

**BREAKING INTO THE MARITAL HOME TO BREAK UP DOMESTIC VIOLENCE:
FOURTH AMENDMENT ANALYSIS OF “DISPUTED PERMISSION”**

I. INTRODUCTION

In an idyllic world, married couples would live together in blissful harmony in a home that is their castle. Spouses would share common interests geared toward preserving their marital partnership and would naturally agree on whom could enter their abode. However, in the real world, some marriages are characterized by domestic violence; when police officers come knocking at their door, the officers may be met at the threshold by both an abused wife who consents to police entry and her husband who objects – otherwise known as “disputed permission.”¹ Under such circumstances, the Supreme Court has held that a warrantless search may not be justified as to the husband on the basis on the wife’s consent.² However, police entry is not necessarily barred if the search is otherwise rendered reasonable, for example by exigent circumstances.³ I will contend that the wife’s consent, while not dispositive, should have some weight in determining whether exigent circumstances justify the police entry.

Section A of this paper will review origins of third-party consent and exigent circumstances in Supreme Court precedent and provide categorizations of what constitutes exigent circumstances. Section B will analyze how the Supreme Court’s recent decisions in *Georgia v. Randolph* and *Brigham City, Utah v. Stuart* have altered these doctrines, and section C will describe why the nature of domestic violence justifies giving weight to a victim’s consent in the exigent circumstances calculation.

II. DISCUSSION

A. The Origins of Third-Party Consent and Exigent Circumstances

¹ The term “disputed permission” comes from the majority opinion in *Georgia v. Randolph*, 547 U.S. 103, 115 (2006).

² *Randolph*, 547 U.S. at 106.

³ See *infra* note 62 and accompanying text.

It is an elementary concept of Fourth Amendment jurisprudence that police entry into a person's house without a warrant is *per se* unreasonable, absent certain well-defined exceptions.⁴ One well-recognized exception is that a search pursuant to the voluntary consent of the person whose property is searched to obtain evidence against him is valid under the Fourth Amendment.⁵ The Supreme Court first addressed whether the doctrine of consent extends to third parties in *United States v. Matlock*.⁶ In *Matlock*, the Supreme Court held that search pursuant to the voluntary consent of an occupant who shares common authority over the property is valid against any absent, non-consenting co-occupant.⁷ The *Matlock* Court reasoned that co-occupants' mutual use of the property through joint access or control for most purposes renders a search pursuant to one co-occupant's consent reasonable because each has assumed the risk that the other might permit a search and that each has the right to do so.⁸ Sixteen years later, in *Illinois v. Rodriguez*,⁹ the Supreme Court held that the doctrine of third-party consent also applies to persons who are reasonably believed to share common authority over the property but

⁴ *E.g.*, *Brigham City, Utah v. Stuart*, 547 U.S. 398 403 (2006); *Randolph*, 547 U.S. at 106; *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

⁵ *Randolph*, 547 U.S. at 109 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)).

⁶ 415 U.S. 164 (1974).

⁷ *United States v. Matlock*, 415 U.S. 164, 170-71 (1974). In *Matlock*, Mrs. Graff consented to police search of Matlock's bedroom after he had been arrested in his front yard. *Id.* at 166. The Supreme Court found that Mrs. Graff had sufficient common authority over the bedroom: Mrs. Graff admitted both she and Matlock occupied the bedroom, both were seen retiring to the bedroom in the evenings, the room bore evidence of a woman's presence, and Matlock had previously told others they were married. *Id.* at 175-77. Thus, Mrs. Graff's consent was valid as to her absent co-occupant Matlock, who was restrained in a squad car a short distance from the house. *Id.* at 177; *Id.* at 179 (Douglas, J., dissenting).

⁸ *Id.* at 172 (majority opinion). The Court also held that common authority is not justified by property law or by any property interest the third party has in the property. *Id.*

⁹ *Illinois v. Rodriguez*, 497 U.S. 177 (1990). In *Rodriguez*, Gail Fisher summoned the police to Rodriguez's apartment, told them he had assaulted her, and consented to a police search while Rodriguez was asleep in the apartment. *Id.* at 179. The Supreme Court agreed with the lower court that Fisher had no actual common authority over the apartment as she had moved out of the apartment a month before, only occasionally spent the night when Rodriguez was also present, and was not listed on the lease nor paid rent. *Id.* at 181-82. However, the Court remanded the case for a determination of whether officers reasonably believed that Fisher had authority to consent, such that her consent would be valid as to Rodriguez. *Id.* at 189.

who in fact do not.¹⁰ In the wake of *Matlock* and *Rodriguez*, lower courts found no difficulties in applying this same doctrine to cases of “disputed permission”: the majority of state courts and all of the Court of Appeals addressing the issue found that third-party consent was also valid over the present objection of a co-occupant.¹¹

Aside from third-party consent, another exception to the Fourth Amendment warrant requirement is the doctrine of exigent circumstances.¹² In *Mincey v. Arizona*, the Supreme Court described this doctrine as when “‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”¹³ Recognized exigencies include the need to avoid destruction of evidence during the time necessary to obtain a warrant and the need to protect the safety of officers or others from danger.¹⁴ The *Mincey* Court elaborated on the latter exigency, explaining that police officers may enter and search a home without a warrant when they reasonably believe someone within needs protection from serious injury or immediate aid, and during the course of such search, officers may legitimately seize any evidence within plain view.¹⁵ However, the warrantless search must still be “strictly circumscribed by the exigencies which justify its initiation.”¹⁶

Some confusion has arisen in lower courts over the distinction between exigent circumstances and something called the “emergency aid doctrine.”¹⁷ Traditionally, exigent

¹⁰ *Id.* at 181-89. The *Rodriguez* Court’s rationale piggybacks off *Matlock* by saying that when officers make a reasonable mistake in believing that a person has authority to consent to a police search the Fourth Amendment, which requires only reasonableness and not absolute correctness, is satisfied. *Id.* at 184-88.

¹¹ *Georgia v. Randolph*, 547 U.S. 103, 108 n.1 (2006).

¹² *See Mincey v. Arizona*, 437 U.S. 385, 392-94 (1978).

¹³ *Id.* at 394 (citations omitted).

¹⁴ *Thacker v. City of Columbus*, 328 F.3d 244, 253 (6th Cir. 2003); *Fletcher v. Town of Clinton*, 196 F.3d 41, 49 (1st Cir. 1999). Two other recognized exigencies are when officers are in hot pursuit of a fleeing felon and the need to prevent a suspect’s escape. *Thacker*, 328 F.3d at 253; *Fletcher*, 196 F.3d at 49.

¹⁵ *Id.* at 392-93. In *Mincey*, the Court found that no emergency or exigent circumstances justified the exhaustive four-day search of the scene of a narcotics bust and homicide when all occupants had been located and a warrant could have been easily obtained at any time without any loss of evidence. *Id.* at 387-89, 393-94.

¹⁶ *Id.* at 393 (citing *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

¹⁷ Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 812 n.60 (2007)

circumstances must have been accompanied by probable cause to justify police entry;¹⁸ however, some courts described the emergency aid doctrine as a subset of exigent circumstances when the police reasonably believe that an occupant needs immediate aid or assistance but have no probable cause.¹⁹ In domestic violence cases, the distinction between the two doctrines often collapses because the same facts that give rise to the exigency also provide probable cause of a suspected crime.²⁰ Thus, under the application of either doctrine, the outcomes generally have been the same.²¹

The government bears a heavy burden in proving that exigent circumstances justify the police entry,²² and the inquiry is necessarily fact-based.²³ However, the following circumstances have supported a finding of exigencies in cases of domestic violence: sounds of domestic violence heard by the police,²⁴ blood or other signs of physical injury possibly requiring medical attention,²⁵ a known history of domestic violence,²⁶ signs of tumult in the form of property

¹⁸ Tuerkheimer, *supra* note 17, at 811 n.53; *see also* United States v. Davis, 290 F.3d 1239, 1242 (10th Cir. 2002); Commonwealth v. Snow, 80 Pa. D. & C.4th 262, 274 (Pa. Com. Pl. 2006).

¹⁹ State v. Geraghty, 163 P.3d 350, 357 (Kan. Ct. App. 2007).

²⁰ Tuerkheimer, *supra* note 17, at 811 n.53; *see also* United States v. Brooks, 367 F.3d 1128, 1135 (9th Cir. 2004) (“Many of the same facts that showed probable cause to suspect evidence of crime are also relevant to show [the officer’s] exigent need to enter.”).

²¹ *See* Tuerkheimer, *supra* note 17, at 813 n.64.

²² *Snow*, 80 Pa. D. & C.4th at 274.

²³ *Davis*, 290 F.3d at 1242; United States v. Bartelho, 71 F.3d 436, 442 (1st Cir. 1995). Some courts consider such factors as the gravity of the underlying offense, whether delay would threaten the police or public safety, whether the delay necessary to obtain a warrant would likely result in destruction of evidence, *Bartelho*, 71 F.3d at 442, as well as the peaceful circumstances of the entry, the likelihood the suspect will escape, and reason to believe the suspect is armed and in the premise to be entered, *Moore v. Andreno*, 505 F.3d 203, 213 (2d Cir. 2007).

²⁴ United States v. Barone, 330 F.2d 543, 544 (2d Cir. 1964) (exigency existed when a patrolman and two others heard screams emanating from within a rooming house at 1:50 a.m.); State v. Applegate, 626 N.E.2d 942, 944 (Ohio 1994) (exigency existed when police responding to an emergency call heard sounds of violence from within).

²⁵ Thacker v. City of Columbus, 328 F.3d 244, 254-55 (6th Cir. 2003) (exigency existed when a belligerent and intoxicated male requested medical assistance for the bleeding cut on his hand; even though he denied police entry, the uncertainty of the situation, including that the man refused to explain how he was injured, that it was unclear who else was in the house, and that the police may need to safeguard the attending paramedics justified entry); United States v. Booth, 455 A.2d 1351, 1352, 1356 (D.C. 1983) (officer responding to a reported assault in progress knocked on the door and was met with a man with dried blood on his face, who would not explain where it came from; the officer was justified in crossing the threshold to ask the occupants of the living room who called the police and if anyone needed assistance and in going upstairs when another male with blood on his face appeared and summoned the officer upstairs); State v. Dillon, 738 N.W. 2d 57, 58-59, 62-63 (So. Da. 2007) (blood drops and no response from within the dwelling where a reported stabbing victim was allegedly located and where people could

damage,²⁷ an inability to assess the condition of an alleged victim inside the premises,²⁸ and when the suspect has demonstrated a willingness to use firearms.²⁹ While an exigency is unlikely to exist if the victim has left the premises or is under police protection,³⁰ courts differ over whether the threat that an imprisoned abuser may shortly return to the home creates an exigency.³¹

be heard inside supported exigency); *State v. Lynd*, 771 P.2d 770, 771, 773 (Wash. Ct. App. 1989) (exigency existed when police responding to a 911 hang-up call found a man with a cut on his face loading things into an automobile; the man admitted he argued with and hit his wife, but claimed she had since left the house and objected to the police entry); *City of Laramie v. Hysong*, 808 P.2d 199, 201, 204 (Wy. 1991) (exigency was an alternative justification for warrantless entry because two store clerks' report that a man jerked a child out of shopping cart, dangled the child by his arm, and repeatedly struck the child could have led an officer to reasonably conclude the child had an injured arm and bruises on the buttocks), *abrogated by* *Georgia v. Randolph*, 547 U.S. 103 (2006).

²⁶ *Tierney v. Davidson*, 133 F.3d 189, 192-93, 197-99 (2d Cir. 1998) (exigency existed when two men on the street reported they heard screaming and banging from within the residence and that there had been prior domestic altercations and when the officers saw a broken pane of glass in the front door and were met at the door with a shaken woman with a red face who denied any altercation); *see Drennan* cited *infra* note 39; *State v. Hyde*, 268 N.E.2d 820, 820-21 (Ohio Ct. App. 1971) (exigency existed when a hysterical woman called for police assistance, one of the responding officers knew of a previous incident of domestic disturbance, and the officers heard loud noises and screams from within and were told by a crying girl on the porch to "get inside, there is trouble in there").

²⁷ *See Tierney* cited *supra* note 26; *United States v. Brooks*, 367 F.3d 1128, 1135 (9th Cir. 2004) (exigency justified police entry when officers responding to emergency call for aid, talked to a hotel guest who feared an assault was in progress and the occupant of the room confirmed that the woman who was inside had been loud, but the officers could not see her and the room was in disarray); *but see Kucharski v. Leveille*, No. 05-73669, 2007 WL 522715, at *14 (E.D. Mich. Feb. 12, 2007) (holding that a cracked windshield at a car accident scene did not rise to the level of an exigency when there were no visible injuries, other adults were present who could tend to any injured, and the impact was not severe enough to deploy the vehicle's airbag), *vacated*, 478 F. Supp. 2d 928 (E.D. Mich. 2007), *vacated*, 526 F. Supp. 2d 768 (E.D. Mich. 2007)

²⁸ *See Brooks* cited *supra* note 27; *State v. Drennan*, 101 P.3d 1218, 1224-25, 1232 (Kan. 2004) (exigency existed when neighbor reported that a man grabbed his wife, pushed her into the house, and that he heard screams, a ruckus, and then silence; one of the responding officers recalled being dispatched to the same residence for a prior domestic disturbance, and the officers received no response to their initial knocking, and then a sweaty man smelling of alcohol appeared but refused to explain where his wife was).

²⁹ *See Kucharski* cited *supra* note 27, at *12-14 (cataloging cases where shots fired supported exigency); *United States v. Donlin*, 982 F.2d 31, 34 (1st Cir. 1992) (exigency justified third police entry when the occupant of a residence, who was known to be intoxicated and violent, threatened officers with a sawed-off shotgun), *abrogated by* *Georgia v. Randolph*, 547 U.S. 103 (2006); *Stallings v. Commonwealth*, No. 2690-06-3, 2007 WL 4380109, at *4 (Va. Ct. App. Dec. 18, 2007) (exigency existed when an eleven-year-old girl staying at the residence told her aunt she was scared because a gun was in the house and when the girl's father threatened both his sister and his neighbor with a gun when each attempted to check on the girl).

³⁰ *Root v. Gauper*, 438 F.2d 361, 363, 365 (8th Cir. 1971) (police entry into home was not justified by an emergency when the victim had been already been transported to the hospital, there was no suggestion of other victims, and the officer waited until the sheriff arrived with a camera to enter the house); *Commonwealth v. Snow*, 80 Pa. D. & C.4th 262, 275-76 & n.8 (Pa. Com. Pl. 2006) (no exigency existed when there was clearly no immediate danger to the defendant's wife, who was apparently protected by the police or had already left the scene with their child, and when the defendant was showering and had not shown any sign of intoxication nor a threatening or violent manner that would corroborate his wife's accusations of DUI and harassment).

³¹ *Compare* *United States v. Henderson*, No. 04 CR 697, 2006 WL 3469538, at *3 (N.D. Ill. Nov. 29 2006) (rejecting as pure speculation the government's argument that "dangerous circumstances" justified police entry

One problematic issue is whether emergency calls constitute an exigency justifying police entry, especially since “911 calls are the predominant means of communicating emergency situations.”³² At least two circuits hold that a 911 call alone creates exigent circumstances.³³ Others courts decline to follow such a rule.³⁴ Among these latter courts exists a marked continuum of circumstances that may constitute an exigency: anonymous 911 calls are comparatively unreliable and unlikely to be exigencies,³⁵ identified callers have more credibility,³⁶ as do emergency calls confirmed by people present on the scene,³⁷ 911 calls leading

because the defendant, who had been placed under arrest, stood a good chance of bonding out and returning to the house where his weapons were stored and his wife, the victim of a recent physical beating, was living), *with* United States v. Hendrix, 595 F.2d 883, 886 (D.C. Cir. 1979) (exigent circumstances and the threat to Hendrix’s wife and baby were an alternative justification for police entry when because of the early hour, it would have taken at least a few hours to obtain a warrant, during which time Hendrix, who had been arrested merely for disorderly conduct, likely would have been able to secure his release, return home, and conceal or use the sawed-off shotgun on the premises), *abrogated by* Georgia v. Randolph, 547 U.S. 103 (2006).

³² United States v. Najar, 451 F.3d 710, 719 (10th Cir. 2006) (citations omitted), *cert. denied*, 127 S. Ct. 542 (2006).

³³ United States v. Brooks, 367 F.3d 1128, 1136 (9th Cir. 2004) (noting that the Seventh and Ninth Circuits have held that a 911 call reporting a domestic emergency without more may be enough to support a warrantless search); United States v. Snipe, 515 F.3d 947, 953-54 (9th Cir. 2008) (officers responding to an emergency call from a hysterical male, who told the dispatcher to “[g]et the police over here now,” were largely justified in their response by that call alone; the police were not required to verify the facts or the caller’s identify before entry because that would dramatically slow emergency response time in a delay that may cost lives); State v. Greene, 784 P.2d 257, 257-59 (Ariz. 1989) (en banc) (exigency justified entry in response to family fight-domestic violence call because “[t]he call itself creates a sufficient indication that an exigency exists allowing the officer to enter a dwelling if no circumstances indicates that entry is unnecessary”).

³⁴ Thacker v. City of Columbus, 328 F.3d 244, 254 n.2 (6th Cir. 2003) (“Gallagher’s 911 call reporting an emergency, justified a police response to investigate the situation, but did not necessarily justify entry into a private home... We make no determination that exigent circumstances necessarily arise every time both a police officer and a paramedic respond to a cutting or stabbing); United States v. Davis, 290 F.3d 1239, 1244 (10th Cir. 2002) (“an officer’s warrantless entry of a residence during a domestic call is not exempt from the requirement of demonstrating exigent circumstances”).

³⁵ State v. Gooden, No. 23764, 2008 WL 186646, slip op. at *1, *4-5, 2008-Ohio-178, at ¶¶ 1, 11-13, 17 (Ohio Ct. App. Jan. 28, 2008) (anonymous tips require independent police corroboration; thus, a brief anonymous phone call reporting a fight with weapons and a woman being held against her will without any corroborating information did not justify police entry).

³⁶ United States v. Bartelho, 71 F.3d 436, 442 (1st Cir. 1995) (exigency justified police entry when caller identified herself, lending credibility to her report that a woman was being threatened by a man with a loaded rifle).

³⁷ United States v. Brooks, 367 F.3d 1128, 1135 (9th Cir. 2004) (exigency justified police entry when officers responding to emergency call for aid talked to a hotel guest who feared an assault was in progress and the occupant of the room confirmed that the woman who was inside had been loud, but the officers could not see her and the room was in disarray).

to scenes with distraught individuals present are likely exigencies,³⁸ and 911 calls from neighbors corroborated by police observations are doubtless exigencies.³⁹

While in most cases “[c]ourts have recognized the combustible nature of domestic disputes, and have accorded great latitude to an officer’s belief that warrantless entry was justified by exigent circumstances,”⁴⁰ at other times courts seem less inclined to defer to police judgment. For example, in *United States v. Davis*, the Tenth Circuit found that exigent circumstances did not justify police entry.⁴¹ The court relied on these facts: (1) the officers, who were responding to an alleged domestic disturbance, did not observe the male occupant, Davis, acting in a threatening or aggressive manner, (2) the woman occupant, Coleman, appeared at the door without any signs of harm, (3) both occupants attempted to keep the officers outside, and (4) the officers did not believe Davis had any prior history of violence.⁴² On the other hand, the facts also indicated that Davis had bloodshot eyes and alcohol on his breath, that Davis initially lied to the officers, telling them Coleman was not present, and that Davis and Coleman presented differing accounts – he stated the noise had come from his disciplining his child while she stated

³⁸ *United States v. Gwinn*, 46 F. Supp. 2d 479, 481-83 (S.D. W. Va. 1999) (exigency justified police entry when officers responded to a mother’s report that Gwinn was threatening to kill her daughter and had a gun, and when after officers arrested an intoxicated Gwinn outside, they saw through the screen door, the daughter and her baby on the couch both crying), *aff’d but criticized by* 219 F.3d 326 (4th Cir. 2000); *State v. Chiampo*, No. 02CA0042, 2003 WL 21078082, at *1, 2003-Ohio-2422U, at ¶ 5 (Ohio Ct. App. May 14, 2003) (exigency justified police entry when an officer responding to an emergency call for help was met at the door by a woman and her daughter who were both crying and upset).

³⁹ *Tierney v. Davidson*, 133 F.3d 189, 192-93, 197-99 (2d Cir. 1998) (exigency existed when two men on the street reported they heard screaming and banging from within the residence and that there had been prior domestic altercations and when the officers saw a broken pane of glass in the front door and were met at the door with by a shaken woman with a red face who denied any altercation); *State v. Drennan*, 101 P.3d 1218, 1224-25, 1232 (Kan. 2004) (exigency existed when neighbor reported that a man grabbed his wife, pushed her into the house, and that he heard screams, a ruckus, and then silence; one of the responding officers recalled being dispatched to the same residence for a prior domestic disturbance, and the officers received no response to their initial knocking, and then a sweaty man smelling of alcohol appeared but refused to explain where his wife was).

⁴⁰ *Tierney*, 133 F.3d at 197; *see also* Tuerkheimer, *supra* note 17, at 820.

⁴¹ *United States v. Davis*, 290 F.3d 1239, 1244 (10th Cir. 2002). *Davis* was one of the cases used in Chief Justice Roberts’ dissent in *Randolph* to criticize the majority’s holding and to argue that exigent circumstances may not suffice to protect the safety of occupants in domestic disputes. *Georgia v. Randolph*, 547 U.S. 103, 140 (2006) (Roberts, C.J., dissenting).

⁴² *Davis*, 290 F.3d at 1243-44.

they had been arguing.⁴³ Moreover, Coleman tried to stop Davis from closing the door on the police, but Davis ordered her out of the house; he then retreated into the house, prompting the police to enter because they thought he might be going for a weapon.⁴⁴ These troubling facts did not dissuade the Tenth Circuit from holding that exigent circumstances did not justify the police entry.⁴⁵ The Tenth Circuit was especially persuaded by the fact that the officers could have assessed the alleged victim's condition without any entry into the home and that the officers knew Davis had a child and should have felt no threat when he retreated into the home to retrieve the child.⁴⁶

Obviously, exigent circumstances as a possible justification for warrantless police entry is a well-developed doctrine in domestic violence cases. However, prior to 2006, many courts found no need to resort to an exigent circumstances analysis as warrantless police entry was often justified by the consent of the victim,⁴⁷ even when the abuser was present and objecting.⁴⁸ Then in early 2006, the Supreme Court altered the landscape of third-party consent by ruling on the issue of disputed permission in *Georgia v. Randolph*. Shortly thereafter, the Supreme Court also reevaluated the application of exigent circumstances in cases of domestic violence in *Brigham City, Utah v. Stuart*.

B. The Supreme Court Readdresses Third-Party Consent and Exigent Circumstances

In *Georgia v. Randolph*, police officers responded to Janet Randolph's complaint that her estranged husband, Scott Randolph, took their son away after a domestic dispute.⁴⁹ When the

⁴³ *Id.* at 1240-41, 1243.

⁴⁴ *Id.* at 1241.

⁴⁵ *Id.* at 1243-44.

⁴⁶ *Id.* at 1241, 1243. The *Randolph* majority similarly dismissed the Chief Justice Roberts' concern with *Davis* by summarily stating that "immediate harm [was] extinguished after husband 'order[ed]' wife out of the home." *Georgia v. Randolph*, 547 U.S. 103, 119 (2006) (majority opinion).

⁴⁷ See Tuerkheimer, *supra* note 17, at 806;

⁴⁸ See *supra* note 11 and accompanying text.

⁴⁹ *Randolph*, 547 U.S. at 107.

officers arrived at the Randolph residence, Janet told them Scott was a cocaine user. Scott arrived shortly thereafter, denied any cocaine use, and stated he had dropped their son off at a neighbor's house.⁵⁰ Janet left briefly to retrieve her son and upon her return, again alleged that Scott was a drug user and volunteered that evidence of drugs was in the house.⁵¹ When the officers asked for permission to search the premises, Scott unequivocally refused, but Janet consented.⁵² The Supreme Court granted certiorari in order to address this issue of disputed permission and held that the warrantless search of a shared dwelling over the express objection of a physically present co-occupant cannot be justified as reasonable as to him on the basis of a co-occupant's consent.⁵³

The *Randolph* Court re-read *Matlock* from the perspective of a visitor seeking entry, reasoning that a visitor has a common understanding based on social expectations that a present occupant may admit him, even though an absent co-occupant may be nonconsenting.⁵⁴ Thus, a visitor is entitled to rely on the co-occupant's assumption of risk that another occupant may admit someone in his absence.⁵⁵ However, co-habitation is not "privacy waived for all purposes."⁵⁶ When, as in *Randolph*, a visitor is faced with disputed permission – an invitation to enter from one occupant and a command to stay out from another present occupant of equal authority, the visitor has no such common understanding of which occupant has the right to

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* The police entered the home and seized a drinking straw covered with cocaine residue, which was then used to obtain a search warrant that led to the seizure of further evidence of drug use. *Id.*

⁵³ *Id.* at 108, 120.

⁵⁴ *Id.* at 111. In his dissent, Chief Justice Roberts criticized the majority's social expectations concept, arguing that it is a departure from any traditional Fourth Amendment inquiry. *Georgia v. Randolph*, 547 U.S. 103, 130 (2006) (Roberts, C.J., dissenting). Even though this concept resembles the test for whether a search has occurred or a person has standing to object to a search, which asks whether a person has a subjective expectation of privacy and whether it is one society is prepared to recognize as reasonable, it has not been applied to questions of consent. *Id.*

⁵⁵ *Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (majority opinion).

⁵⁶ *Id.* at 115 n.4.

prevail and, thus, would not enter.⁵⁷ Therefore, a present co-occupant's express refusal to permit entry prevails over the co-occupant's consent,⁵⁸ necessitating some other justification for the officers' warrantless entry. Through this re-reasoning of precedent, *Randolph* was able to leave *Matlock* and *Rodriguez* intact such that an occupant's consent is still sufficient justification if the nonconsenting co-occupant is absent or if his permission to search is simply not requested.⁵⁹

The *Randolph* Court also emphasized that its holding was limiting merely evidentiary searches⁶⁰ and had "no bearing on the capacity of the police to protect domestic victims."⁶¹ Despite a present occupant's objection, police may lawfully make a warrantless entry into the home if justified by exigent circumstances; the *Randolph* Court defined such exigent circumstances as when officers have good reason to believe that a threat of domestic violence exists as well as when officers enter to protect a domestic violence victim while she collects her belongings.⁶²

Two months after *Randolph*, the Supreme Court reaffirmed its recognition of the exigent circumstances doctrine in *Brigham City, Utah v. Stuart*. In *Brigham City*, officers responding to a 3 a.m. call about a loud party at a residence heard shouting inside and saw two minors drinking beer in the backyard.⁶³ Through the screen door and windows, the officers saw four adults attempting to restrain a minor, who then broke free and struck one of the adults, causing him to

⁵⁷ *Id.* at 113-14.

⁵⁸ *Id.* at 106. The *Randolph* Court stressed that the co-occupant's objection is accorded "dispositive weight," such that the other's consent "adds nothing" to the government's grounds for entering and the officers have "no better claim" for entry. *Id.* at 114-15, 121.

⁵⁹ *Id.* at 121-22. The Supreme Court cautioned that while officers have no duty to seek out absent, potentially objecting co-occupants, they must not procure a co-occupant's absence in order to avoid his objection. *Id.*

⁶⁰ *Id.* at 119.

⁶¹ *Id.* at 118.

⁶² *Id.* at 118. However, the Court again emphasized that when a present co-occupant expressly objects, the victim's consent would have no bearing on this exigency justification because "the justification then would be the personal risk, the threats to life or limb, not the disputed invitation." *Id.* at 113.

⁶³ *Brigham City, Utah v. Stuart*, 547 U.S. 398, 400-01 (2006).

spit blood in the sink.⁶⁴ The other adults forcefully pushed the minor against a refrigerator in their attempt to restrain him.⁶⁵ One of the officers then opened the screen door and announced their presence.⁶⁶ When this went unnoticed, the officer entered the residence, he repeated his announcement, and the altercation subsided.⁶⁷ The Supreme Court held that the warrantless police entry was justified under its reformulation of the exigent circumstances doctrine.⁶⁸

The *Brigham City* Court redefined exigent circumstances to exist when officers have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury and when the manner of the warrantless entry is also reasonable.⁶⁹ The Supreme Court also resolved the previous disagreement among lower courts over whether the exigency standard was objective or subjective⁷⁰ and held that the officer's subjective motivation is irrelevant as long as the circumstances viewed objectively justify police entry.⁷¹ In addition, the Supreme Court emphasized that exigent circumstances has no threshold requirement of a certain gravity of injury – at least when the police are entering in a preventive capacity.⁷² *Brigham City* firmly established that ongoing physical violence within the home is a category falling within the exigent circumstances exception that justifies warrantless police entry.⁷³

⁶⁴ *Id.* at 401.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 403-06.

⁶⁹ *Id.* at 403, 406. The police entry in *Brigham City* passed the second part of this exigency test because the Court reasoned that the officer's announcement of his presence was at least equivalent to a knock, and that such a knock in the midst of the altercation would have been futile anyway. *Id.* at 1949. The officers were not required "to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence." *Id.*

⁷⁰ *Id.* at 403.

⁷¹ *Id.* at 404.

⁷² *Id.* at 405-06 ("Nothing in the Fourth Amendment required them to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering"); see also Tuerkheimer, *supra* note 17, at 811.

⁷³ *Brigham City*, 547 U.S. at 405-06.

The net result of *Randolph* and *Brigham City* is that when officers at the home of a domestic disturbance are faced with disputed permission, warrantless entry cannot be justified by the victim's consent but must be able to satisfy the Supreme Court's new definition of exigent circumstances. However, in the wake of these two decisions, many lower courts continue to justify warrantless police entry on the basis of the victim's consent without having to resort to an exigent circumstances analysis. Lower courts have found it all too easy to distinguish the narrowly drawn *Randolph* holding on the following bases: the potentially nonconsenting co-occupant was absent,⁷⁴ the co-occupant's objection's was made off-site,⁷⁵ the present co-occupant never objected,⁷⁶ the co-occupant's objection was not express,⁷⁷ the objection was too soon,⁷⁸ the co-occupant did not object but rather abdicated authority over the property,⁷⁹ the co-

⁷⁴ United States v. Crosbie, No. 06-047-CG, 2006 WL 1663667, at *1-2 (S.D. Ala. June 9, 2006) (*Randolph* does not extend to the absent defendant who had been ordered out of the house by his wife; her consent as the only occupant present was valid); United States v. McCurdy, 480 F. Supp. 2d 380, 390 n.9 (D. Me. 2007) (*Randolph* does not extend to the absent defendant who was in police custody at the time of search); *see also* cases cited *infra* note 82.

⁷⁵ United States v. Hudspeth, No. 05-3316, 2008 WL 637638, at *1-2, 6-7 (8th Cir. Mar. 11, 2008) (en banc) (husband's earlier objection given at his place of business did not invalidate his wife's consent given at their home after the husband had been arrested and taken to jail), *reinstating in part on reh'g* 459 F.3d 922 (8th Cir. 2006); *but see* United States v. Henderson, No. 04 CR 697, 2006 WL 3469538, at *2 (N.D. Ill. Nov. 29, 2006) (citing with approval that "the same constitutional principles underlying the Supreme Court's concerns in *Randolph* apply regardless of whether the non-consenting co-tenant is physically present at the residence...or...off-site" (quoting United States v. Hudspeth, 459 F.3d 922, 930-31 (8th Cir. 2006), *reinstated in part on reh'g* by No. 05-3316, 2008 WL 637638 (8th Cir. Mar. 11, 2008) (en banc))).

⁷⁶ United States v. Hilliard, 490 F.3d 635, 639, 640 n.5 (8th Cir. 2007) (no evidence Hilliard objected or expressly refused consent to police entry); United States v. Davis, No. 1:06-CR-69, 2006 WL 2644987, at * 2 (W.D. Mich. Sept. 14, 2006) (Davis was present but never objected to police entry because he was asleep); United States v. Cantrell, No. 04-03127-02-CR-S-ODS, 2006 WL 3391406, at *3 (W.D. Mo. Nov. 22, 2006) (no evidence Cantrell expressly or implicitly objected to police entry); Commonwealth v. Ocasio, No. 06-P-1831, 2008 WL 522946, at *3 (Mass. App. Ct. Feb. 29, 2008) (defendant was at the threshold but no evidence of any protest or objection).

⁷⁷ United States v. McKerrell, 491 F.3d 1221, 1222, 1226-27 (10th Cir. 2007) (a man barricading himself in his residence to avoid lawful arrest was not an express objection to search as required by *Randolph* when his sole concern was to avoid arrest; he never told officers to stay out of his home, and he only spoke of the validity of the arrest warrants during telephone negotiations), *cert. denied*, 128 S. Ct. 553 (2007); State v. Clavette, 969 So. 2d 463, 464-66 (D.C. Fla. 2007) (occupant's refusal to respond to police entreaties by telephone and public address system prior to entry did not constitute an express objection as required by *Randolph*); People v. Lapworth, 730 N.W.2d 258, 260 (Mich. Ct. App. 2007) (Lapworth's invocation of the right to remain silent or the right to counsel following *Miranda* warnings was not a tacit objection, but, regardless, a tacit objection would be insufficient under *Randolph*), *appeal denied*, 732 N.W.2d 543 (2007).

⁷⁸ United States v. Groves, No. 3:04-CR-76, 2007 WL 171916, slip op. at *6 (N.D. Ind. Jan. 11, 2007) (girlfriend's consent to search when Groves was not at home was sufficient justification and not invalidated by the fact that Groves had refused a police request to search two weeks prior). In one noteworthy case, *People v. Olmo*, the

occupant was present but his permission to search was not requested,⁸⁰ or amazingly because the officer entering the home pursuant to an occupant's consent was simply unaware that a present co-occupant had objected.⁸¹ Courts also routinely reject arguments that the police procured a co-occupant's absence in order to avoid his potential objection to the police search.⁸² On the other hand, some lower courts have extended *Randolph*'s holding to arguably ambiguous objections⁸³ and to later objections.⁸⁴

defendant's objection given before he was arrested did not invalidate his wife's consent given a short time later when the defendant had already been taken to the police department for processing. *People v. Olmo*, 846 N.Y.S.2d 568, 570-71 (N.Y. Sup. Ct. 2008). The court reasoned that *Randolph* was meant to avoid confrontations between co-occupants disputing police entry. Here, there was no such risk, and, thus, there was "no good reason in law, custom, policy or precedent why defendant's wife should not...have the right to cooperate with the police." *Id.* at 571.

⁷⁹ *United States v. Reed*, No. 3:06-CR-75 RM, 2006 WL 2252515, at *5 (N.D. Ind. Aug. 3, 2006) (*Randolph* does not extend to withheld consent in the form of Reed's false claim "that's not my place. I can't give you permission for that"); *United States v. Murphy*, 437 F. Supp. 2d 1184, 1192-93 (D. Kan. 2006) (*Randolph* would not extend to Murphy's statement "[y]ou cannot go in there. It's not my home, but none gave you permission. It belongs to my mother," which was not an objection but rather Murphy's erroneous belief that his mother had not consented and a disavowal of his authority to consent); *United States v. Sandoval-Espana*, 459 F. Supp. 2d 121, 135-36 (D. R.I. 2006) (*Randolph* does not extend to a respond of "it's not mine," which was an abdication of authority over the vehicle and not an express refusal of consent).

⁸⁰ *United States v. Alama*, 486 F.3d 1062, 1065-67 (8th Cir. 2007) (co-occupant's consent was valid when the defendant, hidden inside the house, did not participate in the request to search colloquy, was arrested and removed from the scene when he finally emerged, and then the search commenced); *State v. Chilson*, 165 P.3d 304, 306-07, 309 (Kan. Ct. App. 2007) (son was segregated from his father pursuant to police protocol for domestic disputes, and, thus, son did not take part in the colloquy in which his father consented to search); *Beall v. State*, 237 S.W.3d 841, 846-48 (Tex. App. 2007) (Beall was not invited to take part in the permission to search colloquy because he was present in the motel room but in the shower at the time his co-occupant consented to police entry); *see also* *United States v. DiModica*, 468 F.3d 495, 497-98 (7th Cir. 2007) (wife met with officers and gave consent to search; officers then went to the DiModica residence, arrested DiModica for domestic abuse without asking for his consent to search, and then searched the home after he was taken to the police station).

⁸¹ *People v. Kane*, No. 267899, 2007 WL 1687581, at * 2 (Mich. Ct. App. June 12, 2007) (son's consent to search given at the front door to the officer who then proceeded to enter the house was sufficient and not invalidated by the fact that the father, who was a short distance way in the yard, told another officer he objected when the father never communicated his objection to the entering officer nor his son), *appeal denied*, 740 N.W.2d 264 (2007).

⁸² *E.g.*, *United States v. Wilburn*, 473 F.3d 742, 745 (7th Cir. 2007) (police did not procure Wilburn's absence but rather kept him the back of a squad car following a valid arrest), *cert. denied*, 127 S. Ct. 2958 (2007); *United States v. Williams*, No. 06-20051-B, 2006 WL 3151548, at *1-2, 5 (W.D. Tenn. Nov. 1, 2006) (police did not procure Williams' absence but rather transported him to jail "based on his state of agitation" following his arrest for domestic violence and damaging his girlfriend's car); *United States v. Cosby*, No. 2:07-CR-54 TC, 2007 WL 2317431, slip op. at *2, 4 (D. Utah Aug. 7, 2007) (police did not procure the Cosby's absence but rather had him handcuffed and taken downtown to continue a robbery investigation); *Commonwealth v. Yancoskie*, 915 A.2d 111, 114-15 (Pa. Super. Ct. 2006) (police did not strategically wait until husband was out of town to conduct their search but rather husband voluntarily went on a fishing trip), *appeal denied*, 927 A.2d 625 (2007), *cert. denied*, 128 S. Ct. 901 (2008).

⁸³ *United States v. Henderson*, No. 04 CR 697, 2006 WL 3469538, at *1-2 (N.D. Ill. Nov. 29, 2006) (holding that Henderson's statement to police to "[g]et the fuck out of my house" included an objection to the search of his

In an interesting development, *Randolph*, which was a third-party consent case, has spawned decisions citing “community caretaking functions” as a potential exigency justifying warrantless police entry into a home to protect a domestic violence victim as she retrieves her belongings.⁸⁵ While commentators believe this doctrine will accord law enforcement “new power” in protecting domestic violence victims,⁸⁶ case law demonstrates that the scope of the police entry must be narrowly tailored to protecting the potential victim with the minimal amount of intrusion. For example, entry is not justified when the abuser is absent and his arrival is not imminent,⁸⁷ and police cannot venture into other areas of the home when the abuser is contained in one room.⁸⁸ On the other hand, police entry is justified if the police fear that the woman who was gathering her belongings inside is hurt and in need of assistance, even if the abuser has been located outside.⁸⁹ Thus, the community caretaking function of law enforcement can easily bleed into the traditional exigent circumstances doctrine.

residence such that his wife’s consent to search after he was arrested and removed from the scene could not justify the search).

⁸⁴ *Commonwealth v. Snow*, 80 Pa. D. & C.4th 262, 269-72 (Pa. Com. Pl. 2006). In *Snow*, police entered the residence after receiving consent from the wife, who was in the front yard, while her husband was present on the scene but inside the home. When the police came upon Snow showering in the bathroom, he immediately objected to their presence. *Id.* at 263, 271. The court held this objection held the same weight as an objection at the front door, thereby revoking the wife’s prior consent and requiring the police to cease their warrantless presence in the home. *Id.* at 269-72.

⁸⁵ See cases cited *infra* notes 87-89.

⁸⁶ See Tuerkheimer, *supra* note 17, at 813.

⁸⁷ *Moore v. Andreno*, 505 F.3d 203, 213-14 (2d Cir. 2007). In *Moore*, Ruth Sines decided to move out of her boyfriend Moore’s home after he threatened to kill her. *Id.* at 205. While she was moving out, Sines received an anonymous phone call; she feared it was Moore en route to his house and bent on violence, so she requested police assistance. *Id.* The Second Circuit held that exigent circumstances did not justify the police entry because Sines told the officers at the Sine that Moore was not at home and there was no indication his arrival was imminent. *Id.* at 213-14.

⁸⁸ *People v. Mikrut*, 864 N.E.2d 958, 963 (Ill. App. Ct. 2007). In *Mikrut*, police accompanied a woman to retrieve her personal belongings from her boyfriend’s home after she told the police she was afraid of her boyfriend, that he had threatened her with violence, and that he had firearms on the premises. *Id.* at 959-60. The police entered over Mikrut’s objection and accompanied the girlfriend to the bedroom, where they saw a rifle in the closet. *Id.* at 960. The court held that the officers acted beyond the scope of their community caretaking function and unreasonably entered the bedroom because Mikrut was secured in the living room. *Id.* at 963.

⁸⁹ *United States v. Black*, 482 F.3d 1035, 1039 (9th Cir. 2007), *reh’g denied*, 482 F.3d 1044 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 612 (2007). In *Black*, Tyroshia Walker called 911 and reported that her ex-boyfriend Black had beaten her up and had a gun, but that she intended to return to his apartment to retrieve her clothing and would wait outside for police to arrive. *Id.* The responding officers found no signs of Walker, and their knocks on the door went

The newest variation on the traditional exigent circumstances doctrine after *Brigham City* is that the officers need not actually see someone inside the house in immediate danger; rather, exigent circumstances are satisfied if the officers have an objectively reasonable basis for believing that someone, including themselves, might be in danger.⁹⁰ On the other hand, a least one circuit has held that an officer's "near total lack of information regarding the situation inside...the home (including specifically, whether [the person sought] was present there)" distinguishes *Brigham City* such that exigent circumstances do not exist.⁹¹ Nevertheless, lower courts are usually generous in applying exigent circumstances to permit police entry to protect and aid domestic violence victims and have craftily distinguishing *Randolph's* harsh rule such that dispositive weight may be given to the victim's consent to search. However, in troubling cases like *United States v. Davis*, where police entry was not justified by an exigency, or in merely evidentiary searches where the victim's consent cannot prevail because of disputed permission, then consenting victims are left with the alternatives means of assisting law enforcement that were offered in *Randolph*.

C. Why the Randolph Alternatives are Insufficient and Why Weight Should be Given to a Victim's Invitation to Enter

The *Randolph* Court assures that those who wish to expose the crimes of their co-occupants and deflect any suspicion raised by co-habitation can on their own initiative deliver

unanswered, but they found an agitated Black in the backyard who denied knowing of Walker's whereabouts. *Id.* The subsequent police entry was justified by exigent circumstances because Walker could have returned to the apartment after her 911 call but before the officers arrived at the scene and because they feared she was inside the apartment and severely injured. *Id.*

⁹⁰ *United States v. Layman*, 244 F. App'x 206, 211 (10th Cir. 2007) (exigency existed when officers thought a wanted felon was residing at the residence, paths worn in the grass indicated occupancy, and thus, officers reasonably believed someone may be inside and overcome by the strong chemical odor indicating the presence of a meth lab), *cert. denied*, 76 U.S.L.W. 3441 (2008).

⁹¹ *Bates v. Harvey*, No. 07-10570, 2008 WL 565774, at *12 n.14 (8th Cir. Mar. 4, 2008). In *Bates*, the Eighth Circuit held that parents' statement in an affidavit supporting a civil commitment order that their son presented "a substantial risk of imminent harm to himself or others" and his mother's statement that her son might be staying at a friend's house did not demonstrate an exigency that would justify police entry into a third party's home after a resident of that home stated he was not there. *Id.* at *1, 12.

evidence or provide information to officers, who might then be able to go before a magistrate and obtain a search warrant, thereby comporting with the Fourth Amendment's warrant preference.⁹² Unfortunately, neither of the *Randolph* Court's alternatives⁹³ are likely to be exercised by domestic violence victims who are often uncooperative and who have learned from the cycle of violence under which they suffer that affirmative efforts to assist law enforcement is not in their best interests.

Victims of domestic violence live in a "continuing 'state of siege'" from abusive behavior that often includes physical, sexual, and psychological abuse.⁹⁴ Each of the three phases of domestic violence presents the victim with incentive to avoid seeking police assistance. The first, tension-building phase is characterized by the victim's repeated attempts to avoid an escalation of the violence through pacification and by covering for the batterer in order to win favor.⁹⁵ The second phase of an acute battering incident is when women are subjected to brutal violence, usually lasting from two to twenty-four hours.⁹⁶ During this phase, the victim has no control, feels psychologically trapped, and will often wait several days to seek medical attention if at all.⁹⁷ The third phase, called the honeymoon period, is "a tranquil period of loving contribution" where the spouses exhibit emotional dependence upon each other – she depends on his caring behavior and he depends on her forgiveness.⁹⁸

⁹² *Georgia v. Randolph*, 547 U.S. 103, 115-17 (2006).

⁹³ The Court acknowledges additional alternatives of sequestering the nonconsenting co-occupant from the house until a warrant can be obtained, *id.* at 117 n.6, or not inviting the potential objector to take part in the threshold colloquy, *id.* at 121. However, because these options are exercisable at the discretion of law enforcement, they are not true alternatives for the consenting co-occupant.

⁹⁴ Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204-08 (1993).

⁹⁵ Lamis Ali Safa, *The Abuse Behind Closed Doors and the Screams That Are Never Heard*, 22 T. MARSHALL L. REV. 281, 293-94 (1997).

⁹⁶ *Id.*

⁹⁷ *Id.* at 294-95.

⁹⁸ *Id.* at 295-96.

Not only does the nature of domestic violence create disincentives for victims to seek out police assistance, but victims may be uncooperative because they are intimidated by their abusive partners and understand that any attempt to break the cycle of violence often increases their short-term danger.⁹⁹ Thus, even if officers come knocking at her door, a victim will not be forthcoming about the harms she suffered or is likely to suffer at the hands of an aggressor who remains on the scene, leaving an interview outside the home an insufficient alternative.¹⁰⁰ The *Randolph* majority concedes the point, stating “we understand that a battered individual will be afraid to express fear candidly,” but argues that does not justify crediting consent over denial because it would distort the Fourth Amendment with little or no effect on domestic abuse investigations.¹⁰¹

However, the *Randolph* Court fails to recognize that victims’ fear of retaliation does affect domestic abuse investigations by foreclosing exercise of its offered alternatives. The majority’s contention that a fearful, consenting co-occupant can simply walk outside the home and seek police protection without any danger of being restrained by the objecting tenant,¹⁰² similarly fails to recognize the psychological “restraint” that batterers exercise over their victims

⁹⁹ *Fletcher v. Town of Clinton*, 196 F.3d 41, 51-52 (1st Cir. 1999). The *Randolph* Court also recognized the danger of escalating violence by stating that an exchange of information between a consenting co-occupant and the police in front of an objecting co-occupant may give rise to an exigency justifying entry. *Georgia v. Randolph*, 547 U.S. 103, 117 n.6 (2006).

¹⁰⁰ *United States v. Brooks*, 367 F.3d 1128, 1136 (9th Cir. 2004). The *Brooks* Court specifically stated that a hallway interview outside a hotel room that was the scene of an alleged domestic dispute would not necessarily have protected the victim. *Id.* at 1136. Thus, the police were entitled to search the hotel room because of the victim’s potential unwillingness to speak to officers and because the Supreme Court has “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.” *Id.* at 1135-36 (citations omitted).

¹⁰¹ *Georgia v. Randolph*, 547 U.S. 103, 119 n.7 (2006).

¹⁰² *Id.* at 119.

that may prevent them from leaving.¹⁰³ Moreover, leaving the home is a dangerous alternative to a woman, who is more likely to be killed by her partner when she has separated from him.¹⁰⁴

In addition to fear of physical harm, a victim of domestic violence may also fail to utilize the *Randolph* alternatives because seeking police assistance to arrest and/or escape from her abuser would have other negative consequences. For example, the victim may be financially dependent on her abuser and fear that she can not provide for herself and her children if he was arrested or withdrew his support because of her compliance with police.¹⁰⁵ If the victim leaves, her abuser may also withhold child support payments and harass her employer, neighbors, and babysitters such that the victim is left without a job, home, or means to care for her children.¹⁰⁶ Moreover, compliance with the police would not prevent an abuser from obtaining custody over their children.¹⁰⁷ Thus, victims of domestic violence may be uncooperative with law enforcement efforts because they have good reason to believe that cooperation would do them more harm than good.

Because victims of domestic violence will not use the *Randolph* alternatives to seek out police assistance and because *Randolph* holds that an express objection prevails over consent in cases of disputed permission, victims must rely on exigent circumstances to justify warrantless police entry. Even though exigencies cover a wide range of domestic disturbances,¹⁰⁸ this should not prevent a victim's consent from having any weight in the exigency calculation. The

¹⁰³ See *Georgia v. Randolph*, 547 U.S. 103, 138 (2006) (Roberts, C.J., dissenting) (arguing that the co-occupant's very presence may prevent the consenting party from leaving). And as Justice Roberts retorts, the victim shouldn't have to depart with the police – "it is her home too." *Id.*

¹⁰⁴ Dutton, *supra* note 94, at 1212.

¹⁰⁵ Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 368 (1996) (stating that there is a 50% chance a victim's standard of living will drop below the poverty line if she leaves her abuser).

¹⁰⁶ *Id.* at 368-69.

¹⁰⁷ See *id.* at 368 & n.53 ("Violent fathers are quite successful in winning custody of their children").

¹⁰⁸ See discussion *supra* pp.3-8, 10-11, and 14-15.

Randolph Court argued that its bright-line rule was necessary for clarity and practicality,¹⁰⁹ but it is contrary to how “[i]n determining whether an entry is objectively reasonable, the Supreme Court has ‘consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry,’ and looked to the totality of the circumstances.”¹¹⁰ In fact, Justice Breyer’s concurrence in *Randolph* contends that the Fourth Amendment does not insist upon bright-line rules, but rather that reasonableness is determined by the totality of circumstances and may include evaluation of victim’s consent.¹¹¹ Moreover, because *Randolph* was a case addressing third-party consent and not exigent circumstances, its insistence that consent “adds nothing” should be limited to third-party consent analyses and should not extend to exigent circumstances, which is a separate exception to the Fourth Amendment’s warrant preference.

There are also various affirmative reasons why a domestic violence victim’s consent to police entry should have weight in determining whether exigent circumstances exist. First of all, studies have shown that arresting the abuser is the best method of stopping domestic violence,¹¹² and to make an arrest, officers need evidence. As the preceding discussion demonstrates, not only are victims initially uncooperative, but many victims who are initially cooperative become uncooperative,¹¹³ and are unwilling to assist with prosecutorial efforts after an abuser’s arrest.¹¹⁴ However, police may easily obtain a victim’s consent to police entry at the scene because “a victim is typically ‘cooperative’ immediately after an acute episode of violence -- at least to the

¹⁰⁹ *Georgia v. Randolph*, 547 U.S. 103, 121 (2006).

¹¹⁰ *United States v. Snipes*, 515 F.3d 947, 953 (9th Cir. 2008) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

¹¹¹ *Georgia v. Randolph*, 547 U.S. 103, 125-27 (2006) (Breyer, J., concurring). In fact, Breyer’s argument that *Randolph* will not adversely affect ordinary law enforcement practices hinges on his belief that officers may consider a victim’s motivation for consenting in justifying immediate entry. *Id.* at 127.

¹¹² *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 781 n.8 (2005).

¹¹³ *Sanctis*, *supra* note 105, at 367-68.

¹¹⁴ *Tuerkheimer*, *supra* note 17, at 806 n.29. *See also* *Brandon v. State*, 778 P.2d 221 (Alaska Ct. App. 1989). In *Brandon*, Joyce Brandon arrived at an abused women’s shelter severely beaten and told a counselor that her husband had beaten her throughout the day. *Id.* at 222. However, when testifying before the grand jury, Joyce said another man had beaten her, and at her husband’s trial, Joyce exercised her Fifth Amendment rights and refused to testify. *Id.* at 223.

extent that she needs police assistance to protect her from further injury.”¹¹⁵ Thus, the victim’s consent can indicate the availability of rapidly evaporating evidence in the form of a victim’s immediate willingness to speak that might not otherwise exist.¹¹⁶ Her consent may also represent access to the home to gather physical evidence that her abuser may easily dispose of in the mean time if the police wait until a search warrant is obtained.¹¹⁷ Because “exigency” by definition includes the need to avoid destruction of evidence during the time necessary to obtain a warrant,¹¹⁸ and because the cycle of violence under which a domestic victim suffers rapidly destroys her willingness to cooperate,¹¹⁹ officers should be able to weigh a victim’s consent to police entry in the exigency calculation.

A second justification for giving weight to a victim’s consent is that the objecting abuser may view such an invitation for police entry as an attempt by the victim to separate from her abuser or to increase control over her life – events which often escalate the violence.¹²⁰ If officers fail to heed this danger of escalation and fail to take a suspect into custody, the fact that the victim resides with her abuser will necessarily result in a continuation of the conduct that triggered the involvement of law enforcement.¹²¹

¹¹⁵ Tuerkheimer, *supra* note 17, at 808.

¹¹⁶ *Georgia v. Randolph*, 547 U.S. 103, 127 (2006) (Breyer, J., concurring).

¹¹⁷ *See Georgia v. Randolph*, 547 U.S. 103, 138 (2006) (Roberts, C.J., dissenting) (arguing that once the door shuts, the objecting co-occupant will destroy any evidence of wrongdoing and inflict retribution, “both in short order”). The *Randolph* majority concedes that if the objecting tenant cannot be incapacitated from destroying easily disposable evidence during the time required to get a warrant, exigent circumstances may justify immediate police entry. *Georgia v. Randolph*, 547 U.S. 103, 117 n.6 (2006) (majority opinion).

¹¹⁸ *See supra* note 14 and accompanying text.

¹¹⁹ *See discussion supra* pp. 16-18.

¹²⁰ Tuerkheimer, *supra* note 17, at 817 & n.88.

¹²¹ Tuerkheimer, *supra* note 17, at 818. *See also* Dutton, *supra* note 94, at 1229 (stating that in one study where battered women called the police, almost 20% indicated that calling the police resulted in increased violence by the batterer).

Third, the victim's content can reflect her subjective fear about being left alone with the abuser.¹²² A domestic violence victim is the intimate partner of her abuser and familiar with the cycle of violence and, thus, may reasonably perceive herself to be in imminent danger in situations where such danger is unapparent to outside observers.¹²³ Because a victim may attempt to communicate her heightened awareness of her personal danger through her consent to police entry, officers should be able to weigh whether her consent adds to the objectively perceived exigency of the occasion.

Fourth, in cases where the woman is an alleged victim of domestic violence and she has denied police entry into her home, courts have generally permitted officers to "reasonably consider whether the victim is acting out of fear or intimidation, or out of some desire to protect the abuser, both common syndromes."¹²⁴ Because officers can weigh the victim's denial of police entry in the exigency calculation and choose to disregard it, officers should similarly be permitted to weigh a victim's invitation to enter and determine whether it gives credit to their belief that exigent circumstances exist.

¹²² See *Georgia v. Randolph*, 547 U.S. 103, 127 (2006) (Breyer, J., concurring). Chief Justice Roberts makes a similar argument in his dissent in *Randolph*, stating "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." *Georgia v. Randolph*, 547 U.S. 103, 139 (2006) (Roberts, C.J., dissenting).

¹²³ See *Dutton*, *supra* note 94, at 1194-95.

¹²⁴ *Fletcher v. Town of Clinton*, 196 F.3d 41, 51-52 (1st Cir. 1999) (finding that officers might reasonably conclude that a woman was at risk for retaliation for previously having her boyfriend arrested despite the fact that she told officers she did not want them in her home that night, especially given that she ignored the officers' knocking, lied about the her boyfriend's presence, and that officers knew the boyfriend had previously interfered with her efforts to contact the police); see also *Tierney v. Davidson*, 133 F.3d 189, 192-93, 198 (2d Cir. 1998) (holding that exigent circumstances justified police entry and search even though the victim said nothing had happened and asked the officer to leave; the officer could have reasonably concluded that the victim and her children were intimidated, in danger, or that she had a gun pointed at her from another location, especially given that she appeared shaken, had a red face, and made self-contradictory statements); *United States v. Bartelho*, 71 F.3d 436, 438, 441-42 (1st Cir. 1995) (responding to a report of a domestic disturbance, officers' entry was justified by exigent circumstances despite the victim's objection to the entry and her statement that her boyfriend had left the building; the officers concluded that the woman was protecting her boyfriend, possibly out of fear of reprisal and they were not required to take her statements at face value, especially given the officers' domestic violence training and that the victim had puffy eyes, wouldn't make eye contact, and appeared nervous); *United States v. Barone*, 330 F.2d 543, 544 (2d Cir. 1964) (police rightfully demanded entrance after hearing screams even though the occupant stated she had no knowledge of any cause for the screams and suggested she might have had a nightmare).

Some critics may claim that weighing the victim's consent is a disguised *per se* rule that will result in a victim's consent always prevailing over her abuser's objection or that it will significantly lower the government's burden of proving an exigency in domestic violence cases.¹²⁵ However, permitting officers to weigh a victim's consent as part of the exigency determination does not create a *per se* rule nor alter the government's burden because consent would assist the government in meeting its exigency burden only when the consent itself indicates exigent circumstances. For example, if a woman's consent to police entry seems motivated by her desire to retaliate against a cheating boyfriend who has contraband hidden in the house, then her consent would not add to the exigency calculation. On the other hand, various factors could lead officers to believe that a woman's consent reflects the existence of exigent circumstances, including the wording of the invitation, the victim's tone of voice, and whether the invitation was made without prompting or in response to a request from police. For example, a woman's unprompted request in a shaky voice that officers "please come inside right away" weighs more towards an exigency than a woman's drawling respond to a police request for entry that "yeah, sure, you can come on in."

Finally, I am particularly persuaded by the Eleventh Circuit's argument in *United States v. Backus* that "[t]o begin with, expectations of privacy must be reasonable to be honored by the law...and it is not reasonable to expect the law to honor an expectation of a wrongdoer that is grounded in events brought about by his wrongdoing."¹²⁶ In *Backus*, a man's verbal and physical abuse had driven his wife away six months prior to the police search, but the Eleventh Circuit

¹²⁵ Chief Justice Roberts' dissent in *Randolph* argues this is precisely what the majority has already done by creating a "consent plus good reason" rule, *Georgia v. Randolph*, 547 U.S. 103, 140 (2006) (Roberts, C.J., dissenting), but that argument is contradicted by the specific language in the majority opinion that co-occupant's consent will "add nothing," officers have "no better claim" for entry, and the other's objection is accorded "dispositive weight." *Georgia v. Randolph*, 547 U.S. 103, 114-15, 121(2006) (majority opinion).

¹²⁶ *United States v. Backus*, 349 F.3d 1298, 1304 (11th Cir. 2003).

held that his wrongdoing did not invalidate his wife's retention of enough common authority over the home to consent to a police search.¹²⁷ In domestic violence cases where officers are faced with disputed permission, the cycle of violence inflicted by the abuser upon his partner has forced her to be uncooperative with law enforcement and foreclosed any other option she had of bringing his wrongdoing to light. Thus, when an abuser engages in suspicious conduct that brings officers on his door, it is not reasonable that his expectation of privacy be given absolute dominion without giving due consideration to the consent of his co-occupant in the exigency calculation.

III. CONCLUSION

When police arriving at the home of an alleged domestic disturbance are faced with disputed permission to enter, officers can no longer validate a warrantless police entry on the basis of the victim's consent. Instead, the government must be able to satisfy its heavy burden of proving exigent circumstances. The *Brigham City* exigency standard and the community caretaking functions language from *Randolph* may have expanded the reach of the exigent circumstances doctrine, but that expansion is not enough. In borderline cases such as *United States v. Davis* or anonymous 911 calls, the facts may objectively indicate circumstances just short of an exigency, but a victim's consent in opposition to her co-occupant's objection may be enough to tip the scales in the government's favor. In those cases, it is necessary that a victim's consent have weight in the exigency determination because *Randolph* has foreclosed its evaluation under a third-party consent doctrine and because *Randolph*'s offered alternatives have also been foreclosed by the cycle of violence inflicted upon the victim by her abuser. Thus, exigency is the only place in the Fourth Amendment analysis where a victim's voice is left to be heard. Her voice should not be silenced forever by *Randolph*, but rather should find its home in

¹²⁷ *Id.* at 1304-05.

the exigent circumstances determination, thereby giving victims of domestic violence the small comfort, that while their voice doesn't mean everything, it doesn't mean nothing.