discussed in *Randolph* is that of a battered wife who seeks the police's help but whose abusive husband does not consent to police entrance in the home.[111] According to the dissent, application of Justice Souter's rule in this situation would result in the police's inability to enter the house and help the victim of spousal abuse.[112] The majority responded that, in such circumstances, the police officer is allowed to go into the house to protect the victim of domestic violence on exigent circumstances grounds (as opposed to consent to search grounds).[113] Thus, both the majority and the dissent appear sensitive to the context of domestic violence. However, the majority applies its general rule (consent of the occupant cannot legally justify the warrantless search over the objection of the other occupant) and the dissent applies its general rule (consent of the occupant trumps the objection of the other occupant) to cases of domestic violence rather than applying a contextualized rule sensitive to different situations.[114]

Additionally, both the majority and the dissent focus only on the extreme case of domestic violence. In *Randolph*, Ms. Randolph called the police because of a domestic dispute with Mr. Randolph.[115] The opinion does not disclose whether Ms. Randolph suffered any physical abuse. The Supreme Court states that she returned to the marital home after spending several weeks with their child at her parents' house in Canada.[116] She complained that her husband was a cocaine user and that he took their child to the neighbor's house.[117] Based on the facts stated in the decision, she did not claim that Mr. Randolph was violent. In fact, it is unclear whether she returned to reconcile with Mr. Randolph. Thus, the Supreme Court's analysis regarding battered women is irrelevant to both the Randolphs' relations and to the relations of many other couples. However,

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111. *Randolph*, 547 U.S. at 117–18, 139–45. *See* Andrea Ferro, Georgia v. Randolph*: Warrantless Search and Seizure and Its Impact on Domestic Violence,* 15 Dig. 77 (2007); Amanda Jane Proctor, *Breaking into the Marital Home to Break up Domestic Violence: Fourth Amendment Analysis of "Disputed Permission,"* 17 AM. U. J. GENDER SOC. POL'Y & L. 139 (2009); Meagan Rasch-Chabot, *The Home As Their Castle: An Analysis of* Georgia v. Randolph's *Implications for Domestic Disputes*, 30 HARV. J.L. & GENDER 507 (2007) (discussing search of dwellings in cases of domestic violence).

112. *Randolph,* 547 U.S.at 139 (Roberts, C.J., dissenting).

113. *Id*. at 117.

114. For an analysis of this case as it is applied to the home of battered women, see JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 106 (2009); Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L. J. 485 (2009); Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801 (2007).

115. *Randolph,* 547 U.S. at 107.

116. *Id.* at 106–07.

117. *Id.* at 107.

gender is an important aspect of consent in all third-party consent cases and not only in extreme cases of battered women.

The Supreme Court's analysis of the relations between the two co-occupants is limited to domestic violence cases. However, the power dynamic between co-tenants is a relevant consideration in all third-party consent to search cases.[118] The impact of the co-tenants' relations on consent is not limited to extreme cases of domestic violence. This relation provides an important background to truly understand all cases of third-party consent and to assess the consent's validity. The Court should be sensitive to the relationship between the co-tenants at all times, and not only in extreme situations of domestic violence. Consideration of this factor is warranted for policy consideration reasons (i.e., enabling the police to protect battered women) and as part of the examination of the context under which consent was given. Understanding the relations between co-tenants is essential to address the question of the consent's validity.

Consent to the search affects the other co-occupants not only in third-party consent to search cases but in all consensual search cases. However, in third-party consent to search cases, the impact on the non-consenting co-occupant is even more severe because the consent of one occupant is used against the other occupant. In their critique of the Court's gender neutral analysis of consent, feminists only point to the gender power dynamics between the consenting individual and the police officer, neglecting the gender power dynamics between the two occupants.[119] Gendered relations should be addressed especially in cases of married or cohabitating couples. In these cases, the gender dynamic is more acute than in cases of roommates. By assuming equality between the two occupants, the Supreme Court neglects the importance of these relations.

By proposing consideration of the gender dynamics between the two co-occupants, this Article does not mean to suggest a paternalistic intervention in their relations by the police or by the court to the aid of women. This Article suggests more narrowly that the police and the court should take this dynamic into account when determining the validity of consent given. Additionally, in *Randolph* as in other cases, the cohabitants were a man and a woman. However, the dynamics between the two co-occupants are relevant also in cases of same-sex couples or in cases where family members, relatives, friends, or colleagues share a home. As in cases of couples, the relations between these co-habitants is a factor to be considered when assessing consent. Thus, the Court must engage in a nuanced analysis of the relations between co-occupants in order to fully evaluate unilateral consent given by one of the occupants.

118. For the dynamics between the consenting party and the suspect, see Dorothy K. Kagehiro & Ralph B. Taylor, *Third-Party Consent Searches: Legal vs. Social Perceptions of "Common Authority,"* 18 J. APPLIED SOC. PSYCHOL. 1274 (1988); Dorothy K. Kagehiro, William S. Laufer & Ralph B. Taylor, *Social Perceptions of Third-Party Consent and the Reasonableness Test of* Illinois v. Rodriguez, 29 J. RES. CRIM. & DELINQ. 217 (1992); Dorothy K. Kagehiro, Ralph B. Taylor, William S. Laufer & Alan T. Harland, *Hindsight Bias and Third-Party Consentors to Warrantless Police Searches*, 15 L. & HUM. BEHAV. 305 (1991).

119. *See* Raigrodski, *Consent Engendered*, supra note 103.

B. Consent as an Individualized Process

The Supreme Court rhetoric constructs consent as an individualized process, meaning consent is a personal decision unaffected by social circumstances. By disregarding the gender, race, and class of the consenter and the other occupant's lack of consent, the Supreme Court divorces the consent from its context. The Supreme Court's analysis of consent is also a-contextual in the sense that it disregards other factors, including the circumstances in which consent is given, the person to whom consent is given (the police, the spouse, a visitor), and the purpose for which consent is given (to a police search, to let the police in, to let a visitor in, to buy curtains). The Supreme Court views consent as a personal process unaffected by these circumstances;[120] consent is isolated from its surroundings, with no background and no impact on others.[121]

As previously discussed, Supreme Court opinions assume that the relationship between the consenting occupant and the objecting occupant is irrelevant. While the Court recognizes the importance of the power dynamic in the case of battered wives,[122] the relationship influences cases beyond domestic violence. For example, the *Randolph* decision is a-contextual, as it disregards the fact that unilateral consent to police entry was given in the context of a married couple sharing a home.[123] Contrary to the Supreme Court, this Article claims that these factors do matter and relate to the voluntariness and validity of consent. Ignoring the relationship's influence divorces the analysis of consent from gender considerations and from its overall context.

The Supreme Court's use of assumption of risk rhetoric also leads to an individualistic notion of consent. According to the Court, each occupant assumes the risk that the other occupant may invite the police into the shared home.[124] Relying on prior Fourth Amendment cases, Chief Justice Roberts explains that:

> The common thread in our decisions upholding searches conducted pursuant to third-party consent is an understanding that a person "assume[s] the risk" that those who have access to and control over his shared property might consent to a search . . . [T]his assumption of risk is derived from a third party's "joint access or control for most purposes" of shared property . . . [S]hared use of property makes it "reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right" . . . A person assumes the risk that his co-occupants—just as they might report his illegal activity or deliver his contraband to the government—might consent to a search of areas over which they have access and control.[125]

Other Supreme Court opinions rely on the same assumption of risk rationale.[126]

120. *See Randolph,* 547 U.S. at 106; Illinois v. Rodriguez, 497 U.S. 177, 185–86 (1990); United States v. Matlock, 415 U.S. 164, 170 (1974).

121. *See Randolph,* 547 U.S. at 106; Rodriguez, 497 U.S. at 185–86; *Matlock*, 415 U.S. at 170.

122. *Randolph*, 547 U.S. at 117–18.

123. *Id.* at 122–23.

124. *Id.* at 134–36.

125. *Id*. at 134-36 (Roberts, C.J. dissenting) (internal citations omitted).

126. *See Matlock*, 415 U.S. 171 n. 7; *Frazier v. United States*, 394 U.S. 731, 740 (1969).

Even Justice Souter, who based his opinion on reasonable expectations, cites previous cases acknowledging the risk assumption rationale.[127]

This economic assumption of risk rhetoric describes two occupants calculating risks rather than a married couple living together in a sharing, trusting relationship.[128] Furthermore, this rhetoric indicates an individualistic mode of decision making that views the other occupant's impact as a hazard rather than as a mutual decision making mechanism through which both occupants come to a joint decision. Accordingly, each occupant needs to be aware of how the other occupant's actions in the shared home could negatively affect him and each occupant must guard his own interests. The Supreme Court thus makes sharing unsafe in that it inherently entails the risk of waiving your privacy.

According to the Supreme Court, each party has the authority to consent to a police search and mutual consent is not necessary.[129] Under such a rule, the police should decide who prevails in a case of disputed consent, as there is no notion of joint decision of a married couple. Each tenant makes his individual decision, and the court later determines whose decision trumps in a case of disagreement, as in *Randolph*.[130] The Court only declares that both tenants have an equal right to consent and that no occupant has more power than the other, but it does not endorse a joint decision model for providing consent to search.[131] When the validity of the search is contested, a court would decide which occupant's decision prevailed.

Justice Souter rejects the alternative model of joint decision as atypical, unusual and particular:

> [S]hared tenancy is understood to include an "assumption of risk," on which police officers are entitled to rely, and although some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, the chance of such an eccentric scheme is too remote to expect visitors to investigate a particular household's rules before accepting an invitation to come in.[132]

Thus, the rule according to which each co-habitant may consent to search assumes that usually it is each co-tenant to himself, regardless of the other cotenants. The Supreme Court rejects notions of trust, cooperation, connectedness, and mutuality in favor of individualism. As Chief Justice Roberts explains in *Randolph*, one need not trust or share with his co-occupant, but rather

127. *Randolph,* 547 U.S. at 110–111.

128. For psychological studies that show that co-occupants do not assume the risk that the other co-occupant will allow a police search, see Dorothy K. Kagehiro & William S. Laufer, Illinois v. Rodriguez *and the Social Psychology of Third-Party Consent*, 27 CRIM. L. BULL. 42, 43–44 (1991); Dorothy K. Kagehiro & William S. Laufer, *The Assumption of Risk Doctrine and Third-Party Consent Searches*, 26 CRIM. L. BULL. 195, 202, 207 (1990).

129. *Randolph*, 547 U.S. at 106; Illinois v. Rodriguez, 497 U.S. 177, 185–86 (1990); *Matlock*, 415 U.S. at 170.

130. *Randolph*, 547 U.S. at 106.

131. *Id.*

132. *Id.* at 111–12.

"[t]o the extent a person wants to ensure that his possessions will be subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed."[133] Thus, the Court constructs consent as an individualistic process and rejects a joint model of consent.

Of course, not all couples make joint decisions or live in harmony. In situations where there is domestic violence, like in *Rodriguez*,[134] or a dispute between the husband and wife, like in *Randolph*,[135] little cooperation is expected. However, a joint decision model—an alternative to the Supreme Court's model—might be relevant in other situations. A married couple especially might behave as a unit. At a minimum, a wife might be influenced or affected by her co-occupant's preference. Even if the couple's relations are not harmonious, she might take his opinion into account when making her decision. Contrary to the Supreme Court, this Article suggests that the co-tenant's opinion is relevant. One tenant's decision to permit the search is not divorced from her relations with the other tenant. Rather, even in non-harmonious relations, her consent must be understood in the context of her relation with her husband and his refusal to let the police search the house.

At first, the Court's individualistic approach described above seems to empower women. In cases of domestic violence, this approach enables women to seek police protection despite the batterer's wishes. In other cases, an individualistic approach grants the woman power equal to that of her spouse. As explained by the majority in *Randolph*, in cases of battered women, the police can help victims of spousal abuse not by using consent but rather, other grounds for search (such as exigent circumstances).[136] However, this Article argues that an individualistic approach does not necessarily empower women.[137] Women are relational: they value the relationships in their lives and see themselves as connected to others.[138] Thus, the Court's individualistic notion of consent might disturb a woman's sense of connectedness and the importance of relations in her life. In spite of the critique of the individualistic notion of consent, the Article does not call for an alternative joint notion of consent. Rather, it posits a more modest and less radical claim: consent is influenced and affected by the other occupant's opinion.

Professor Coombs criticizes Fourth Amendment law for applying a narrow, individualistic conception of privacy rather than a shared notion of privacy.[139]

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133. *Id*. at 135 (Robert, C.J., dissenting).

134. 497 U.S. at 179.

135. 547 U.S. at 106.

136. 547 U.S. at 119.

137. Compare this to the family law context, where scholars have criticized an individualistic view of family law that treats the family as individual family members rather than as a unit and protects autonomous selves rather than connected individuals in relations and social networks. *See* Martha Minow, *"Forming Underneath Everything that Grows:" Toward a History of Family Law*, WIS. L. REV. 819, 894 (1985).

138. West, *supra* note 67.

139. Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593 (1987). For another critique of the narrow view of privacy under Fourth

She argues that the law views persons as individualistic in their behaviors and expectations and ignores the way a search affects the defendant's family, friends, colleagues and relationships.[140] Instead, she advocates for a notion of shared privacy according to which searches paradigmatically involve an intrusion into an area that is subject to an ongoing personal relationship between the defendant and others.[141] According to Coombs, privacy is the "protection of chosen intimacy rather than aloneness,"[142] and the right to privacy belongs to groups rather than individuals.[143] In place of a narrow individualistic analysis, she recommends a contextual analysis that captures the complexity of human relations.[144] In her view, "third-party consent should be recognized where the consent is uncoerced, and where the consenter, by virtue of his relationship to the primary right holder, would otherwise have standing to challenge the search."[145] Thus, in third-party consent cases "where the intimacy of the relationship between the consenter and the defendant renders betrayal of the defendant's interests unlikely, courts should take care to assure themselves that the consent was uncoerced."[146] The more intimate the relationship between the defendant and the consenter, the more suspicious the court should be that the consent was truly voluntary.[147]

Though Professor Coombs focuses on privacy, her approach is relevant to consent as well. The Supreme Court adopts not only an individualistic approach to privacy but also an individualistic concept of consent. This individualistic notion of consent is especially problematic in third-party consent to search cases where two people share a home and one gives her consent to the police to the detriment and against the wishes of the other occupant (whether he is present and objecting or absent and presumably would have objected).

IV. THE DYNAMIC BETWEEN THE POLICE OFFICER AND THE CONSENTING OCCUPANT

This Part explores the dynamic between the police officer and the consenting occupant. Based on textual analysis and feminist literature on consent, this Part makes two interrelated claims. First, the Supreme Court's analysis is power-blind: the Court ignores the power dynamic between the state representative and the citizen, treating them as equals negotiating the terms of the search. Second, the Supreme Court constructs consent as a legitimating factor; consent justifies the police actions and privileges the police over the citizen. While these two claims are relevant to all consensual searches, their

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Amendment law, see also Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment after* Lawrence, 57 UCLA L. REV. 1 (2009).

140. Coombs, *supra*, note 139, at 1594.

141. *Id.* at 1596.

142. *Id.*

143. *Id.*

144. *Id.* at 1598.

145. *Id.* at 1597.

146. *Id.* at 1599–1600.

147. *Id.* at 1661.

importance is more acute in third-party consent to search cases. In third-party consent to search cases one occupant consents to police who hold official positions of power to the detriment of the other occupant (the defendant), which further complicates third-party consent to search cases.

A. Power Blind Analysis of Consent

Like the relationship between two occupants, the Court views the relationship between the police and the individual in neutral terms with no regard to the power imbalance between them. Under the Supreme Court's analysis, consent to search resembles agreement to a contract with the police rather than acquiescence to state intrusion. According to Justice Souter, disagreement over police entrance mirrors disagreement over admitting a guest or choosing the style of curtains: "there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."[148] The Supreme Court misguidedly compares this mundane aesthetic decision to a decision to cooperate with state authority.[149]

Moreover, the power blind analysis of consent is apparent in the Court's rhetoric. The Supreme Court uses the neutral term "caller"[150] when it elucidates the rule regarding the police's right to enter the house:

> [I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.[151]

The choice of the word "caller" to describe a police officer disregards the power he holds over the individual as a state official. As Chief Justice Roberts points out in his dissent, an officer is not just a "visitor" but a state's representative:

> Mrs. Randolph did not invite the police to join her for dessert and coffee; the officer's precise purpose in knocking on the door was to assist with a dispute between the Randolphs—one in which Mrs. Randolph felt the need for the protective presence of the police.[152]

Though Chief Justice Roberts acknowledges that the situation in *Randolph* is not one of a social visit but rather of state intervention, he stops short of acknowledging the inherent hierarchy between the officer and the Randolphs. Feminists like Professor Raigrodski have demonstrated that there is inequality of power between the police and the individual. They have critiqued Fourth

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148. Georgia v. Randolph, 547 U.S. 103, 114 (2006).

149. *Id.*

150. The Court also uses the words "outsider" and "guest." *See id.* at 113, 114.

151. *Id.* at 113.

152. *Id*. at 139 (Roberts, C.J., dissenting).

Amendment law for ignoring this power dynamic and maintaining the power imbalance:[153]

> The Court's construction of consent and coercion disregards the inherently coercive nature of all police-initiated encounters that undermine the notion of a meaningful consent. Moreover, the dichotomy of consent-coercion perpetuates patriarchal power structures that privilege, among other things, the police in its encounter with the individual. This dichotomy reflects a male perspective and is itself an artificial construct of patriarchal ideology . . . [T]he Court's consent-to-search cases are driven by this patriarchal ideology to maintain social structures of power disparities and to perpetuate the subordination of women, minorities, and other disempowered members of society.[154]

Contrary to the Court's neutral analysis, Professor Raigrodski highlights the power imbalance inherent in police searches. Similarly, Professor Ross critiques Fourth Amendment law for disregarding power disparity between the suspect and the police.[155] Building on the feminist critique of rape law, Professor Ross advocates recognition of more subtle forms of coercion that would result in a broader definition of coercion that negates consent.[156] She points out that structural power imbalances between the suspect and the police affect a person's choice to assent or resist.[157] Thus, submission should not be equated with consent.

Professor Ross proposes a focus on the point of view of the consenter rather than on the reasonableness of the police action. To do so, she believes consent must be viewed in the context of social constraints and inequalities.[158] Ross prefers a subjective test of consent over an objective test.[159] Accordingly, the courts should examine the will of the consenting suspect instead of how much force was used by police.[160] This focus on the consenter's perspective will demonstrate concern with the consenter's experience. Ross is careful to note that, while focusing on the consenter, courts should not blame suspects for allowing access to the police based on the assumption that the suspect chose to consent to the search.[161] She emphasizes that lack of resistance does not equate to allowance of a search.[162] Ross argues that disregarding the power imbalance between the police officer and the citizen gives the former more power.[163] She

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153. *See* Robert V. Ward Jr., *Consensual Searches, The Fairytale that Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*, 15 TOURO L. REV. 451 (1999); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person*,*"* 36 HOW. L.J. 239 (1993).

154. Raidgrodski, *Consent Engendered*, *supra* note 103, at 38–39.

155. Ross, *supra* note 20.

156. *Id.* at 1.

157. *Id.* at 47 (citing Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983)).

158. *Id.* at 43, 49 (citing MacKinnon, *supra* note 157).

159. *Id.* at 29–30.

160. *Id.* at 43 (citing Mackinnon, *supra* note 157).

161. *Id.* at 55–56.

162. *Id.*

163. *Id.* at 67.

shows how power blind analysis of consent results in perpetuating existing power disparities and suggests that autonomy and privacy should be the core goals of the consent doctrine.[164] Ross shows how power blind analysis essentially renders the consent fallacious. On the other hand, taking into account the power imbalance would strengthen the autonomy and privacy of the consenting suspect.

The alternative feminist analysis of consent interprets Fourth Amendment law through ideas of anti-subordination and empowerment:

> [T]he Court must identify the power matrix between the parties, considering such factors as the gender, race, and class of both the officer and the individual, and any other factors which may contribute to an imbalance of power in the specific case at hand, such as general police practices or general attitudes about crime and security. The court must then determine whether such power disparities were exploited in an impermissible way . . . Power imbalances are often invisible and appear natural . . . This is exactly why we impose a moral obligation on the powerful to act from the perspective of those less powerful.[165]

The feminist alternative advocated by Raigrodski empowers the consenter rather than maintaining existing power disparities.[166] Contrary to the Court's power blind analysis, the feminist alternative seeks to mitigate the power imbalance between the police and individual. Additionally, the feminist notion of consent is set from the perspective of the suspect. Rather than assessing whether the police used too much coercive force, the court should examine the subjective will of the suspect. Feminists suggest that courts examine consent from the consenter's point of view rather than inspecting the police actions.

> [I]n evaluating the consensual nature of the search and of the encounter between the police and the individual we should primarily focus on the actual state of mind of the individual. We should attempt to evaluate his or her agency and choices within the complex arena of fractured structural forces and pressures, especially historic indicators of multiple social oppressions. This would require asking different sets of questions. We should ask, for example, did the individual act with a consciousness of his or her social position? What is the range of experience that informed her ability to imagine alternative choices? How did he feel when he "consented"?[167]

According to Raigrodski, the court analysis of consent should not be limited to questioning whether police have used excessive and coercive power to attain consent.[168] Rather, the court analysis of consent should center on the suspect and

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164. *Id.* at 64. *But see* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994) (suggesting that one of the principles of the Fourth Amendment law is reciprocal government-citizen trust).

165. Raigrodski, *Consent* Engendered, *supra* note 103, at 61. For similar feminist analysis of consent paying attention to power imbalance, see Raigrodski, *Reasonableness and Objectivity*, *supra* note 105; Ross, supra note 20.

166. *See generally* Raigrodski, *Consent Engendered*, *supra* note 105, at 61; Raigrodski, *Reasonableness and Objectivity*, *supra* note 105; Ross, supra note 20.

167. Raigrodski, *Consent Engendered*, *supra* note 103, at 61.

168. *Id.*

question whether she truly consented to the search as opposed to submitting to the police.[169]

The Supreme Court's analysis is not only power blind but also gender- and race-blind. The Court assumes that neither plays a role in the power dynamics between the police officer and the consenting individual and that the consent is unaffected by race or gender. Conversely, scholars discussing power imbalance have highlighted the way that race affects whether an individual adheres to police authority. Research shows that people, especially racial minorities, tend to submit to police power, and that the police are sometimes motivated by racial stereotypes.[170] As a result, scholars criticize Fourth Amendment law for being insensitive to and unconcerned with the reality of race.[171]

For example, Professor Carbado claims that courts ignore race and engage in a colorblind or race neutral analysis.[172] He criticizes courts' assumption that individuals' interactions with the police are neither affected by nor mediated through race.[173] Similarly, he criticizes the courts' assumption that race plays no part in whether and how the police engage certain people.[174] Accordingly, race only matters if a particular police officer exhibits overtly racist behavior.[175] Otherwise, police action is presumed to be constitutional.[176] As a result, Professor Carbado argues that "people of color are burdened more by, and benefit less from, the Fourth Amendment than whites."[177] He suggests a consenter perspective that is race-conscious.[178] This approach does not focus on racist police officers but on the "ways in which race structures the interaction between police officers and nonwhite persons."[179]

Consent to search under the Fourth Amendment has not only racial implications but also gender implications.[180] Feminists like Professor Raigrodski

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169. *Id.*

170. Adrian J. Barrio, *Rethinking* Schneckloth v. Bustamonte*: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215; Dorothy K. Kagehiro, *Psycholegal Research on the Fourth Amendment*, 1 PSYCHOL. SCI. 187 (1990).

171. David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L. J. 423 (2003); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151 (1994); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L. J. 525 (2003).

172. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

173. *Id.*

174. *Id.*

175. *Id.* at 968–69.

176. *Id.*

177. *Id.* at 969.

178. *Id.* at 970.

179. *Id.*

180. Fourth Amendment law also has class implications. *See* Jordan C. Budd, *A Fourth*

call for an analysis of consent that acknowledges the dynamics of power between police and citizens on the basis of race and sex:

> Encounters between the police and the individual cannot be characterized as equal in power under our current social hierarchical structures. Rather they reflect the invisible subordination of the individual to the power of the patriarchal state and law. In most cases, the individual would in fact be powerless to resist these forces and would quietly submit by consenting to the search, absent meaningful choices from his or her subordinated position. Every time the Court insists on characterizing this submission as a true act of agency and free-willed choice, oblivious to power disparities and social constraints, it reifies the individual's subordinated state. This is especially true for women and minorities whose subordination to the police is but one manifestation of their all-encompassing social subordination.[181]

Thus, Professor Raigrodski argues that the notion of consent is male-biased and "maintains social structures of domination and power disparities and perpetuates the subordination of women, minorities, and other disempowered members of society."[182]

Professor Raigrodski applies the feminist critique of the consent/coercion dichotomy to Fourth Amendment law.[183] She claims that the Court distinguishes between consensual searches and exceptional instances of the use of force or threats by the police.[184] By creating this hierarchy, only rare and extreme instances of police abuse of power render a search invalid.[185] Searches in which the police did not use such force are deemed consensual and thus legitimate, valid, and constitutional.[186] Though she discussed generally consent to search, Professor Raigrodski's critique is relevant to third-party consent to search cases as well. In cases of third-party consent to search, gender and race also play an important role in understanding consent. Furthermore, in this context the power analysis works in three dimensions (each of the three edges of the triangle) and should not be limited only to the police-consenting individual dimension. Rather, the race and gender dynamic are present in relations between the police and the co-tenants.

Examining the race and gender effects on consent is complicated. In

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Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home, 85 IND. L.J. 355 (2010); Alfredo Mirande, *Is There a "Mexican Exception" to the Fourth Amendment?*, FLA. L. REV. 365 (2003) (discussing Mexicans and other non-resident aliens); Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On* Guitterez *and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57 (2000) (discussing undocumented immigrants); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003); William J. Stuntz, *Privacy in the Criminal Context: Panel IV The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999).

181. Raigrodski, *Consent Engendered*, *supra* note 103, at 58.

182. *Id.* at 37–38.

183. For another critique of this dichotomy, *see* Simmons, *supra* note 28. *But see* Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L. J. 69 (2007).

184. Raigrodski, *Consent Engendered*, *supra* note 103, at 49–50.

185. *Id.*

186. *Id.*

Randolph, the police officer was a man and the consenting individual a woman.[187] However, the power dynamics remain relevant in the opposite case where the police officer is a woman and the consenting individual is a man. Power dynamics are also apparent when a male police officer encounters a male civilian.[188] Additionally, the power dynamics analysis is applicable in situations of upper-class individuals, as the case of Harvard Professor Henry Louis Gates demonstrates.[189] As these examples show, gender, race, and class may intersect in different ways. The relation between the police officer and the consenting individual is complex, involving race, class, and gender. Thus, analysis of consent should not be simplistic and one-dimensional, addressing only subordination to authority analysis. Rather, the analysis of consent should be nuanced and sophisticated, accounting for the different relations between two people.

B. Consent as a Legitimating Factor

Consent is a legitimizing factor in that it makes police action legal. Accordingly, assuming no other exception applies, a warrantless search is unconstitutional unless there is consent.[190] Consent changes the relationship between the parties and legitimizes otherwise illegal police action.[191] Similarly, nonconsensual sexual intercourse is illegal rape.[192]

Consent is what distinguishes a legal search from an invalid search and sexual intercourse from rape. Some feminists argue that the law should not demand that the woman resist her rapist but rather that the man ask the woman's permission.[193] In terms of evidence, instead of requiring her to show that she fought back, he must show that she said yes.[194] In the context of consent to search, Fourth Amendment law requires the state show that the third-party (or suspect) gave his or her consent rather than show that the police obtained a warrant.[195] The police may pursue a consent search even when probable cause to

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187. Georgia v. Randolph, 547 U.S. 103, 107 (2006).

188. Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009).

189. For a power dynamic analysis of this case, see Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1 (2010); Ross, *supra* note 20, at 30.

190. For a description of exceptions, see generally Jones v. U.S., 357 U.S. 493, 499 (1958); U.S. v. Jeffers, 342 U.S. 48, 51 (1951); Brinegar v. U.S., 338 U.S. 160 (1949); Johnson v. U.S., 333 U.S. 10, 14–15 (1948).

191. For a discussion of consent as legally and morally transformative, see Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165 (1996); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996).

192. Moreover, in the case of a contract, consent is required in order to form a valid agreement, and lack of consent results in an unenforceable agreement.

193. *See* Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143 (1983).

194. *See* Chamallas, *supra* note 193; Wiener, *supra* note 193.

195. *See* Bumper v. North Carolina, 391 U.S. 543, 548 (1968) (stating, "[w]hen a prosecutor seeks

support a search warrant exists.[196] In addition, the police do not need to explain to the individual that he or she has the right to refuse to give consent.[197] Rather than meaningfully examining the police use of power, the court readily assumes the consent of the individual.

In this context, as in the rape context, the burden placement is crucial. To place the responsibility for deciding not to consent on the citizen is to privilege police power. By ignoring police power over the citizen and viewing police and the citizen as equals bargaining at arm's length, the waiver of constitutional rights is seen as legitimate. In this way, the contractual perception of consent veils power imbalances between the police and the citizen. Furthermore, placing the burden on the citizen to refuse or deny consent deepens the imbalance of power.

The law views the citizen as controlling the situation by deciding whether to refuse consent or allow it. Instead, the law could place the burden on the police to prove they did not misuse their power.[198] As the law stands, the suspect bears responsibility for either giving or refusing consent to the search.[199] This ignores the power imbalance between the police and the consenting individual. The power-blind rhetoric analysis[200] clarifies why the legitimating aspect of consent privileges the police over the citizen. As Professor Raymond argues:

> [Fourth Amendment law p]lace[s] the responsibility to protect rights on the defendants themselves. . . . [T]he loss of rights is understood as the product of defendant-centered decisions like consent, compliance, or voluntary cooperation rather than police conduct. . . . [B]ecause the result is the product of the defendant's own choices, the outcome is both reasonable and adequately protective of individual rights . . . . [T]he courts and the government advocate for the view that reasonable people can and should decline to cooperate with police. Moreover, it suggests that the smart defendant . . . invokes that right and refuses cooperation. The cooperator winds up portrayed as a fool or a sucker, someone who foolishly but willingly relinquished his right to be left alone. . . . [T]he model causes the courts . . . to focus on questions of how individuals should behave rather than how police should . . . . While claiming . . . to focus on how the reasonable person would feel under the circumstances, many courts in fact look to whether police, in their view, have behaved appropriately, or to

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to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given") (internal citation omitted).

196. Illinois v. Rodriguez, 497 U.S. 177. *See* Marshall's dissent arguing that only exigent circumstances would justify a warrantless search, otherwise the police needs to get a warrant. United States v. Matlock, 415 U.S. 164 (1974) (Marshall, J., dissenting). *See* Douglas's dissent arguing that, because the police had an opportunity to obtain a search warrant but failed to do so, the consensual search was invalid. Rebecca Strauss, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 877 (2002).

197. Schneckloth v. Bustamonte, 412 U.S. 218, 231–32 (1973).

198. *See* Gregory S. Fisher, *Search and Seizure, Third-Party Consent: Rethinking Police Conduct and the Fourth Amendment*, 66 WASH. L. REV. 189 (1991) (asserting that the court should focus on police conduct and require police to justify their reliance on third-party consent).

199. The Supreme Court also puts the burden on the citizen in that he or she may limit the scope of the search. *See* Florida v. Jimeno, 500 U.S. 248, 252 (1991).

200. *See supra* section IV.A.

> whether there has been police overreaching.[201]

Though Professor Raymond addresses the general law of consensual search, her critique is relevant to the specific case of third-party consent. In third-party consent searches, as in other consensual searches, the Court disregards this legitimating nature of consent. The Court's neutral analysis disregards the possibility that even when the police do not abuse their power, voluntary consent might not be truly given. In consensual search cases,

> [The courts] view[] defendants' loss of rights as their own responsibility. . . . [I]n the ordinary course, reasonable people have—and believe that they have—the right to disregard the police, ignore their requests, and refuse to cooperate with them. Compliance with police thus becomes the product not of compulsion or submission to police authority, but of individual acquiescence. . . . [C]ooperators should blame their loss of constitutional rights on their own foolish desire to engage in cooperative and socially appropriate behavior.[202]

Fourth Amendment law aims to limit state power and protect citizens from unwarranted state intrusion.[203] However, Fourth Amendment law currently privileges the police instead of empowering the individuals. This inequality of power is not cured by requiring the police to notify the citizen that he or she has the right to disallow the police's search:[204]

> Waivers . . .will not cure the broader problem of police coercion. . . . Scholars who focus on the lack of knowledge as if that were the sole problem in consent searches miss the point. Lack of knowledge is just one indicator of the individual's lack of power. It is a relatively small issue within the broader problem of coercion. . . it would be misleading to tell individuals that they can withhold consent, for that implies that there will be no negative repercussions from telling the officer to leave them alone, when in fact, police may search and/or arrest nonconsenting individuals in many instances even after the suspect has manifested nonconsent. . . . The warning changes nothing. The officer still holds all the cards. He can arrest; he can retaliate for citizens who fail to consent; he can become violent. All a waiver would do where the person truly feels coerced is mask the coercion. The lack of knowledge requirement should be understood as part of a general disregard for the power differential between police and suspect and part of search law's project to dislocate the legal concept of coercion from the experience of the person facing police pressure.[205]

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201. Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1484–86 (2007).

202. *Id.* at 1530.

203. *See* U.S. Const. amend. IV.

204. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (Brennan, J., and Marshall, J., dissenting). *See also* Steven L. Chanenson, *Get the Facts Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399 (2004); Morgan Cloud, *Ignorance and Democracy*, 39 TEX. TECH. L. REV. 1143 (2007); Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171 (2007); Gerald E. Lynch, *Why Not a Miranda for Searches?*, 5 OHIO ST. J. CRIM. L. 233 (2007); Matthew Phillips, *Effective Warnings Before Consent Searches: Practical, Necessary, And Desirable*, 45 AM. CRIM. L. REV. 1185 (2008).

205. Ross, *supra* note 20, at 35–37. *See also* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 203–06.

After consenting (and after Sergeant Murray started conducting the search pursuant to her consent), Ms. Randolph withdrew her consent,[206] yet her consent would have justified the search had the present Mr. Randolph not objected to the search.[207] The dissent validated the consensual search notwithstanding her change of mind.[208] The majority, on the other hand, did not use her revocation as grounds to invalidate the search.[209] The Supreme Court viewed consent as a static, rather than a dynamic, process. Once consent is given, there is no possibility of retraction; irrevocable permission is granted and a change of mind has no meaning. Thus, the Supreme Court disregards later revocation of consent as irrelevant. The Court should have raised questions such as: Can a person withdraw her consent after the search has started? At what point in time may a person no longer change her mind? Is there such a time limit? At the same time, if a person refuses consent, the police may keep asking his or her permission, the previous objection notwithstanding. Consent given after many refusals is still valid consent. The Supreme Court looks at a specific point in time where consent was granted and freezes that moment in time. Thus, consent is not changing and evolving but stable and frozen. This static notion of consent, like the court's disregard of police power, privileges the police.

V. THE DYNAMIC BETWEEN THE POLICE OFFICER AND THE SUSPECT

This part explores the dynamic between the police officer and the suspect (the defendant). Generally, the suspect gives his consent to the search when asked by the police officer.[210] However, in third-party consent to search cases the suspect does not consent; rather, the police officer obtains the other tenant's consent to the search.[211] Examining this edge of the triangle through the lenses of textual analysis and feminist literature on consent, this Part makes two interrelated arguments. First, the Supreme Court's analysis of consent is a-contextual. In examining consent the Supreme Court disregards the circumstances and conditions under which consent is given and applies the same rule to different situations. Specifically, the Supreme Court applies the same rule when a third-party consents and when the suspect consents to the search[212] and thus reveals its indifference to who gave his or her consent to the search. Second, the Supreme Court constructs consent as a private and personal decision of the individual.[213] Thus, the public, political, societal, and constitutional aspects of consent are veiled. By framing the waiver of the constitutional privacy right as a

206. Georgia v. Randolph, 547 U.S. 103, 107 (2006).

207. *Id.*

208. *Id.* at 127–43 (Roberts, C.J., dissenting).

209. *See id.* at 122–23 (holding that the physically present co-occupant's objection to the search rendered the consent invalid).

210. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

211. *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974); Frazier v. Cupp, 394 U.S. 731(1969). *See also supra* Part II.

212. *See, e.g.*, *Matlock*, 415 U.S. 164; *Frazier*, 294 U.S. 731. *See also supra* Part II.

213. *See infra* Part V.B.

private and nonpublic issue, the Supreme Court blurs the line between the private and the public.

While these claims are relevant to all consensual searches, they are more acute in third-party consent to search cases, as stressed throughout this Article. In all consent to search cases there is a waiver of the right to privacy, but in third-party consent to search cases it is the consent of one occupant that waives the constitutional right of the other occupant. Such cases are unique in that the consent of one person is deemed enough to waive the constitutional right of *another* person. The consent of a third-party justifies this intrusion of privacy.

This edge of the triangle—the relationship between the police officer and suspect—is relevant regardless of the suspect's physical presence or absence. In cases like *Randolph*, where the two occupants are present, this dynamic is clearly important. Moreover, this relationship is significant even in cases of an absent suspect because both the police and the third-party inherently consider the suspect's interests.

A. A-Contextualized Analysis of Consent

In his concurring opinion in *Randolph*, Justice Breyer emphasizes that "the Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever-changing complexity of human life. It consequently uses the general terms 'unreasonable searches and seizures.'"[214] Additionally, the Supreme Court has continuously emphasized that "[r]easonableness . . . is measured . . . by examining the totality of the circumstances."[215] Despite these assertions, the Supreme Court's analysis of consent is insensitive to circumstances and context.

The Supreme Court applies the same analysis of consent in third-party consent cases that it applies in other consensual search cases. Consent justifies the search, whether given by the suspect or by another occupant.[216] Each co-tenant has the authority to give consent.[217] The opinion of the other occupant is only relevant when he is physically present and objecting to the search.[218] If he is outside the home, or even sleeping in another room, then his objection holds no weight. Generally, the third-party's consent justifies the search even assuming that the absent suspect would have objected to the search if he was present. The opinion of the suspect is relevant and overrides the consent of the other occupant only if there is disputed consent among two present occupants.[219]

The *Randolph* dissent critiques the majority's rule as arbitrary, stating that it

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214. *Randolph*, 547 U.S. at 125 (Breyer, J., concurring).

215. *Id.* (citing Ohio v. Robinette, 519 U.S. 33, 39 (1996)). *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (arguing that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances").

216. *Matlock*, 415 U.S. at 177. *See also supra* Part II.

217. *Id*. *See also supra* Part II.

218. *See Randolph*, 547 U.S. at 107.

219. *Id.*

depends on whether the occupant was lucky enough to be present or not.[220] Disregarding the opinion of the occupant (except in the specific situation of a physically present objecting occupant) demonstrates the Supreme Court's a-contextualized analysis. This a-contextual analysis misses an important fact for evaluating consent. Third-party consent to search differs from a suspect's consent to search. Only in the former is the consent of one used against another. The search results are not to the detriment of the consenting co-occupant but to the detriment of the other co-occupant. By ignoring this difference, the Supreme Court excludes a relevant fact from its analysis. As discussed in the previous Parts, the Court ignores other relevant facts as well, such as the race and gender of the consenter[221] and the power imbalance between the police and the individual.[222]

Fourth Amendment law as stated by the Supreme Court is a-contextual in that it prescribes a general rule that does not consider specific circumstances. The *Randolph* decision uses the general word "occupant."[223] The Supreme Court's analysis ignores the relationship between the occupants and applies the same rule to couples, blood relatives,[224] and roommates.[225] Justice Souter specifically mentions that the same rule applies to all residential co-occupants.[226] However, in *Randolph*, as in most cases relied on by the Supreme Court, the consenting occupant is a wife or girlfriend and the objecting occupant is her husband or boyfriend.[227] The Supreme Court applies the same blanket rule whether the police officer is searching a house,[228] bureau drawers, a bag,[229] a

220. *Id.* at 137 (Roberts, C.J., dissenting).

221. *See supra* section III.A.

222. *See supra* section IV.A.

223. The Court also uses the terms "tenants," "residents," "co-inhabitants," "individuals," and "persons." *See generally id.*

224. Frazier v. Cupp, 394 U.S. 731 (1969).

225. *See* Illya Lichtenberg, *The Bus Sweep Controversy: Agency, Authority and the Unresolved Issues of Third Party Consent*, 81 U. DET. MERCY L. REV. 145 (2004) (examining a case in which a bus driver is the third-party); Martha E. Lipchitz, *Constitutional Law: Third-Party Consent to Seizure of Taxicab Passenger Does Not Violate Passenger's Fourth Amendment Rights*, 35 SUFFOLK U. L. REV. 423 (2001) (also examining a case in which a taxicab driver is the third-party); Steven R. Morrison, *The Fourth Amendment's Applicability to Residents of Homeless Shelters*, 32 HAMLINE L. REV. 319 (2009) (examining a case in which a homeless shelter staff is the third-party); Andrew M. Souder, *Bargaining Away Fourth Amendment Rights in Labor Dispute Resolution:* Bolden v. SEPTA (1991), 38 VILL. L. REV. 1133 (1993) (examining a case in which an employee union consented to drug testing of member employees); Margaret R. Sweeney, United States v. Woodrum, *Beware Taxicab Passengers, Your Individual Rights Are Being Diminished*, 28 N.E. J. CRIM. & CIV. CON. 123 (2002) (examining a case in which a taxicab driver is the third-party).

226. Georgia v Randolph, 547 U.S. 103, 109 (2006). *But see* Russell M. Gold, *Is This Your Bedroom?: Reconsidering Third-Party Consent Searches Under Modern Living Arrangements*, 76 GEO. WASH. L. REV. 375 (2008).

227. *Randolph*, 547 U.S. at 107 (noting that Mr. and Ms. Randolph were separated but Ms. Randolph returned to the marital house for either reconciliation or to retrieve her belongings). *See also* United States v. Matlock, 415 U.S. 164 (1974) (noting that Ms. Graff and Mr. Matlock were living together); Illinois v. Rodriguez, 497 U.S. 177 (1990) (noting that Mr. Rodriguez and Ms. Fischer were living together); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

228. *See* Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*,

car,[230] a locker, or a computer.[231] The dissent goes even further and treats sharing information,[232] papers, documents, containers, or places the same.[233] The *Randolph* majority characterizes this as a "false equation"[234] and criticizes the dissent for failing to acknowledge the importance of the privacy of the home. However, the majority's analysis of consent also disregards the context in which consent was given. The dissent, like the majority, ignores the special circumstances of third-party consent. In other words, both the dissent and the majority treat third-party consent cases like any other consent to search cases and disregard the nonconsenting co-occupant/police side of the triangle.

In *Randolph*, the police came to the home after Ms. Randolph called the police complaining about a domestic dispute she had with her husband.[235] However, the reason for the search is irrelevant to the Court's analysis, as is the relationship between the two occupants. The Supreme Court's rule applies to all third-party consent to search cases, no matter what triggered the search. The context of the search of a marital home within a marital relationship is absent from the Supreme Court's opinion.[236] In *Randolph* the search was triggered by Ms. Randolph and was conducted by Sergeant Murray pursuant to her consent.[237] However, the search's findings were used against Mr. Randolph in court.[238] This special aspect of the triangle, the police-suspect relation, is absent from the court's analysis.

The Supreme Court also disregards the withdrawal of Ms. Randolph's consent.[239] After Ms. Randolph consented to the search, evidence of drug use was found.[240] Sergeant Murray left the house to get an evidence bag from his car, but when he returned to the house Ms. Randolph withdrew her consent.[241]

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95 CORNELL L. REV. 905 (2010).

229. *Frazier*, 394 U.S. 731.

230. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); *Coolidge*, 403 U.S. 443. *See also* Alex Chan, *No, You May Not Search My Car! Extending* Georgia v. Randolph *To Vehicle Searches*, 82 WASH. L. REV. 377 (2007).

231. The court also compares computers to containers. *See* United States v. Andrus, 483 F.3d 711, 717 (10th Cir. 2007). *See also* Noah Stacy, *Apparent Third Party Authority and Computers: Ignorance of the Lock Is No Excuse*, 76 U. CIN. L. REV. 1431 (2008).

232. United States v. Jacobsen, 466 U.S. 109, 129 (1984).

233. The language of the Fourth Amendment also groups together "persons, houses, papers and effects." U.S. Const. amend. IV.

234. Georgia v. Randolph, 547 U.S. 103, 115 (2006).

235. *Id.* at 107.

236. *Compare id. with* Heather L. Hanson, *The Fourth Amendment in the Workplace: Are We Really Being Reasonable?*, 79 VA. L. REV. 243, 245 (1993) (stating that the Supreme Court considers context in a search of a place of employment), Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581 (2011) (arguing that context should be considered in the application of the Fourth Amendment to information on the internet), and Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. BULL. 39 (2011).

237. *Randolph*, 547 U.S. at 107.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

Nevertheless, Sergeant Murray retrieved the evidence.[242] Nowhere in the opinion did the Court consider the revocation of Ms. Randolph's consent, and her change of heart did not invalidate her consent to the search. The court did not question why she changed her mind or whether this should affect the validity of the search. Perhaps Sergeant Murray should have again requested Mr. Randolph's consent in order to proceed with the search once Ms. Randolph had withdrawn her consent.

Some feminists suggest an alternative contextualized notion of consent.[243] This contextual consent relies on the nature of the human relationships involved, the complexity of human emotion, the power inequalities between the parties, and the social meanings of their actions, rather than on a universal notion identical under all circumstances.[244] This notion of consent gives autonomy great weight and negates the Supreme Court's assertion of a powerful social actor that knows what is best for, and therefore can take advantage of, the less powerful social actors.[245] Additionally, the feminist notion of consent considers the experiences and values of women by engaging in practical reasoning that is sensitive to situation and context and by exploring social meaning as ways for exacerbating and exploiting power inequalities.[246] Applying this feminist analysis to *Randolph* raises questions about how Ms. Randolph's presence and consent affected the relations between Sergeant Murray and Mr. Randolph. Not only did she trigger the search but she changed the situation from a nonconsensual search to a consensual one and from a consent by suspect case to a third-party consent case. However, these circumstances are absent from the Randolph decision.

B. Consent as a Private Decision

Scholars critique the consent to search exception and resulting diminishment of the constitutional right to privacy.[247] The result of the *Randolph*

242. *Id.*

243. Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 40 (2002).

244. *Id.* at 41–42, 49.

245. *Id.* at 42–43.

246. For a case-by-case analysis of third-party consent to search, see Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975 (2007) (rejecting a bright line rule); Stephen E. Henderson, *Learning From All Fifty States: How To Apply The Fourth Amendment And Its State Analogs To Protect Third Party Information From Unreasonable Search*, 55 CATH. U.L. REV. 373 (2006) (cataloguing the Fourth Amendment and similar state doctrines).

247. *See* Sharon E. Abrams, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963 (1984); James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413 (1993); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307 (1998); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199 (1993); Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119 (2002); 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.

decision is a strengthened constitutional right to privacy.[248] Under the majority's current rule, the police must stay out of a home because of the present tenant's objection notwithstanding the invitation by the other occupant.[249] The state may not invade the privacy of the home in such situations unless there is a warrant or exigent circumstances arise.[250] The rule heightens the burden on the police to obtain the consent of the citizen before conducting a search. Between the two occupants the Court majority preferred the objecting occupant. After scholars critiqued the consent to search exception and the weakening of the constitutional right to privacy, the latest Supreme Court decision seems to go in the direction of respecting and strengthening the Fourth Amendment right.[251] Therefore, the *Randolph* court emphasizes the importance of the Fourth Amendment right to privacy.[252]

However, the dissent criticizes the majority's rule for protecting social norms and expectations rather than privacy.[253] According to Chief Justice Roberts, "The majority's analysis alters a great deal of established Fourth Amendment law. The majority imports the concept of "social expectations," previously used only to determine when a search has occurred and whether a particular person has standing to object to a search, into questions of consent."[254] In addition, the dissent believes that the majority's rule aims to strengthen police

REV. 1 (1991); Andrew Fiske, *Disputed-Consent Searches: An Uncharacteristic Step Toward Reinforcing Defendants' Privacy Rights*, 84 DENV. U. L. REV. 721 (2006); Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319 (1984); David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U.L. REV. 941 (1997); Nancy J. Kloster, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N. DAK. L. REV. 99 (1996); Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993); Tracey Maclin, *Justice Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723 (1992); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153; Daniel L. Rotenberg, *An Essay On Consent(less) Police Searches*, 69 WASH. U. L.Q. 175 (1991); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133 (2003); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989); David Alan Sklansky, *'One Train May Hide Another':* Katz, *Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875 (2008); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993); Douglas M. Smith, Comment, Ohio v. Robinette*: Per Se Unreasonable*, 29 MCGEORGE L. REV. 897 (1998); Brian A. Sutherland, *Whether Consent to Searches Was Given Voluntary: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV.2192 (2006); Russell L. Weaver, *The Myth of "Consent"*,39 TEX. TECH. L. REV. 1195 (2007).

248. Georgia v. Randolph, 547 U.S. 103, 115 (2006). *See* John M. Burkoff, *Search Me?*, 39 TEX. TECH. L. REV. 1109 (2007); Renee E. Williams, Note, *Third Party Consent Searches After* Georgia v. Randolph*: Dueling Approaches to the Dueling Roommates*, 87 B.U. L. REV. 937 (2007).

249. *Randolph*, 547 U.S. at 116–17.

250. *Id.*

251. Burkoff, *supra* note 248; Williams, *supra* note 248.

252. Burkoff, *supra* note 248, at 1134.

253. *Randolph*, 547 U.S. at 136–37, 141 (Roberts, C.J., dissenting).

254. *Id*. at 141.

power to fight crime by unburdening police action.[255] Chief Justice Roberts states:

> Just as the source of the majority's rule is not privacy, so too the interest it protects cannot reasonably be described as such . . . That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is 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.[256]

According to the dissent, the majority's rule is arbitrary and does not protect the privacy of the suspect. At the same time, Justice Souter criticizes the dissent for not respecting the privacy of the home:

> In the principal dissent's view, the centuries of special protection for the privacy of the home are over. The dissent equates inviting the police into a co-tenant's home over his contemporaneous objection with reporting a secret . . . and the emphasis it places on the false equation suggests a deliberate intent to devalue the importance of the privacy of a dwelling place. The same attitude that privacy of a dwelling is not special underlies the dissent's easy assumption that privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police.[257]

According to Justice Souter, the importance of the privacy of the home deserves a special search rule.

The *Randolph* decision is problematic not only because protecting privacy is simply a coincidental result of the decision. It is problematic also because consent is portrayed as a person's personal and private decision with no constitutional, social, or political consequences and implications. Both the dissent and the majority ignore these implications and treat privacy waiver as a personal and discretionary decision.

Contrary to the court's view of consent as a private decision, feminist literature on rape exposes the social aspects of consent.[258] Because of these social aspects, rape can be viewed as a political rather than a personal issue.[259] According to Catharine MacKinnon, rape results from male social dominance rather than individual instances of nonconsensual sexual intercourse.[260] Feminist literature describes rape as one aspect of women's sexual vulnerability and exploitation under patriarchic society.[261] MacKinnon argues that male sexual dominance results not only in rape but also in pornography, sexual harassment,

255. *Id*. at 140–41 (Roberts, C.J., dissenting).

256. *Id*. at 136–37 (Roberts, C.J., dissenting).

257. *Id*. at 115.

258. *See generally* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

259. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, *supra* note 258, at 93, 100; CATHARINE A. MACKINNON, *Method and Politics*, *in* TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 258, at 106, 113.

260. MACKINNON, *Method and Politics*, *supra* note 258, at 106, at 114.

261. *Id.*

prostitution and trafficking. Thus, the feminist aim is to reveal the public aspects, social consequences and political implications of rape. Women's consent to sex is viewed in the context of social constraints, women's systemic inequality and subordination to men, and women's powerlessness in patriarchal society. Women's consent to sex is not isolated from social dynamics of power between women and men that still prevail in our society. Similarly, because state power and a constitutional right are involved in police searches, the issue of consent holds political and public importance. Like consent to sex, consent to search should be viewed in the context of broad social political dynamics. In addition to consent's gender and race aspects previously discussed,[262] there is a political aspect of consent to search in terms of the constitutional right to privacy.

In order to understand consent one must consider the public and constitutional aspects of the decision to consent as well as the political aspect of consent that results from the power dynamic between a state representative and an individual. Searching the home has political implications (consider, for example, state intervention) and social implications (consider, for example, domestic violence) and thus raises public concerns and involves constitutional rights (the right to privacy).

Viewing privacy as a right one can waive at his discretion justifies coercive police searches and privileges police power. This view of the right to privacy also frames the right as a private issue and disregards its public implications. Justifying coercive searches and ignoring public implications of the right to privacy are interrelated: an apolitical analysis of consent veils not only the power dynamics but also the political and public aspects of the constitutional right to privacy. Rather than centering its analysis on police abuse of power and police intrusion into the privacy of the home, the Supreme Court focuses on the citizen's consent and waiver of privacy.

Under current law, the right to privacy rests with the citizen. He has discretion over how to use it and decides whether to claim it or waive it. There is no mention of the public aspects of constitutional rights. An individual decides whether to give consent or not and bears the consequences for his or her decision. As long as privacy is waived, the search is justified and legitimate. Conversely, the police carry no responsibility at all and the Supreme Court disregards the fact that it is state action that triggered the waiver of privacy. One can waive his right to privacy by telling another person a secret. But in the case of a search, waving the right to privacy means opening the home to state intrusion. These facts are absent from the Court's decisions, which tell a story about a person cordially inviting the police inside. Excluding this element allows the Supreme Court to conclude that consent is a discretionary, private process. The use of the term "visitor"[263] not only veils the power imbalance between the individual and police officer but also portrays consent as a civil and private interaction. This ignores the public and political elements of consent.

By viewing consent to search as a private decision, the Supreme Court blurs

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262. *See supra* section IV.A.

263. *See* Georgia v. Randolph, 547 U.S. 103, 111–12 (2006).

the line between private and public[264] and categorizes a state-individual interaction as private. It veils the fact that police search is not a private matter but a public matter. It is performed by a state representative using his state power and leads to a state trial. If consent was simply private, it would not involve an infringement of a constitutional right.[265] The constitution protects public values and civil rights.

Current consent law is problematic not only in its ignorance of the power dynamics between citizen and police and state intervention in the privacy of the home, but also in its blurring of the line between personal and public spheres.[266] While feminist critiques of Fourth Amendment law focus on other dichotomies (objective-subjective, victim-agent, consent-coercion),[267] this is yet another binary: the private-public dichotomy. The home is considered a sacred, private place[268] while the police unmistakably embody the public sphere. Nonetheless, the Supreme Court views the police invasion of the privacy of the home as a private issue. Rather than recognizing the political aspects of this situation, the Supreme Court shifts the line dividing the private from the public. In doing so, the Court reduces the sense of privacy that citizens have in their homes and diminishes their protection against state intervention into that privacy. Viewing the right to privacy as something an individual can waive, like viewing the police search as a civil visit, shifts the search into the private sphere.

The line between private and public is apparent in other areas. Viewing consent to search as a "private" decision is different than the right to make private decisions (for example, the right to decide to have an abortion[269] or to use contraceptives[270]). These private decisions evolve the right towards being free

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264. *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319 (1993); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy, in* PUB. AND PRIVATE IN SOC. LIFE 281 (1983) (describing the private/public dichotomy).

265. *See* Sam Kamin, *The Private is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. REV. 83 (2004) (detailing invasion of privacy by private actors and the intrusion of privacy by governmental agents); Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461 (2010) (reconciling the tension between individual liberties and public interests in Fourth Amendment law).

266. *See* Donald R. C. Pongrace, *Stereotypification of the Fourth Amendment's Public/Private Distinction: An Opportunity For Clarity*, 34 AM. U.L. REV. 1191 (1985).

267. Raigrodski, *Consent Engendered*, *supra* note 103, at 61; Raigrodski, *Reasonableness and Objectivity*, *supra* note 105. *See also* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996) (detailing the procedure/substances dichotomy); George E. Dix, *What is the Proper Role of "Purpose" Analysis to Measure the Reasonableness of a Search or Seizure?: Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373 (2006) (detailing the subjective/objective dichotomy); Donald L. Doernberg, *"The Right of the People:" Reconciling Collective and Individual Interests Under The Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983) (detailing the individual/collective dichotomy); Kit Kinports, *Criminal Law: Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71 (2007) (detailing the subjective/objective dichotomy).

268. *See, e.g.*, *Randolph*, 547 U.S. at 115.

269. *See* Roe v. Wade, 410 U.S. 113 (1973).

270. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

from state intervention when making such intimate decisions. Additionally, this private decision to consent to search is not the same as the privacy found within one's home (for example, to engage in homosexual sex in the privacy of one's home[271]). Feminists argue that treating the home as a private sphere shields batterers and justifies the lack of protection of domestic abuse victims.[272] Similarly, treating consent as a private decision within the discretion of individuals frames police power and intervention as a nonpolitical issue.

The notion of consent as a private, apolitical issue is especially acute in cases of third-party consent where one occupant waives his co-occupant's right to privacy. According to the Supreme Court, private information easily becomes public: by the mere sharing of information or the home with another occupant, one occupant's private realm becomes public upon the other occupant's action.[273] The discretion of the occupant will transform what was private into a public domain open to police scrutiny. Thus, a co-occupant cannot control or limit the access to the information or the house once either is shared. As Justice Marshall explains:

> That such [third-party consent] searches do not give rise to claims of constitutional violations rests . . . on the premise that a person may voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions. . . . What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . Thus, an individual's decision to permit another "joint access [to] or control [over the property] for most purposes" . . .limits that individual's reasonable expectation of privacy and to that extent limits his Fourth Amendment protections. . . . If an individual has not so limited his expectation of privacy, the police may not dispense with the safeguards established by the Fourth Amendment.[274]

Thus, the mere sharing of the house reduces one's privacy and justifies police search.

The consent of the co-occupant exposes the privacy of the home to the police without the permission of the suspect. Waiving a constitutional right of the suspect is easy and automatic, as the house may be searched at the discretion of his co-occupant. By the mere sharing of a house (or property or information) one loses control over the right to privacy. His constitutional right is subject to the discretion of his co-occupant. A private home becomes public and exposed to state intervention by the mere fact of shared living. To maintain his privacy, a person should have a separate place, away from the reach (or awareness) of the other tenant.[275]

In addition, the difference between consensual searches and searches based on warrants demonstrates that viewing consent as private is problematic.[276] In

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271. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

272. SUK, *supra* note 114; Tuerkheimer, *supra* note 114.

273. *Randolph*, 547 U.S. at 110–11; Illinois v. Rodriguez, 497 U.S. 177, 189–90 (1990).

274. *Rodriguez*, 497 U.S. at 189–90.

275. *Randolph*, 547 U.S. at 135.

276. *See* Wayne D. Holly, *The Fourth Amendment Hangs In The Balance: Resurrecting The Warrant*

earlier cases, the searches were held legal because the suspect (or his co-tenant) waived his constitutional right to privacy, not because a judge issued a warrant based on evidence justifying police intrusion.[277] As Justice Scalia states, "The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects . . . . The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched . . . or from a third party who possesses common authority over the premises."[278] Thus, in consensual search cases the court does not examine the justification of the search ex ante, but only ex post when the defendant challenges the legality of the evidence's acquisition. For example, the *Rodriguez* dissent recognizes the importance of a constitutional rights waiver that mandates a warrant unless exigent circumstances exist.[279] The legal process of obtaining a warrant protects the constitutional rights of the suspects, whereas in consensual searches the suspect's constitutional rights are waived without such protection. According to the *Rodriguez* majority, consent is the private, personal decision of the citizen.[280] Unlike consensual searches, searches pursuant to a warrant are publicly scrutinized by a judge who considers and approves the search ahead of time.[281] By not preferring a warrant-based search over a consensual search, the Supreme Court blurs the private-public line and bases a large percentage of searches on the discretion of the consenting citizen, thus categorizing it as a private matter.

The *Randolph* decision views consent as a private decision. This result ignores the political and public aspects of consent and blurs the line between private and public spheres. This narrow view of consent is problematic because

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Requirement Through Strict Scrutiny, 13 N.Y.L. SCH. J. HUM. RTS. 531 (1997); Rebecca Strauss, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868 (2002) (discussing the difference between consent searches and warrant searches). *See also* Craig M. Bradley, *Two Models of the Fourth Amendments*, 83 MICH. L. REV. 1468 (1985); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Randolph E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988) (discussing the relationship between the warrant clause and the reasonable test in Fourth Amendment law).

277. *See, e.g.*, *Rodriguez*, 497 U.S. at 181.

278. *Id.*

279. *Id*. at 190 (Marshall, J., dissenting). *See* United States v. Matlock, 415 U.S. 164, 178 (1974) (Douglas, J., dissenting).

280. *See Rodriguez*, 497 U.S. at 181.

281. *Id*. at 190 (Marshall, J., dissenting). *See also* AKHIL REED AMAR, THE BILL OF RIGHTS 64–77 (1998); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1–45 (1997); Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1175–81 (1991) (arguing that Fourth Amendment law does not prefer searches pursuant to a warrant). *But see* Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994); Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820 (1994); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 San Diego L. Rev. 227 (2005); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581 (2008).

it veils important aspects of consent and makes state intervention legitimate upon the discretion of the individual.

VI. ABOLITION OF THIRD-PARTY CONSENT TO SEARCH DOCTRINE

In opposition to the narrow Supreme Court analysis of consent in third-party consent to search cases, consent must be viewed as a political and social decision (rather than a private one) and as a decision that is influenced by power dynamics. Consent is socially constructed and influenced by gender and race.[282] Moreover, consent is dynamic; it changes and evolves over time, yet the current consent doctrine depicts it as static. Exploring the perception of consent in third-party consent to search cases shows that the Supreme Court adopts a problematic and underdeveloped notion of consent. Consent is a more complex and nuanced phenomenon than the Supreme Court's analysis acknowledges. A better understanding of consent must ensure that the individual's consent is meaningful and voluntary. A contextual, gender- and race-conscious notion of consent that accounts for the relationships between the two occupants and the police will be more realistic and more accurate. Taking into account context, gender, and race when examining consent will more accurately reflect the experience of the consenting individual. A more sophisticated notion of consent will also preserve citizens' autonomy, privacy, and dignity.[283] A rich notion of consent that acknowledges power dynamics better protects individuals against coercive searches and ensures that consent is freely and voluntarily given.

But what will the alternative notion of consent look like? How will consent work in practice? How can a court account for power dynamics, gender, race, and societal constructions? What will a meaningful and truly voluntary notion of consent (as opposed to un-coerced) look like? How can consent protect both individuals' autonomy and agency while accounting for social inequalities? How can the court examine the subjective understandings of the individual?

In the context of rape law, feminist scholars suggest either redefining consent from a women's point of view[284] or abandoning consent altogether[285] so that the definition of rape will not include a consent component.[286] These two approaches are applicable to current consent to search doctrine. Some scholars want to redefine consent so that it focuses on the suspect's perspective rather

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282. *See supra* Part III.

283. *See* John D. Castiglione, *Human Dignity Under The Fourth Amendment*, 2008 WIS. L. REV. 655 (2008).

284. *See* Melanie A. Beres, *"Spontaneous" Sexual Consent: An Analysis of Sexual Consent Literature*, 17 FEMINISM & PSYCHOLOGY 93 (2007).

285. Victor Tadros, *Rape Without Consent*, 26 OXFORD J. LEGAL STUD. 515 (2006). *See also* CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY (Rosemary Hunter & Sharon Cowan eds., 2007) (debating whether to reconstruct consent or replace it with a different concept, how to respect women's autonomy and equality and at the same time to take into account social structure inequalities, how to break away from the victim/agent dichotomy, and how to give a contextualized account of women's choices and consent).

286. For feminist literature on consent, see generally CHOICE AND CONSENT, *supra* note 285.

than the reasonableness of the police action.[287] Judging by the experience of rape doctrine reform efforts, adoption of a subjective test might lead to a condemnatory evaluation of the suspect's conduct.[288] Though the scholars that advocate for this redefinition of consent are careful to point out that the courts should not blame the suspects for their deeds or scrutinize their behavior, the experience of feminist rape doctrine reform leaves little room for optimism.[289] Even though rape laws were changed pursuant to feminist activism, courts still apply gender stereotypes, cultural conventions about sex, and rape myths. When examining a rape victim's behavior, courts apply gender and heterosexual norms. Additionally, rape victims who do not act like the court assumes a real rape victim is supposed to act are harshly judged and disbelieved by the courts. Judges still frequently see women as responsible for being assaulted because they engage in risk and not protect themselves.[290] While reconstruction of consent is a valuable project, the possibility that courts will evaluate and criticize suspects' conduct is cause for hesitation. Thus, this redefinition of consent might disadvantage women and minorities rather than empower them.

In addition to the risk of wrongfully blaming the suspect, a subjective notion of consent bears the risk of perpetuating gender and race stereotypes. Determining the subjective individual's perspective should not lead to employing gender stereotypical views. In interpreting the individual's subjective perspective of consent, courts might apply gender and race biases to interpret the story told by the individual. Again, in this way the alternative consent doctrine would work to the detriment of women. Rather than empowering them, consent would reinforce patriarchic gender norms. If a court invalidates consent because of the power imbalance between the consenting individual and the police, it might be seen as perpetuating stereotypes of women as weak, in need of protection, and without the ability to consent.[291] Protecting women might be

287. *See* Raigrodski, *Consent Engendered*, *supra* note 103, at 61; Raigrodski, *Reasonableness and Objectivity*, *supra* note 105; Ross, *supra* note 20. *See also* Jessica Y. Harrison, *A Statutory Proposal to Clarify the Meaning of Consent in Wisconsin Search and Seizure Law*, 2000 WIS. L. REV. 403 (2000) (presenting a statutory definition of consent to search).

288. *See, e.g.*, SUSAN EHRLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT (2001); SUSAN ESTRICH, REAL RAPE (1987); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

289. *See, e.g.*, Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865 (2008) (noting that, in spite of the changes in rape law, courts still harshly judge women as risky).

290. *See, e.g.*, Regina A. Schuller, Blake M. McKimmie, Barbara M. Masser & Marc A. Klippenstine, *Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 NEW CRIM. L. R. 759 (2010); Morrison Torrey, *When Will We be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

291. *See* Raigrodski, *Consent Engendered*, *supra* note 103, at 54. *See also* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181 (2001) (exploring a similar tension in the context of sex—sex as either danger or pleasure); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235 (1998); JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006); Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV.749 (2010) (placing stereotypes of women in the context of contractual consent).

seen as a sign of their vulnerability and victimhood, and it might wrongly be interpreted to mean that men cannot rely on women's consent. Disregarding women's consent because of power imbalances might lead to the absurd result that women can never give valid consent. The new consent doctrine would thus portray women as infantile beings unable to consent, disregard their autonomy and expressed wishes, and effectively disempower them.[292] Maintaining a balance between recognition of women's agency and recognition of their vulnerability under societal constraints is a difficult task. Feminists have not yet struck a balance between respecting women's autonomy and protecting them from social inequalities.[293]

In addition to these concerns, scholars advocating reform of the notion of consent present a vague redefinition of consent.[294] Because the new definition is unclear, it is hard to see how courts will implement the new consent. How will the courts find subjective consent and how will they apply anti-subordination and empowerment in their analysis? The proposal to consider power dynamics by basing the notion of consent on anti-subordination and autonomy is appealing. Indeed, these scholars present a powerful critique of the court's ignorance of power dynamics and gender and race inequalities. However, this vague redefinition seems hard for courts to implement. Consider, for example, Professor Ross's approach.[295] She proposes using a victim's perspective and viewing consent as a subjective question.[296] Additionally, she argues that autonomy and privacy should be the core goals of the consent doctrine.[297] However, other than providing these general guidelines, she does not give a specific and clear redefinition of consent. She gives only a vague and general description of consent analysis, and it is not clear how to translate her guidelines into a workable definition for courts to apply.

Professor Raigrodski's approach is similarly unclear.[298] She suggests abandoning objective reasonableness standards and adopting principles of anti-subordination and empowerment instead.[299] Then, consent doctrine would reflect the power dynamics between police and individuals.[300] Raigrodski advocates a doctrine-based multiperspectival Fourth Amendment law that takes into account multiple viewpoints.[301] However, the only guidance she offers

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292. *See generally* KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR AND FEMINISM (1994); NAOMI WOLF, FIRE WITH FIRE: NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21ST CENTURY (1994).

293. *See generally* CHOICE AND CONSENT, *supra* note 285; Hanna, *supra* note 19.

294. *See, e.g.*, Raigrodski, *Consent Engendered*, *supra* note 103, at 61; Raigrodski, *Reasonableness and Objectivity*, *supra* note 105; Ross, *supra* note 20.

295. Ross, *supra* note 20.

296. *Id.*

297. *Id.*

298. *See generally* Raigrodski, *Consent Engendered*, *supra* note 103, at 61; Raigrodski, *Reasonableness and Objectivity*, *supra* note 105.

299. Raigrodski, *Consent Engendered*, *supra* note 103, at 60; Raigrodski, *Reasonableness and Objectivity* , *supra* note 105, at 157.

300. Raigrodski, *Consent Engendered*, *supra* note 103, at 60; Raigrodski, *Reasonableness and Objectivity* , *supra* note 105, at 156–57.

301. Raigrodski, *Consent Engendered*, *supra* note 103, at 61; Raigrodski, *Reasonableness and*

judges or lawyers is a methodology of narratives.[302] She does not propose a clearly workable redefinition of consent. Thus, the redefinition of consent is difficult in practice.

In addition, such a standard of consent poses difficulties for police. While fighting crime, the police will have to rely on subjective notions of consent. Feminist authors acknowledge that their redefinition of consent puts a higher burden on police than current Fourth Amendment law.[303] However, they do not address the possibility that their proposals will diminish the police's power to fulfill their duties.[304] Police need an easy-to-operate rule rather than a complicated and nuanced formula. In order to quickly and efficiently investigate crimes, respond to calls, and prevent crime, the police need clear guidelines. A redefinition of consent needs to balance the constitutional right to privacy on one hand and the police's ability to perform its assigned tasks on the other. Thus, both the courts and the police will face difficulties in implementing the feminist redefinition of consent.

The proposal to completely abolish the current consent exception is radical and impractical.[305] However, abandoning *only* third-party consent doctrine appears a less extreme and more plausible solution.[306] The triangular relation analysis highlights the difference between third-party consent to search and other consent searches. As the triangle metaphor highlights, third-party consent to search cases involve relations between not two but three people. These cases star not only a police officer and a suspect, but also a tripartite relationship. Furthermore, the notion of consent to search is more problematic in third-party consent cases than in other consent cases. In the former, it is one co-tenant giving consent to the detriment of the other co-tenant. These differences demonstrate that eliminating the third-party consent doctrine makes a smaller and more modest change to Fourth Amendment law than elimination of consensual searches all together. This alternative approach strengthens the privacy and autonomy of the suspects without compromising rule of law. Only the suspect can permit a search in which evidence found will be used against him. The other occupant cannot allow a police search in order to gather evidence to be used against the suspect. Needless to say, the third-party could still deliver the incriminating evidence to the police on her own initiative or tell the police what she knows to help them obtain a warrant, as Justice Souter suggested.[307] In

Objectivity , *supra* note 105, at 157.

302. Raigrodski, *Consent Engendered*, *supra* note 103, at 61; Raigrodski, *Reasonableness and Objectivity* , *supra* note 105, at 157.

303. Raigrodski, *Consent Engendered*, *supra* note 103, at 60; Raigrodski, *Reasonableness and Objectivity* , *supra* note 105, at 224.

304. Raigrodski, *Consent Engendered*, *supra* note 103, at 60; Raigrodski, *Reasonableness and Objectivity* , *supra* note 105, at 224.

305. Tracey Maclin, *The Good and Bad News about Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27 (2008); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211 (2001); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005).

306. *See* Brown, *supra* note 22; Matthews, *supra* note 22.

307. Georgia v. Randolph, 547 U.S. 103, 116 (2006).

addition, police can still acquire a warrant.

Under *Randolph*, the objection of the physically present suspect overrides the consent of the third-party.[308] The proposal to abolish third-party consent furthers this holding by preferring the suspect's consent over the third-party's consent. This proposal also eliminates the possibility that the police might manipulate *Randolph*'s rule.[309] As the law stands, the police can obtain third-party consent by removing the suspect from the home or by waiting until the suspect is out of the home before initiating the search, relying on third-party consent. Abolishing third-party consent will discourage such misuse of police power. No doubt setting aside third-party consent means less consensual searches. But even without third-party consent doctrine, Fourth Amendment law still leaves police many grounds under which to search. Therefore, this proposal properly balances respecting the right to privacy and enabling police work.

As shown in this Article, the Court applies a problematic and unsophisticated notion of consent. In the context of third-party consent to search (as in the context of rape law) the court struggles to truly grasp the meaning of consent. In spite of the Court's efforts to understand consent, it is a vague concept, difficult to define and apply in a court of law. Similarly, the vast legal scholarship on consent, though innovative and rigorous, is lacking in clarity.[310] The feminist alternative of consent is provocative and original but still not fully developed.[311] Hence, abandoning third-party consent doctrine altogether is preferable to redefinition. Critiquing the current notion of consent is important, yet the alternative redefinition of consent remains underdeveloped and unclear.[312] Thus, this Article advocates for the elimination of the third-party consent to search doctrine. This will enable a balance to be struck between the feminist concerns and abolition of the consent to search doctrine. Limitation of this doctrine, albeit a moderate change, will strengthen the privacy and autonomy of individuals.

VII. CONCLUSION

This Article proposes a new way to analyze the third-party consent to search doctrine through a triangle relation concept. By analyzing Supreme Court

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308. *Id.* at 106.

309. *Id.*

310. *See* Beres *supra* note 284.

311. *See id.*; Tadros, *supra* note 285.

312. *See* Kerr, *supra* note 60 (supporting the third-party consent to search doctrine and reviewing criticisms of the doctrine). *See also* Virginia Lee Cook, *Third-Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121 (1973); Andrew J. Defilippis, *Securing Informationships: Recognizing a Right to Privity in Fourth Amendment Jurisprudence*, 115 YALE L.J. 1086 (2006); George C. Thomas III, *The Short, Unhappy Life of Consent Searches in New Jersey*, 36 RUTGERS L. REC. 1 (2009); Michael J. Ticcioni, United States v. Andrus*: Does the Apparent Authority Doctrine Allow Circumvention of Fourth Amendment Protection in the Warrantless Search of a Password-Protected Computer?*, 43 NEW ENG. L. REV. 339 (2009); Elizabeth A. Wright, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841 (2005) (detailing an alternative and limited third–party consent doctrine).

cases on searches of the home, the Article examines the third-party consent doctrine through the dynamics between the three actors: the consenting occupant (the third-party); the other occupant (the suspect); and the police officer. The Article explores the relations between the two occupants,[313] the relations between the consenting third-party and the police officer,[314] and the relations between the suspect (the defendant) and police officer.[315]

The Article critically analyzes the Supreme Court's rhetoric and the notion of consent developed by the Court. Looking to feminist scholarship on consent in the context of consent to search, this Article argues that the Supreme Court's analysis of consent is a-contextual, gender-blind, and insensitive to power dynamics. In addition, the Supreme Court proffers an apolitical and individualistic notion of consent that ignores the relations between the three actors. The Supreme Court views consent as a private decision which has no effect on—and is unaffected by—its social surroundings.[316] Thus, the Court gives the police power over individuals and, as a result, diminishes the right to privacy.

Based on these insights, this Article concludes that, as used today by the Supreme Court, consent is an underdeveloped concept that justifies police coercion and legitimizes submission to police power by relabeling the submission "consent." At the same time, feminists' alternative redefinition of consent is still vague and unclear. However, this does not necessarily lead to the pessimistic view that consent is a meaningless and unworkable concept that should be abandoned. Rather, abolishing consensual searches altogether is radical and unrealistic. Thus, this Article suggests eliminating third-party consent to search doctrine. The triangular relation analysis highlights this doctrine's divergence from other consensual searches. The analysis also reveals why the problematic features of consent are more acute in third-party consent to search cases. Limiting the consent to search exception has the benefit of respecting autonomy and the right to privacy while not putting too high a burden on the police. Eliminating third-party consent to search doctrine will successfully balance the feminist concerns about matrices of power and the need to preserve a useful concept of law.

313. *See supra* Part III.
314. *See supra* Part IV.
315. *See supra* Part V.
316. *See supra* Part V.B.