Fourth Amendment — Search and Seizure — Conflicted Consent When the Objecting Tenant Is Absent — Fernandez v. California

The Supreme Court has long recognized that the Fourth Amendment allows a police officer to search a residence without a warrant if she obtains the consent of an occupant.[1] But in its 2006 decision, *Georgia v. Randolph*,[2] the Supreme Court held that a physically present tenant's objection to the police's entry overcomes his cotenant's consent and prevents a search.[3] The Court reached this conclusion based largely on an analysis of the social expectations that a civilian visitor would possess if she were welcomed in by one tenant but denied entry by another.[4] Last Term, in *Fernandez v. California*,[5] the Supreme Court considered a subsidiary issue: whether the tenant's objection overcomes his cotenant's consent when the objecting tenant is absent.[6] Relying once again upon social expectations analysis,[7] the Court held that it does not.[8] The Court's unpersuasive determination that social expectations supported the outcome further affirms criticism of social expectations analysis that the test is an imprecise way to assess the validity of conflicted grants of consent.[9] This criticism is justified, but the test also has value because it leaves the Court discretion to assess conflicted consent questions incrementally. Unlike a test that would provide clear answers to all questions of conflicted consent, such an incremental method of analysis allows the Court to avoid making a firm decision between privacy rights and law enforcement efficiency and thus permits the Court to strike a balance between the two across multiple decisions.

On October 12, 2009, after identifying himself as a member of a local gang, Walter Fernandez, along with a few compatriots, attacked

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1 *See* Georgia v. Randolph, 547 U.S. 103, 106 (2006).

2 547 U.S. 103.

3 *See id.*

4 *See id.* at 113–14.

5 134 S. Ct. 1126 (2014).

6 *See id.* at 1129–30. Lower courts split on the issue, with most of the U.S. Courts of Appeals that considered the issue finding the objection carries weight only while the tenant is present. *See* United States v. Shrader, 675 F.3d 300, 307 (4th Cir. 2012); United States v. Cooke, 674 F.3d 491, 499 (5th Cir. 2012); United States v. Henderson, 536 F.3d 776, 777 (7th Cir. 2008); United States v. Hudspeth, 518 F.3d 954, 961 (8th Cir. 2008) (en banc). *But see* United States v. Murphy, 516 F.3d 1117, 1124 (9th Cir. 2008) (holding that a cotenant's objection survives his absence), *abrogated by Fernandez*, 134 S. Ct. 1126.

7 *See Fernandez*, 134 S. Ct. at 1135.

8 *See id.* at 1129–30.

9 *See, e.g.*, Shane E. Eden, Student Article, *Picking the* Matlock*:* Georgia v. Randolph *and the U.S. Supreme Court's Re-examination of Third-Party-Consent Authority in Light of Social Expectations*, 52 S.D. L. REV. 171, 209 (2007) (criticizing the *Randolph* solution for not giving "law enforcement and the lower judiciary a greater sense of direction").

and robbed Abel Lopez.[10] Responding to Lopez's 911 call, two police officers headed to an alley frequented by the local gang, where a bystander informed the officers that Fernandez was in a nearby apartment.[11] The officers then saw a person run into it, followed by sounds of fighting and screaming.[12] Knocking on the door, the officers were met by Roxanne Rojas.[13] Rojas — who was carrying a young child in her arms — displayed signs of recent injuries, including traces of blood, a red face, and a swollen nose.[14] Rojas said she had been in a fight, but that only she and her two children were present.[15]

The police asked Rojas to step out of the house so they could perform a protective sweep, at which point Fernandez appeared and told the police they could not enter.[16] The police arrested Fernandez on the suspicion that he had beaten Rojas, and Lopez shortly thereafter identified Fernandez as his attacker.[17] Fernandez was brought to the police station, and one hour later the police requested and received Rojas's consent to search the apartment.[18] Inside the apartment, the police found gang paraphernalia, a butterfly knife, clothing the suspect wore during the robbery, and ammunition.[19] Rojas's four-year-old son also showed the police where Fernandez hid a sawed-off shotgun.[20]

Fernandez was charged with several crimes, including possession of a firearm by a felon, possession of a short-barreled shotgun, and felony possession of ammunition.[21] Prior to his trial, Fernandez moved to suppress the evidence found in his home.[22] Denying the validity of the warrantless search, he contended that his objection to the police's entry trumped Rojas's subsequent consent.[23] The trial court denied the motion, and Fernandez appealed.[24]

The California Court of Appeals affirmed.[25] Siding with the majority of U.S. Courts of Appeals, the court concluded that a tenant's

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10 People v. Fernandez, 145 Cal. Rptr. 3d 51, 52–53 (Ct. App. 2012).

11 *Fernandez*, 134 S. Ct. at 1130.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at 1130–31.

20 *Id.* at 1131.

21 *Id.*

22 People v. Fernandez, 145 Cal. Rptr. 3d 51, 58 (Ct. App. 2012).

23 *See id.* Fernandez cited *Randolph* and *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008), *abrogated by Fernandez*, 134 S. Ct. 1126, as support for this proposition. *See Fernandez*, 145 Cal. Rptr. 3d at 58. *Murphy* held that a cotenant's objection remains in effect even in his absence. *See Murphy*, 516 F.3d at 1124.

24 *See Fernandez*, 145 Cal. Rptr. 3d at 58.

25 *Id.* at 66–67.

objection has no force if he is not present.[26] The court argued that its decision would provide clarity to law enforcement and that a contrary holding would stretch *Randolph* too far by allowing a tenant's objection to forever prevent his cotenant from validly consenting to a warrantless search.[27] The court further asserted that its holding was consistent with *Randolph*'s social expectations analysis because an absent cotenant's objection would no longer carry the same social weight.[28] The California Supreme Court denied the petition for review, but the U.S. Supreme Court granted certiorari.[29]

The Supreme Court affirmed.[30] Writing for the Court, Justice Alito[31] emphasized that the objecting cotenant's presence had been a "controlling factor" in *Randolph*, as evidenced by the repeated references to "physical presence" in both the majority opinion and Justice Breyer's concurrence.[32] After establishing this context, Justice Alito considered Fernandez's two principal arguments. Fernandez first asserted that presence is unnecessary when the tenant is absent only because the police have removed him.[33] As support, Fernandez cited dictum in *Randolph* that noted if there is "evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," the cotenant's consent may not be sufficient.[34] Justice Alito responded that evidence of improper removal would only be relevant where the removal was not objectively reasonable, and Fernandez had never disputed the reasonableness of his arrest.[35]

Fernandez contended next that his objection to the police's entry endured despite his subsequent absence because he rendered it while he was present.[36] Justice Alito found this argument inconsistent with *Randolph* for two reasons. First, Fernandez's desired outcome does not comport with social expectations — which were central to *Randolph*'s holding — because a guest would be much more likely to accept a tenant's invitation to enter a residence if the objecting tenant were not physically present at the door.[37] Second, the Court found that Fer-

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[26] *Id.* at 65.

[27] *See id.* at 66.

[28] *See id.* (quoting United States v. Henderson, 536 F.3d 776, 783–84 (7th Cir. 2008)).

[29] *Fernandez*, 134 S. Ct. at 1131.

[30] *Id.* at 1137.

[31] Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Breyer.

[32] *See Fernandez*, 134 S. Ct. at 1133–34.

[33] *See id.* at 1134.

[34] *See id.* (quoting Georgia v. Randolph, 547 U.S. 103, 121 (2006)) (internal quotation mark omitted).

[35] *See id.*

[36] *See id.* at 1135.

[37] *See id.*

nandez's reasoning would have created "the very sort of practical complications that *Randolph* sought to avoid."[38] If presence were not required for an objection to bar police entry, the police and courts would need to resolve a host of subsidiary questions, including how long the objection would persist, what length of absence would remove the tenant's coauthority and thus ability to object, what method of objection would qualify, and whom the objection would affect (the police who received the tenant's objection or any law enforcement officer).[39]

Justice Alito concluded his opinion by addressing the conflicting rights of the two cotenants.[40] He underscored the importance of a cotenant's being able to allow the police entry into her home in order to dispel suspicion of her complicity in her cotenant's crimes.[41] He also emphasized that it would disrespect Rojas's "independence" if she could not control access to her home over the objection of her abuser.[42]

Justice Scalia wrote a concurrence to address an argument raised in an amicus brief[43]: that the search of Fernandez's apartment violated his Fourth Amendment rights because it violated his property rights.[44] Justice Scalia agreed that property rights are relevant in defining Fourth Amendment violations but found there was not sufficient authority to conclude that a guest commits a trespass if she enters premises after one tenant gives consent and another tenant refuses it.[45]

Justice Thomas issued a brief concurrence in which he reiterated his disapproval of *Randolph* and its reliance on social expectations to define Fourth Amendment rights.[46] He rejected this "novel analytical approach" as having no basis in text, history, or precedent.[47] Justice Thomas argued that the search was justified because Rojas had common authority over the premises and freely gave her consent.[48]

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[38] *Id.*

[39] *See id.* at 1135–36. Fernandez also insisted that his proposed holding would not burden law enforcement because in most cases where police seek to arrest a tenant, they will also be able to obtain a warrant to search the house. *See id.* at 1136–37. The Court responded that it is irrelevant to the reasonableness of a consent search whether a warrant can be obtained and that seeking a warrant imposes additional burdens on law enforcement that receiving consent avoids. *See id.*

[40] *See id.* at 1137.

[41] *See id.*

[42] *Id.* In her dissent, Justice Ginsburg rejected the point, reasoning that in cases involving the health and safety of one tenant, the abusive and objecting cotenant would not be able to bar the police entry because exigent circumstances would justify his removal. *See id.* at 1143 (Ginsburg, J., dissenting).

[43] Brief of the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Fernandez*, 134 S. Ct. 1126 (No. 12-7822), 2013 WL 4072519.

[44] *See Fernandez*, 134 S. Ct. at 1137 (Scalia, J., concurring).

[45] *See id.* at 1137–38.

[46] *See id.* at 1138 (Thomas, J., concurring).

[47] *See id.*

[48] *See id.*

Justice Ginsburg dissented.[49] She began her opinion by refuting the majority's analysis of *Randolph*.[50] First, Justice Ginsburg rejected the majority's conclusion that *Randolph*'s social expectations analysis turned on presence.[51] According to Justice Ginsburg, the significant factor in *Randolph*'s analysis had been whether the cotenant conveyed an objection to the police's entry, not whether the cotenant remained present.[52] Confronting the social expectations analysis directly, she contended that a guest's social obligation to a cotenant would not vanish in that cotenant's absence.[53] More fundamentally, though, Justice Ginsburg considered the majority's reliance on social expectations problematic because of the "marked distinctions between private interactions and police investigations."[54] Second, Justice Ginsburg questioned the majority's concern about practical considerations.[55] Focusing upon the duration of the objection, she insisted that an objection would not stop the police from entering "eternally" because the police would be able to obtain a warrant, obviating any need to seek consent.[56] Justice Ginsburg also asserted that the majority decision itself created practical complications, primarily because it left ambiguous whether a tenant's objection endures during temporary absences.[57]

The next section of Justice Ginsburg's opinion expounded upon the central premise of her analysis: that "exceptions to the warrant requirement must be 'few in number and carefully delineated.'"[58] Justice Ginsburg explained that it would have been easy for the police to get a warrant in Fernandez's case and that warrants are generally simple and quick to obtain.[59] She also asserted that strictly enforcing the warrant requirement is fundamental to protecting Americans from "unchecked police activity,"[60] and as a result, a warrant should have been required despite Rojas's consent.[61]

Although the Court issued a clear decision on the question before it in *Fernandez*, its unpersuasive determination that social expectations supported its holding further affirms criticism of the social expectations

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[49] Justice Ginsburg was joined by Justices Sotomayor and Kagan.

[50] *See Fernandez*, 134 S. Ct. at 1139 (Ginsburg, J., dissenting).

[51] *See id.* at 1140.

[52] *See id.*

[53] *See id.*

[54] *Id.* Justice Ginsburg explained that police officers can arrest a person and remove him, *id.*, and no private citizen would be given permission to enter a home to "rummage through the dwelling in search of evidence and contraband," *id.* at 1141.

[55] *See id.* at 1141.

[56] *See id.*

[57] *See id.*

[58] *Id.* at 1139 (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 318 (1972)).

[59] *See id.* at 1142.

[60] *Id.* at 1143.

[61] *See id.* at 1142–43.

test that it is an imprecise way to assess the validity of conflicted consent. This criticism is well-founded, but the test also has value because it leaves the Court discretion to assess conflicted consent questions on an incremental basis. Unlike a test that would provide clear answers in all conflicted consent cases, such an incremental method of analysis allows the Court to avoid making a firm decision between privacy rights and law enforcement efficiency and thus permits the Court to balance the two interests across multiple decisions.

Social expectations analysis was not originally designed to resolve questions of conflicted consent. The test, which derives from Justice Harlan's concurrence in *Katz v. United States*,[62] was instead developed to determine when a person has a right to privacy.[63] The Court's decision in *Minnesota v. Olson*[64] provides a classic example. There, the Court held that a person has a right to privacy when staying in another's home because "society recognizes that a houseguest has a legitimate expectation of privacy" in that space.[65] *Randolph* marked a shift in the test's application. Rather than applying the test to assess the searchee's expectation of privacy in a particular place, the Court used it in *Randolph* to assess the reasonableness of the searcher's reliance on a conflicted grant of consent.[66] Regardless of the test's efficacy in its original context, it has proven imprecise when used to assess the validity of conflicted grants of consent. The use of the test in *Fernandez* demonstrates this clearly.

Contrary to the majority's assertion in *Fernandez*, there is little reason to conclude that social expectations require an objecting tenant to be present for his objection to carry weight. A person is indeed more likely to enter if the objecting tenant is not there to physically

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[62] 389 U.S. 347 (1967); *see* Jeremy A. Blumenthal et al., *The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy,"* 11 U. PA. J. CONST. L. 331, 331 (2009). In *Katz*, Justice Harlan explained that a person has a reasonable expectation of privacy under the Fourth Amendment when two conditions are met: first, a person has a subjective expectation of privacy, and second, society recognizes that expectation as "reasonable." *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (internal quotation marks omitted). The latter condition became the basis of the social expectations test. *See* Monique N. Bhargava, Note, *Protecting Privacy in a Shared Castle: The Implications of* Georgia v. Randolph *for the Third-Party Consent Doctrine*, 2008 U. ILL. L. REV. 1009, 1015–16.

[63] *See* Bhargava, *supra* note 62, at 1015.

[64] 495 U.S. 91 (1990).

[65] *Id.* at 98.

[66] *See* Georgia v. Randolph, 547 U.S. 103, 130 (2006) (Roberts, C.J., dissenting) ("[T]he Court has not looked to such expectations to decide questions of consent under the Fourth Amendment, but only to determine when a search has occurred . . . ."); Adrienne Wineholt, Note, Georgia v. Randolph*: Checking Potential Defendants' Fourth Amendment Rights at the Door*, 66 MD. L. REV. 475, 493 (2007) ("[A]s past cases indicate, the Court has consistently only considered widely shared social expectations in the *Katz* context, and predominantly to evaluate whether a search had occurred."). *See generally* Wineholt, *supra*, at 493 (describing past applications of the social expectations test in its traditional setting).

throw him out.[67] But most people would likely agree that if a homeowner tells a visitor to stay out of his house, the visitor should respect that command and not try to wheedle her way in during the homeowner's subsequent absence.[68] At the very least, one can make reasonable arguments in both directions, and this demonstrates the problem. Social expectations analysis is an imprecise way to assess conflicted consent, and courts relying on it are left to guess at the appropriate result.[69] There are at least three reasons why this is true.

First, a court is incapable of identifying the social expectation of a person confronting a conflicted welcome because its search for a categorical holding necessarily requires it to overlook the intricate social context so critical to defining the expectation.[70] If, for example, a consenting tenant's friend had previously stolen money from the objecting tenant, social expectations would likely dictate that the visitor respect the objector's prohibition of entry. On the other hand, if the visitor were soliciting money for a political party that one cotenant loathed but that the other supported, the visitor would likely not violate social etiquette by returning to the house when the politically unsympathetic tenant was absent.[71] One can easily imagine dozens of similarly nuanced situations, each requiring its own investigation into the particular details of the relationships to determine whether it would be socially acceptable for a guest to enter.[72] But courts cannot conduct such fine-grained analyses of each fact pattern, and so they retreat to more general settings, eliminating in the process the very details a person would look to in identifying the social expectation.

By conducting the social expectations analysis in this way, courts also run into a second problem: they ignore the critical factor that the visitor is not a polarizing political fundraiser but instead a police

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[67] *See Fernandez*, 134 S. Ct. at 1135 ("[W]hen the objector is not on the scene . . . the friend or visitor is much more likely to accept the invitation to enter.").

[68] *See id.* at 1140 (Ginsburg, J., dissenting) ("Only in a Hobbesian world . . . would one person's social obligations to another be limited to what the other [, because of his presence,] is . . . able to enforce." (second and third alterations in original) (quoting United States v. Henderson, 536 F.3d 776, 787 (7th Cir. 2008) (Rovner, J., dissenting)) (internal quotation marks omitted)).

[69] *Cf. Randolph*, 547 U.S. at 129–30 (Roberts, C.J., dissenting) (demonstrating that the social expectations analysis in *Randolph* could have reached various conclusions based upon the particular social scenarios the Court looked to for comparison and concluding that the outcome in the case ultimately rested upon a "hunch about how people would typically act," *id.* at 130).

[70] *See id.* at 129–30 (examining the many different factors that would go into determining whether a visitor would turn away based on the objection of one roommate when another roommate invited the visitor in and concluding that "[t]he possible scenarios are limitless, and slight variations in the fact pattern yield vastly different expectations about whether the invitee might be expected to enter or to go away," *id.* at 130); Blumenthal et al., *supra* note 62, at 352 (describing empirical results that show privacy expectations "vary substantially across cases and fact patterns").

[71] Of course, it is easy to propose arguments to the contrary regarding both of these situations. This further highlights the test's imprecision.

[72] *See Randolph*, 547 U.S. at 130 (Roberts, C.J., dissenting).

officer.[73] No piece of context is more important than who the actors are.[74] Once one considers that the visitor is a police officer, though, any hope of analogizing to typical social contexts is lost. Police officers have unique powers and intentions, which render typical social interactions inapposite.[75] In a private context, an uninvited dinner guest cannot put handcuffs on her objecting host, throw him in the back of her car, and then lock him away in her attic for a few hours while she enjoys dinner with the host's more hospitable cotenant. Most critically, though, the guest does not want to eat dinner with the cotenant. She wants to dig through the host's closet and look for illegal contraband so that she can keep the host locked away in her attic for a potentially substantial amount of time. A social visitor with such intentions would never be allowed entry and certainly not after the tenant that she sought to harm told her to stay out.

Finally, even if one can tolerate that courts are analyzing a less-than-accurate social setting, a third problem arises: people vary substantially in what social behavior they consider acceptable.[76] The social behavior embraced by college students living in dorms will depart significantly from that of adults living in a family-friendly neighborhood. In the former setting, it may be perfectly acceptable to enter a dorm room against the wishes of the absent roommate: the relationship between the roommates is more transient, and the stakes in the setting are less serious because of the lack of familial and economic investment. In the latter environment, on the other hand, it will likely be expected that guests will take an absent homeowner's wishes more seriously because of the heightened importance of preserving domestic tranquility.[77] It is also easy to imagine that some cultures would consider entry over the prior objection of a homeowner a grave social

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[73] *See Fernandez*, 134 S. Ct. at 1140 (Ginsburg, J., dissenting) (emphasizing the limitations of drawing such analogies because of the "marked distinctions between private interactions and police investigations").

[74] *See* Stephanie M. Godfrey & Kay Levine, *Much Ado About* Randolph*: The Supreme Court Revisits Third Party Consent*, 42 TULSA L. REV. 731, 746–47 (2007) (finding that the social expectations in *Randolph* would vary if the context of the relationships changed); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 108 (2008) ("To figure out the applicable privacy norm under a widely shared social expectations approach, the question can never be what any sensible person would have done. The pertinent social expectations will almost always turn on the specific identity of the caller, including his relationship to and knowledge of the individual claiming a privacy violation.").

[75] *See Fernandez*, 134 S. Ct. at 1140–41 (Ginsburg, J., dissenting).

[76] *See* Godfrey & Levine, *supra* note 74, at 745 (finding that the test will be difficult to apply because of differences across distinct cultural groups); Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 497 (2009) ("[I]t can no longer be assumed that people conform to a standard set of [social] expectations.").

[77] Again, these generalities show their seams, but in doing so, they prove the point: each situation is unique and every person has a slightly different social expectation.

error whereas others would brush it aside.[78] The end result of this imprecise test is that courts lack guidance and must simply make a guess about what they believe the social expectation to be.

Were *Fernandez* the end of the line for conflicted consent cases, the test's imprecision would not be a problem, but further issues are likely to arise. The most prominent question remaining is the one Justice Ginsburg raised in her dissent: what length and type of absence is required for a tenant's objection to give way to his cotenant's grant of consent?[79] Given that the *Fernandez* majority's reasoning depends on the idea that a visitor would be more likely to enter when the objecting tenant was "not on the scene (and especially when it is known that the objector will not return during the course of the visit),"[80] temporary absences would probably not suffice, particularly if the objector was still on the property. But social expectations analysis is a flexible tool, and arguments are available to justify nearly anything.[81] Perhaps a visitor would slip in if the objecting tenant was sleeping but hesitate if the objector was using the bathroom. If the objector was on the other side of town, that might give the visitor a certain courage, but if the objector was merely walking his dog down the block, the visitor might waver. The arguments are endless for a litigator, but for a judge the end result is always supposition.

Detractors of social expectations analysis are correct to criticize the test for being imprecise, but the test's reliance on incremental assessments also provides value. A test that provided answers to all questions of conflicted consent would necessarily choose between privacy and law enforcement efficiency at the complete expense of the other. The first group of such tests would achieve law enforcement efficiency at the cost of narrowing privacy rights.[82] One example of such a test is the "assumption of risk" approach advanced in Chief Justice Roberts's *Randolph* dissent. Under the "assumption of risk" theory, a person who shares property with another runs the risk that the other will turn it over to the police, and thus no objection should be able to

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[78] *See* Tom B. Bricker, Note, *Bad Application of a Bad Standard: The Bungling of* Georgia v. Randolph*'s Third-Party Consent Law*, 44 VAL. U. L. REV. 423, 454 (2010) (expressing concern with the social expectations test because its conclusions will vary across cultures and states).

[79] *See Fernandez*, 134 S. Ct. at 1141 (Ginsburg, J., dissenting) (pondering whether momentary departures from the front door such as a nap or a trip to the bathroom would qualify).

[80] *Id.* at 1135 (majority opinion).

[81] *See* Note, *The Fourth Amendment's Third Way*, 120 HARV. L. REV. 1627, 1635 (2007) [hereinafter Note, *Third Way*].

[82] *Cf.* Mincey v. Arizona, 437 U.S. 385, 393 (1978) ("[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.").

overcome the other's consent.[83] If a person can have a right to privacy only in isolation, though, the right's coverage will be greatly restricted.[84] The second group of such tests would accomplish the opposite: broad protection of rights at the expense of law enforcement efficiency. A ban on consent searches[85] is an example. So too are the varied proposals that argue a tenant's objection should endure over his cotenant's grant of consent until he retracts it.[86]

An incremental approach such as social expectations analysis avoids the necessity of choosing between the two competing interests,[87] and as a result, it allows the Court to strike a balance between the interests across multiple decisions. The rule created by *Randolph* and *Fernandez* demonstrates such a result: a police officer can conduct a warrantless search based on a tenant's consent after another tenant objects only if the objector is subsequently absent. Although this rule may not strike the perfect balance between the two interests, a balance does exist, one which would have been impossible if the Court had employed a test that provided answers across all cases.

The Court's use of social expectations analysis in *Fernandez* further affirms critical assessments of the test that it is an imprecise way to assess the validity of conflicted consent. These criticisms miss the value of the test's incremental application, though. Unlike a rule that would apply across all conflicted consent cases, social expectations analysis allows the Court to avoid making a firm decision between law enforcement efficiency and privacy rights and thus permits the Court to balance those interests across multiple decisions.

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[83] Georgia v. Randolph, 547 U.S. 103, 128 (2006) (Roberts, C.J., dissenting). This approach was followed by a number of lower courts prior to *Randolph*. *See, e.g.*, United States v. Sumlin, 567 F.2d 684, 688 (6th Cir. 1977) ("We cannot see how the additional fact of Appellant's initial refusal to consent in any way lessened the risk assumed that his co-occupant would consent."), *abrogated by Randolph*, 547 U.S. 103.

[84] *See* Daniel E. Pulliam, Note, *Post-*Georgia v. Randolph*: An Opportunity to Rethink the Reasonableness of Third-Party Consent Searches Under the Fourth Amendment*, 43 IND. L. REV. 237, 257 (2009) (asserting that the "assumption of risk" approach "crippled Fourth Amendment liberty").

[85] *See* Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 271–72 (2001) (calling for a ban on consent searches); *see also* Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 78 (2008) (supporting the same).

[86] *See, e.g.*, Pulliam, *supra* note 84, at 258 (suggesting a "personal consent approach" in which evidence obtained from a search would only be admissible against a present tenant if his consent was sought and granted).

[87] A number of alternative tests have been proposed that also rely on incremental analysis. *See, e.g.*, Note, *Third Way*, *supra* note 81, at 1630–34 (describing "dynamic incorporation," *id.* at 1630, which would use state common law, including state tort and property law, to assess the reasonableness of police action). These solutions all have advantages and disadvantages when compared to social expectations analysis, but each is subject to the same criticism that it fails to provide a precise test.