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Is This Your Bedroom?: Reconsidering Third-Party Consent Searches under Modern Living Arrangements Note

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Introduction

Americans live in countless different types of housing arrangements. Whether for convenience, financial necessity, companionship, or other reasons, nearly ten percent of American households include at least one nonrelative.[1] This variety of living arrangements has increased significantly in recent years.[2]

The Supreme Court recognized this multiplicity of living arrangements[3] but has never laid out a clear rule defining when a housemate[4]

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1 Population Div., U.S. Census Bureau, America's Families and Living Arrangements: 2005 tbl.H1, http://www.census.gov/population/www/socdemo/hh-fam/cps2005.html (open CSV file for Table H1 All Races) (last visited Nov. 1, 2007) [hereinafter 2005 Census Data].

2 *Compare* FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY app. A, at A-49 (2002), *available at* http://www.census.gov/prod/2002pubs/censr-4.pdf (indicating that nearly 6.5 million households in 2000 contained at least two unrelated people), *with* 2005 Census Data, *supra* note 1, tbl.H1 (indicating that almost 10 million households in 2005 contained at least two unrelated people).

3 Georgia v. Randolph, 547 U.S. 103, 109 n.2 (2006).

4 Throughout this Note, the term "housemate" will refer to persons sharing living quarters with someone other than a spouse, parent, or child. *See infra* note 15. The term "room-

has sufficient control over a portion of his shared residence to authorize a police search. Because of this lack of a clear rule, the roughly ninety percent of Americans who do not live alone[5] cannot be certain whether they are actually "secure in their persons, houses, papers, and effects" as the Bill of Rights guarantees.[6] More concretely, nearly nine out of ten Americans might unknowingly have their bedrooms searched by police without a warrant or probable cause. It is shameful if a person's security from unjustified police search in his home depends on whether he has the financial resources to live alone.

The Supreme Court first dealt with third-party consent searches of shared living arrangements in *United States v. Matlock*[7] in 1974, and laid out only a vague rule as to when actual authority to consent exists.[8] After that case, in *Illinois v. Rodriguez*,[9] the Court created the doctrine of apparent authority to consent.[10] This doctrine, too, is necessarily vague as applied to housemate consent searches because apparent authority is judged based on the reasonable perception at the scene of authority under the *Matlock* standard. These vague standards created a circuit split where a person's security in his "house[ ], papers, and effects" under the Fourth Amendment if he does not live alone varies depending upon whether he lives in California or in Illinois.[11] New rules are necessary that are consistent with and clarify Supreme Court precedent in order to preserve the original purposes

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mate" will refer only to nonrelatives who share a bedroom. For the sake of clarity, the more general term, housemate, will not include the more specific term, roommate.

5 This number was calculated based on 2005 Census Data, *supra* note 1, tbl.H1, and the estimated total U.S. population in 2005 from Population Div., U.S. Census Bureau, Annual Estimates of the Population for the United States, Regions, States, and for Puerto Rico: April 1, 2000 to July 1, 2006 (NST-EST2006-01), http://www.census.gov/popest/states/NST-ann-est.html (last visited Nov. 1, 2007).

6 U.S. CONST. amend. IV.

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

8 *See infra* Part II.A. Actual authority to consent exists when one person has sufficient access or control over a certain area that he can fairly be said to consent to its search with that consent valid against an absent party who also has control over the area. *See Matlock*, 415 U.S. at 171.

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

10 *Id.* at 186. Apparent authority to consent allows courts to uphold a search where the consenting party does not actually have sufficient authority to meet the *Matlock* standard as determined later by a court, because it reasonably appeared to law enforcement officers at the time of the search that the consenting party had sufficient authority. *Id.*; *see infra* Part II.B.

11 *Compare* United States v. Kelley, 953 F.2d 562, 566 (9th Cir. 1992) (holding that perceived access to the apartment's telephone located in her housemate's bedroom was sufficient access to allow third-party consent to search the housemate's bedroom), *with* United States v. Barrera-Martinez, 274 F. Supp. 2d 950, 962 (N.D. Ill. 2003) (holding that it is presumptively true that one housemate cannot consent to the search of another's bedroom).

of the Fourth Amendment—to protect the sanctity of the home and prevent the arbitrary exercise of power and the deprivation of liberty.

Much more recently, in 2006, the Supreme Court in *Georgia v. Randolph*[12] judged the effectiveness of third-party consent based on widely shared social expectations.[13] This Note considers how the Court's emphasis on widely shared social expectations adds consistency to the *Matlock* and *Rodriguez* tests. Widely shared social expectations dictate that a person uncertain of who controls which portion of a shared residence would ask simple questions to clarify whose room he was entering before simply drawing assumptions based on circumstances. Furthermore, just because a person shares a residence does not mean that he has waived his expectation of privacy in all of his possessions or in all areas of the residence.

Modern living arrangements are inherently ambiguous, and it is no longer safe to assume that the person answering the door has dominion over the entire residence.[14] This Note does not purport to create rules encompassing all living arrangements, but it articulates two rules that apply to all unrelated persons living together.[15] First, police officers must separately analyze authority to consent to the search of each narrowly defined area or object. Courts should only find actual authority to consent if the consenting party in fact had sufficient authority over each narrowly defined area or object searched. Second, police officers must ask clarifying questions to determine the scope of a housemate's authority to authorize a search for the doctrine of apparent authority to consent to apply. These rules will clarify and refine the vague tests of *Matlock* and *Rodriguez* to protect the home with the same fortitude that our Founders intended.[16]

Part I of this Note examines the original purposes of the Fourth Amendment. Part II explains the current state of Supreme Court law on actual and apparent authority to consent and its inconsistent applications in lower federal courts.[17] Part III proposes rules to preserve

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

13 *Id.* at 111.

14 A studio apartment presents a particularly stark example of an ambiguous living arrangement where these rules are necessary. *See infra* Part IV.A.

15 In this area of the law, parent-child and spousal relationships hold particular force in finding authority to consent and are not within the scope of this Note. Marital relationships are also excluded, whether they derive from common-law status or a wedding ceremony. By contrast, relationships not granted legal status, such as unmarried cohabitating couples not in a common-law marriage, are addressed within the scope of the proposed rules.

16 *See infra* Part I.

17 There are inconsistent applications in state courts as well, but the inconsistency becomes particularly clear through a handful of federal cases. *See infra* Part II.

the protections of the Fourth Amendment by clarifying the scope of actual authority to consent and bringing the doctrine of apparent authority in line with widely shared social expectations.[18] Part IV applies the proposed rules to several cases to demonstrate their operation in practice. Part V then addresses potential objections to the rules proposed in this Note. Finally, Part VI analyzes the benefits of the rules as applied.

I. Purposes of the Fourth Amendment

The Fourth Amendment[19] was adopted to protect against the evils of general warrants—invading the privacy of the home and giving too much discretion to law enforcement.[20] General warrants or writs of assistance, as the type used against the pre-American colonists were called, were warrants that did not specifically articulate what areas may be searched, the objects of the search, or what persons or items may be seized.[21]

The Framers found these writs of assistance to undermine liberty and allow the arbitrary exercise of power.[22] John Adams wrote that writs of assistance deprived the colonists of their freedom, and he believed that James Otis's argument against them in a 1761 case "breathed into this nation the breath of life."[23] Patrick Henry railed against passage of the Constitution without a Bill of Rights because it lacked protection for certain personal rights including protection

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18 The proposed rules apply to all areas of a shared residence, but they will be most relevant in cases where someone consents to the search of his housemate's bedroom. Other areas of a shared residence tend to be jointly controlled and accessed, so sufficient authority to consent to the search of these areas tends to be fairly clear. Accordingly, this Note will focus on searches of bedrooms.

19 The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

20 Olmstead v. United States, 277 U.S. 438, 463 (1928); *see also* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 43 (1969).

21 NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 28 n.55, 31 (Johns Hopkins Press 1937).

22 John Adams, Abstract of the Argument, *in* 2 LEGAL PAPERS OF JOHN ADAMS 134, 140 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

23 Letter from John Adams to H. Niles (Jan. 14, 1818), *in* 10 THE WORKS OF JOHN ADAMS 274, 276 (1856). Adams also wrote, "Then and there the child Independence was born. In fifteen years, namely in 1776, he grew to manhood, and declared himself free." Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 THE WORKS OF JOHN ADAMS 244, 248 (1856).

against general warrants.[24] Otis called these writs "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book."[25]

In the early twentieth century, the Supreme Court recognized that "[s]ince before the creation of our government, [general] searches have been deemed obnoxious to fundamental principles of liberty."[26] The deprivation of liberty resulted from law enforcement officers exercising power completely arbitrarily. Otis argued that the power to issue writs of assistance "is a power that places the liberty of every man in the hands of every petty officer."[27] This complaint even found a voice in the petition from the Continental Congress to the King of England.[28]

The most prominent specific objection to the writs of assistance was that they invaded and undermined the sanctity of the home. The principle that a man's home is his castle is still valued in American law[29]—deriving from English law and sources significantly older than that.[30] According to the Supreme Court in *Weeks v. United States*,[31] the "4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law."[32] This heightened protection for the home inspired the rule of *Payton v. New York*[33]—that the search of a home without a

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24 "I feel myself distressed, because the necessity of securing our *personal rights* seems not to have pervaded the minds of men; for many other valuable things are omitted:—for instance, general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. . . . Everything the most secret may be searched and ransacked by the strong arm of power." LASSON, *supra* note 21, at 94.

25 Adams, *supra* note 22, at 140.

26 Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

27 Adams, *supra* note 22, at 141–42.

28 "The officers of the customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information." LASSON, *supra* note 21, at 75.

29 Georgia v. Randolph, 547 U.S. 103, 115 (2006) (noting that this concept is ancient and has been recognized throughout U.S. history).

30 LASSON, *supra* note 21, at 13–15, 34 n.78 (tracing the roots of this concept to Biblical times, through ancient Roman law, and then through English law). William Pitt argued that this principle must apply regardless of a person's financial circumstances. Payton v. New York, 445 U.S. 573, 601 n.54 (1980) ("The poorest man may in his cottage bid defiance to all the forces of the Crown.").

31 Weeks v. United States, 232 U.S. 383 (1914).

32 *Id.* at 394; *accord* Olmstead v. United States, 277 U.S. 438, 463 (1928); Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

33 Payton v. New York, 445 U.S. 573 (1980).

warrant is presumptively unreasonable.[34] Because consent searches are an exception to the *Payton* rule and do not require a warrant or even probable cause,[35] it is important to constrain their scope to prevent the evils of general warrants.[36]

II. Development of the Case Law

The Supreme Court's Fourth Amendment jurisprudence in housemate consent searches has been both sparse and vague, causing conflicting interpretations in lower courts. This Part reviews the essential Supreme Court cases and examines the conflicting interpretations that have emerged from the lower courts as a result. These Supreme Court cases established the doctrines of actual and apparent authority to consent, and most recently considered conflicting consent.

A. United States v. Matlock

In *United States v. Matlock*,[37] the Supreme Court first recognized the authority of a roommate with joint access to property to consent to its search, with this consent valid against the absent roommate.[38] Gayle Graff shared a bedroom with defendant William Matlock, and her clothes were found around the bedroom searched, including in the dresser.[39] Matlock was arrested outside of the home, and the police asked Graff for consent to search their shared bedroom.[40] After she consented, the police found a diaper bag containing nearly $5000 in cash in the only closet in the room.[41]

The *Matlock* Court upheld the search and held that Graff had sufficient actual authority to consent because she had "joint access or control for most purposes."[42] The Court required that the consenting party have "common authority over or other sufficient relationship to

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34 *Id.* at 586.

35 Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

36 *See* Ybarra v. Illinois, 444 U.S. 85, 104 (1979) (Rehnquist, J., dissenting) (noting that the exceptions to the Fourth Amendment warrant requirement must be narrowly drawn or they "could swallow the warrant requirement itself"). This is why the Supreme Court refers to the third-party consent exception as one "'jealously and carefully drawn.'" Georgia v. Randolph, 547 U.S. 103, 109 (2006) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

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

38 *Id.* at 170.

39 *Id.* at 175–76.

40 *Id.* at 166.

41 *Id.* at 166–67.

42 *Id.* at 171 n.7.

the premises or effects sought to be inspected."[43] In that case, the Court found that because Graff slept in the room and had clothing there, she had either common authority or other sufficient relationship to the premises to constitute legally sufficient consent.[44] It is not explicit in the opinion whether Graff also had clothes in or access to the closet searched, but it is assumed for the purposes of this Note.[45]

The Supreme Court justifies a third-party consent search such as this one by the assumption of risk doctrine.[46] When a person allows another joint access or control for most purposes over a certain area, he has assumed the risk that that other person will allow it to be searched.[47]

Because the *Matlock* standard for determining when someone has sufficient authority to consent to a search of a certain portion of a shared residence uses the abstract and manipulable language of "joint access or control," lower courts have reached divergent results on housemate consent.[48] They diverge because they disagree on the scope of the area to consider in evaluating authority to consent, what should be presumed about a person's bedroom vis-à-vis his housemate, and the level of access necessary to constitute joint access and control for most purposes.

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43 *Id.* at 171. Actual authority cannot be determined by officers on the scene but is determined by courts after a search is challenged. *See id.* at 171–72 (framing the issue of actual authority as whether the Government made the requisite showing at trial).

44 *Id.* at 175–77.

45 This assumption is important in comparing the results under the proposed rules with the actual holding in *Matlock*. *See infra* text accompanying note 105.

46 *Matlock*, 415 U.S. at 171 n.7. This is the Supreme Court's justification despite the psychological arguments that people in this position do not actually perceive the risk that their housemates will consent to a police search and therefore do not in actuality consciously assume a risk. Dorothy K. Kagehiro & William S. Laufer, Illinois v. Rodriguez *and the Social Psychology of Third-Party Consent*, 27 CRIM. L. BULL. 42, 43–44 (1991) [hereinafter Kagehiro & Laufer, *Social Psychology*]; Dorothy K. Kagehiro & William S. Laufer, *The Assumption of Risk Doctrine and Third-Party Consent Searches*, 26 CRIM. L. BULL. 195, 202, 207 (1990) [hereinafter Kagehiro & Laufer, *Assumption of Risk Doctrine*]. These authors do not recognize the distinction between the terms roommate and housemate as used in this Note, but their conclusion about not actually perceiving risk applies to both situations.

47 Joint access or control does not depend on formal notions of property law, but rather on how the property is actually used. *Matlock*, 415 U.S. at 171 n.7.

48 *Compare* United States v. Aghedo, 159 F.3d 208, 311 (7th Cir. 1998) (finding actual authority to consent only on facts of plenary authority sufficient to overcome the presumption to the contrary), *and* United States v. Barrera-Martinez, 274 F. Supp. 2d 950, 962 (N.D. Ill. 2003) (finding insufficient evidence of one housemate's authority to consent to the search of the other's bedroom), *with* United States v. Kelley, 953 F.2d 562 (9th Cir. 1992) (finding that one housemate's belief that she would be permitted to enter her housemate's bedroom to use the telephone provided sufficient authority to consent to the search of his bedroom closet).

Comparing the Ninth Circuit with the Seventh Circuit illustrates the divergent applications. The Ninth Circuit, in *United States v. Kelley*,[49] upheld a search by finding that Holly Bakker, the defendant's housemate, had actual authority to consent.[50] That court assessed whether Bakker's belief that she had access to her housemate's bedroom for the purpose of using the telephone[51] in one corner of the room was sufficient access and control to permit her to consent to a search of David Kelley's closet located on the other side of the room.[52] The court considered Bakker's access to the room by evaluating it with respect to the room as a whole.[53] It did not differentiate between the one area that she was allowed to access (the corner of the room with the telephone) and the closet searched, which there is no indication that she had any right to access.[54] The court did not presume that a person's bedroom is his own space and not his housemate's.[55]

The law in the Seventh Circuit is markedly different. In *United States v. Aghedo*,[56] the court upheld a search based on the actual authority of the leaseholder and resident, Adeniji Dairo.[57] Raymond Aghedo was temporarily living in a room in Dairo's home.[58] The court began with a presumption that each housemate had exclusive control over his own room,[59] but Dairo had significant access to the room, including keeping intimate apparel and other possessions there.[60] She also entered the room whenever she wished to clean, including when Aghedo was not present.[61] The court also gave some

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49 United States v. Kelley, 953 F.2d 562 (9th Cir. 1992).

50 *Id.* at 566.

51 Although Bakker assumed that she had access to Kelley's room to use the telephone, she and Kelley had neither discussed it, nor had she ever actually entered his room for any reason. *Id.* at 567 n.2 (Reinhardt, J., dissenting).

52 *See id.* at 566 (majority opinion).

53 *See id.*

54 *See id.*

55 *See id.* (making no mention of any such presumption and allowing Bakker's assumption that she would be allowed to enter to use the phone to constitute joint access or control for most purposes to be sufficient actual authority to consent).

56 United States v. Aghedo, 159 F.3d 308 (7th Cir. 1998).

57 *Id.* at 309–10.

58 *Id.* at 309.

59 *Id.* at 310 ("Two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms without explicitly making this expectation clear to one another.") (citation omitted); *see also* United States v. Barrera-Martinez, 274 F. Supp. 2d 950, 961 (N.D. Ill. 2003) (presuming that one housemate cannot consent to the search of another's bedroom unless specific facts indicate otherwise).

60 *Aghedo*, 159 F.3d at 310.

61 *Id.*

mention to separately considering the area underneath the mattress but found that plenary access to clean the room combined with use of the room to store possessions was sufficient for actual authority to consent to the entire search.[62]

The different analytical approaches of these circuits have led to conflicting results. In the Ninth Circuit, mere hypothetical permission to use a housemate's telephone justified the search of the entire bedroom including the closet.[63] In the Seventh Circuit, this would not overcome the presumption that housemates cannot consent to the search of another's bedroom.[64] One significant analytical difference in these approaches is that the Ninth Circuit looked only to the authority to enter the room where the Seventh Circuit briefly addressed authority to search under the mattress specifically.[65] This circuit split makes constitutional protections from arbitrary police action in the home—and more specifically in a person's own bedroom—dependent upon where he resides.[66] This different application of fundamental principles of Fourth Amendment jurisprudence across circuits demonstrates the need for a clear and uniform interpretation of *Matlock*.

B. Illinois v. Rodriguez

In 1990, the Supreme Court deemed apparent authority to consent an exception to the Fourth Amendment warrant requirement for searches and seizures in a home.[67] In *Illinois v. Rodriguez*, Gail

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62 *Id.* at 309–11. Although the Seventh Circuit hinted at separately analyzing the area under the mattress without really doing so in detail, this Note advocates explicitly analyzing the narrow area to be searched—in this case, under the mattress. *See infra* Part III.A.

63 *See* United States v. Kelley, 953 F.2d 562, 566 (9th Cir. 1992).

64 *See Aghedo*, 159 F.3d at 310; *Barrera-Martinez*, 274 F. Supp. 2d at 962 (citing *Aghedo* for the proposition that each roommate presumes exclusive control over his own room and further presuming that housemates do not have actual authority to consent to the search of another housemate's room unless there are specific facts indicating otherwise).

65 One author pointed out that delineating the scope of the area to be searched is an important factor in whether a court is likely to find authority to consent. *See* Thomas E. Fording, *Criminal Procedure—Housemate with Limited Right of Access May Consent to Warrantless Search of Defendant's Bedroom*—United States v. Kelley, *953 F.2d 562 (9th Cir. 1992)*, 26 SUFFOLK U. L. REV. 295, 300 (1992). Fording addresses *Kelley* and points out that because the court considered only the bedroom in its entirety, it was much more likely to find authority to consent than if it were to look at only certain portions of the room. *Id.*

66 This is particularly troubling because the home is the center of one's private life, Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring), and in no portion of the home is this more true than in the bedroom. Furthermore, the protection of the home from unwarranted invasion by the government was the foremost objective of the Fourth Amendment. *See supra* Part I.

67 Illinois v. Rodriguez, 497 U.S. 177, 186 (1990). Similar to actual authority to consent, apparent authority is judged after the fact in a courtroom. Unlike actual authority, it is judged

Fischer called the police to report that her boyfriend had beaten her.[68] When the police met her at her mother's house, she told them the incident occurred in a certain apartment and she would take them there.[69] She referred to the apartment as "our apartment," had a key, and claimed to have clothes and furniture there.[70] In actuality, Fischer had not lived in the searched premises for almost a month.[71] Nonetheless, she unlocked the door and permitted the police to enter.[72] The police saw cocaine in plain view.[73]

The Court opined that to meet the reasonableness requirement of the Fourth Amendment, police officers must always act reasonably but need not always be correct.[74] In a case where actual authority to consent is insufficient under *Matlock*, if "the facts available to the officer at the moment . . . [would] 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises,"[75] then the evidence should not be excluded, because there was apparent authority to consent.[76] The case was remanded to determine whether the officers reasonably believed that Fischer had validly consented.[77]

Apparent authority allows leeway for officers to make mistakes as long as the mistakes are "'those of reasonable men, acting on facts leading sensibly to their conclusions of probability.'"[78] The *Rodriguez* Court further specified that even when the party purporting to consent claims to live on the premises, circumstances could lead a reasonable person to doubt that assertion, and police officers must inquire further to determine authority before a search can be conducted.[79] The requirements of reasonableness have changed since *Rodriguez*,

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by considering the reasonableness of the police action at the scene rather than the objectively true facts about authority.

68 *Id.* at 179.

69 *Id.*

70 *Id.* It is unclear from the record whether she stated that she still lived there or had lived in that apartment previously. *Id.*

71 *Id.* at 181.

72 *Id.* at 180.

73 *Id.*

74 *Id.* at 185–86.

75 *Id.* at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).

76 This is similar to the good faith exception to the exclusionary rule, which requires courts to admit evidence obtained under an improper warrant if the officers executing the warrant acted in good faith on what appeared to be a facially valid warrant. United States v. Leon, 468 U.S. 897, 922–26 (1984).

77 *Rodriguez*, 497 U.S. at 189.

78 *Id.* at 186 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

79 *Id.* at 188.

prompting the need to slightly alter the rule for apparent authority to remain consistent with its origins.[80]

C. Georgia v. Randolph

The Supreme Court's most recent foray into third-party consent searches was *Georgia v. Randolph*[81] in the 2005 Term. In that case, police responded to a domestic dispute, and Janet Randolph met the police at the front door.[82] Scott Randolph, Janet Randolph's husband, returned shortly thereafter.[83] Ms. Randolph told the police of her husband's cocaine use and indicated that there was evidence of his drug use in the house.[84] The police requested consent to search, which Mr. Randolph "unequivocally refused."[85] Ms. Randolph then consented and led the police to an upstairs bedroom that she identified as her husband's.[86]

The Supreme Court held that the warrantless evidentiary search of a home over the express refusal by a physically present resident cannot be justified as reasonable, within the meaning of the Fourth Amendment, by the consent of another resident.[87] Even more important than this holding is the Court's reasoning. First, the Court stated that the third-party consent exception is "'jealously and carefully drawn.'"[88] Second, the Court reiterated that the principle derived from its colonial and common-law roots that the home continues to merit special protection as the center of our private lives.[89] Third, the Court looked to widely shared social expectations to determine the reasonableness of this warrantless home search.[90]

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80 *See infra* Part III.

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

82 *Id.* at 107.

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* at 120.

88 *Id.* at 109 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

89 *Randolph*, 547 U.S. at 115 (citing Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)).

90 *Id.* at 111 ("The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations."). This approach has recently been criticized as creating unpredictable results and circumventing the principles of federalism. *The Supreme Court, 2005 Term, Fourth Amendment—Consent Search Doctrine—Co-occupant Refusal to Consent*, 120 HARV. L. REV. 163, 171–72 (2006). Nonetheless, analyzing widely shared social expectations is the Court's current approach to judging reasonableness within this context.

Assessing widely shared social expectations under the facts in *Randolph*, the Court held that a caller would not find sufficient reason to enter the home if one occupant allowed it but the other was present and objecting.[91] The ruling excluding the seized evidence rested on that analysis; therefore, widely shared social expectations must be the critical test for reasonableness for third-party consent searches.[92] By striking down this search on facts similar to those previously upheld by most courts,[93] the Court further winnowed the scope of the third-party consent exception.

III. Rules Proposed

To address the problems detailed above and accommodate the increasing prevalence of shared living arrangements, this Note proposes two rules to modify both actual and apparent authority. These rules ensure that the Fourth Amendment protects people regardless of where they live or whether they can afford to live alone.[94] First, this Note proposes clarifying the scope of third-party consent analysis to separately analyze each narrowly defined area or object searched for whether actual authority to consent to its search exists. Second, a housemate's apparent authority to consent should only be deemed effective when officers ask simple clarifying questions because only then can any inferences that they draw about authority be reasonable.

A. New Rule for Actual Authority–Refining the Matlock *Approach*

To determine whether a person had actual authority to consent to the search of his housemate's bedroom, courts should separately analyze authority to consent to police entering the bedroom and authority

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91 *Randolph*, 547 U.S. at 113.

92 This Note does not purport to address spousal situations, such as was the case in *Randolph*; however, that *Randolph* involved spouses does not detract from the applicability of widely shared social expectations in assessing the reasonableness of third-party consent searches of unrelated housemates. There is nothing in the principle itself limiting its use to marital situations, and as a matter of common sense, looking at widely shared social expectations seems to be a fair measure of reasonableness.

93 *Randolph*, 547 U.S. at 108 n.1 (listing the prior cases where similar searches were upheld).

94 One judge criticized his court's failure to acknowledge modern living arrangements and the number of people who share living spaces to afford the cost of rent. United States v. Kelley, 953 F.2d 562, 566–67 (1992) (Reinhardt, J., dissenting). This criticism was leveled prior to a significant increase in the number of persons who share living quarters, *compare* HOBBS & STOOPS, *supra* note 2, app. A, at A-49 (indicating that 4.8 million people lived with one or more unrelated persons in 1990), *with* 2005 Census Data, *supra* note 1, tbl.H1 (indicating that almost 10 million people lived with one or more unrelated persons in 2005), so the persuasive force of Judge Reinhardt's concerns has increased further in the fifteen years since that case.

over each narrowly defined area or object searched.[95] The first question to consider is whether under *Matlock*'s "access or control for most purposes test," the consenting party had access to some portion of the residence to permit initial entry.[96] If that threshold is satisfied, the next question is whether under the *Matlock* test he had access to the bedroom in question. Based on plain view principles, evidence discovered as a result of a plain view search from an area of the residence to which the consenting party has "joint access or control for most purposes" should be admissible.[97] If a court finds sufficient access or control such that the consenting party had actual authority to consent in the first step of this analysis, this authority only permits the officer to enter the room and seize items in plain view if their incriminating nature is "immediately apparent."[98]

If the police were constitutionally permitted to enter the room, the court would next consider whether the police could conduct an additional search and go beyond what plain view would allow. To allow police to conduct a further search such as opening drawers or manipulating objects,[99] the consenting party must have authority to consent to the search of the narrowly defined area of the room or object searched. Courts do not need to analyze each "metaphysical subtle[ty]" such as treating each dresser drawer or each closet shelf differently than the others.[100] This rule follows the Court's unwillingness as set forth in *Frazier v. Cupp*[101] to consider the "metaphysical subtleties" of separately analyzing each pocket of a duffel bag.[102]

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95 Only in areas where useful evidence is found could such a challenge to the validity of the search come before a court. That limitation confines the scope of how many different areas a court would need to analyze.

96 At this level, the test begins to fall into the same failing as *Matlock*, which has provided little guidance as to what constitutes access for most purposes. *See supra* Part II.A. Nonetheless, the proposed analytical process will significantly reduce the inconsistencies in application. *See infra* Part VI.A.

97 A plain view search requires that the items in question be in plain view from a place that the officer is entitled to be standing. *See* Arizona v. Hicks, 480 U.S. 321, 334 (1987) (O'Connor, J., dissenting); Coolidge v. New Hampshire, 403 U.S. 443, 465–67 (1971) (plurality opinion).

98 Horton v. California, 496 U.S. 128, 136 (1990); *see Hicks*, 480 U.S. at 326–27 (holding that probable cause is required for seizure of evidence in plain view).

99 What constitutes an additional search beyond what is permitted by plain view should be judged by *Hicks*, 480 U.S. at 324–25.

100 Thomas Fording's article helps provide the boundaries of what distinctions are metaphysically subtle in this context. Fording, *supra* note 65, at 300 ("The distinction between individuals' expectations of privacy in their bedroom closets, as compared to their overall expectations of privacy in their bedrooms, is not 'metaphysically subtle.'").

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

102 *Id.* at 740.

If a court deems actual authority to consent—either to the entry of the bedroom or to a further search thereafter—lacking, evidence discovered should be suppressed subject to the usual exceptions to the exclusionary rule unless the court finds apparent authority to consent.[103] Apparent authority to consent may substitute for actual authority at each level of analysis.[104]

Matlock's joint access or control test should be interpreted in light of the original purposes of the Fourth Amendment and the assumption of the risk justification underlying it. *Matlock* stated, "[I]t is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have *assumed the risk* that one of their number might permit the *common area* to be searched."[105] The threshold of joint access or control for most purposes must be fairly high to justify applying assumption of the risk to undermine the sanctity of the home free from unwarranted intrusion. Based on *Matlock*, this notion of assumption of the risk only applies where widely shared social expectations so indicate and in areas that can reasonably be defined as "common areas." The proposed analysis, differentiating between consent to enter the bedroom and consent to search narrow areas of it, prevents courts from expanding a consenting party's hypothetical access to a portion of a room into blanket access to all areas via the assumption of the risk doctrine.

The proposed rule for actual authority clarifies the *Matlock* holding as applied to housemates, but is still consistent with the Court's jurisprudence. Consistent with *Matlock,* the test for actual authority remains "joint access or control for most purposes."[106] The rule proposed here is actually more faithful to *Matlock*'s reasoning than are some lower court cases such as *Kelley*.

Consistency with *Matlock* is further evident when that case is reconsidered under the proposed rule. In *Matlock*, Graff had been sleeping in the searched room regularly, and her clothes were found in

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103 The exclusionary rule prohibits the use of evidence obtained illegally. Mapp v. Ohio, 367 U.S. 643, 655 (1961). Because that rule would exclude a significant amount of evidence, the Court has also created exceptions to it. *See, e.g.*, Illinois v. Krull, 480 U.S. 340, 349 (1987) (extending good-faith exception to include reasonable reliance on statute); United States v. Leon, 468 U.S. 897, 913 (1984) (creating good-faith exception to the exclusionary rule); Rakas v. Illinois, 439 U.S. 128, 133–34 (1978) (narrowly defining standing to challenge admission of evidence obtained in violation of the Fourth Amendment).

104 *See* Illinois v. Rodriguez, 497 U.S. 177, 186 (1990).

105 United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (emphasis added).

106 *Id.*

the dresser.[107] This level of access would constitute joint access or control for most purposes such that it would be reasonable to consider Matlock to have assumed the risk that Graff would allow the police to enter the room or search the dresser. The search of the closet is the next step in the analysis, but because she was already using the dresser, there were women's clothes found in the closet and the opinion does not specify otherwise,[108] it seems reasonable to assume that she also used or had significant access to the only closet in her bedroom. Therefore, under the proposed rule, actual authority to consent would still have existed in *Matlock*.

B. New Rule for Apparent Authority

The rule for apparent authority to consent should require law enforcement officers conducting a search based on third-party consent to ask simple clarifying questions. Police officers should be guided by the proposed structure for actual authority to consent and should assess first whether there is sufficient authority to permit entrance into a particular bedroom, and second, whether there is sufficient authority to search a particular area of the room. The only required clarifying questions would be those that a reasonable person would ask to determine the scope of authority such as "Do you live here?" "Is this your bedroom?" or "Do you use this closet?"

This requirement does not significantly alter the *Rodriguez* rule. It only adapts it to modern living arrangements. Because the bounds of what is reasonable have changed since *Rodriguez*, the clarifying question requirement has become necessary. This rule abides by *Rodriguez*'s rationale that police officers need not always be correct, but must always act reasonably.[109] Under *Rodriguez*, clarifying questions were required when the authority to consent appeared ambiguous.[110] Given the wide array of living arrangements in current American society, this authority is now virtually always ambiguous. It is never safe to assume that the party answering the door has dominion over the entire residence.

Moreover, this clarifying question requirement only applies to apparent authority because the reasonableness of police action is irrelevant to a court's determination of whether actual authority existed. Practically, law enforcement officers would probably be best served

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107 *Id.* at 168.

108 *See id.* at 166–68, 169 n.3.

109 *Rodriguez*, 497 U.S. at 185–86.

110 *Id.* at 188.

by asking clarifying questions every time they obtain third-party consent so that relevant evidence is not excluded in the event that they are mistaken and actual authority does not exist; failure to ask such questions, however, has no import if the consenting party has actual authority to consent. If a person lies to the police regarding his authority over the bedroom, area, or object in response to questioning, the police can still reasonably rely on what he says without adverse evidentiary consequences. To better explain how these rules will work in practice, the next Part applies them to several test cases.

IV. Rules Applied

A. Studio Apartment

An interesting scenario that explicates the proposed rules is where two or more people share a studio apartment.[111] Assume that each resident has a separate dresser in which he keeps clothes and personal items such as letters and credit card statements. Further assume that neither roommate has given the other permission to use his dresser or any access to it. Additionally, the two roommates share a desk.

Under this approach, either roommate would have actual authority to consent to the police entering the room and conducting a plain view search because each has joint access or control for most purposes over the apartment. Any further search requires assessing the narrow area of the room to be searched and the consenting party's authority over it. If one roommate attempts to consent to the search of the other roommate's dresser, he will not have actual authority to consent because he has no access to that object.

If a police officer wishes to search the desk without a warrant, he could get consent from either resident because each roommate uses the desk. It does not matter if one roommate uses certain drawers and not others because that distinction would be "metaphysically subtle."[112]

A court would next consider what would be required to find apparent authority to consent. First, the officer must ask if the person purporting to consent lives there. Next, the officer must inquire if he is the only person who lives there. This question is obligatory in this

111 A college dormitory room would provide the same scenario and analysis when assessing one resident's authority to consent valid against another resident—excluding any potential university authority. The scope of this Note is limited to unrelated persons who live together, so this hypothetical is similarly limited.

112 *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969).

situation where an officer sees two beds and dressers in the room because any reasonable person would suspect that there might be more than one resident. Even if there is only one bed in the room, it is probably obligatory for an officer to ask whether anyone else lives there because of the inherent ambiguity in modern living arrangements. The officer should then ask if the party purporting to consent lives in the room the officer wishes to search.[113] The officer must then inquire about any particular area of the room. Apparent authority cannot exist if the officer does not ask these clarifying questions about particular areas, because no reasonable officer would assume authority to consent over every area of a shared bedroom.[114] If there is neither actual nor apparent authority to consent, the search is unconstitutional.[115]

B. United States v. Kelley

In *United States v. Kelley,* Holly Bakker truthfully told the police that she had rented the apartment in question with David Kelley "as a purely financial arrangement" three days prior to the search and that they had separate bedrooms.[116] She further told police that she was permitted to use Kelley's bedroom to use the only telephone in the house, which was located in the back right-hand corner of his room.[117] She assumed this to be true, but had neither discussed it with Kelley nor actually entered the room.[118] Upon this authority, police entered Kelley's bedroom and searched it, seizing incriminating evidence from both his closet and a chair.[119] The opinion does not indicate where in the room the chair was located, but it describes the closet as located in the "far left-hand corner" of the bedroom.[120] Both the door to the closet and the door to the bedroom were open.[121] On these facts, the

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113 This last question is solely to clarify that two people share this bedroom even though the answer seems obvious because this is only a studio apartment and has only one room. It might even be deemed unnecessary by a particular court and not a question that a reasonable person would ask in this situation.

114 Apparent authority is unnecessary if the consenting party had actual authority to consent.

115 *See Rodriguez*, 497 U.S. at 188–89.

116 United States v. Kelley, 953 F.2d 562, 564 (1992). The facts of this case were discussed briefly earlier in this Note, *see supra* Part II.A, but will be analyzed in detail here for the purposes of application.

117 *Kelley*, 953 F.2d at 564.

118 *Id.* at 567 n.2 (Reinhardt, J., dissenting).

119 *Id.* at 564 (majority opinion).

120 *Id.*

121 *Id.*

Ninth Circuit held that Bakker had joint access and control for most purposes of the residence, and she had access to his bedroom as well.[122] According to the court, this access was sufficient to permit the search.[123]

The approach to actual authority advocated here considers first whether Bakker had sufficient authority to consent to the police entering the home. Sufficient authority is judged by the *Matlock* test.[124] In this case, she had sufficient authority by virtue of being a resident. It is safe to assume that she had, at the very least, joint access and control over ingress and egress from her bedroom.

The second consideration is what portions of the house she had the authority to consent to be searched. That authority encompasses all areas in which she met the *Matlock* test. The living room, perhaps a kitchen or other shared space, as well as her bedroom probably would qualify. The relevant portion of the house in this case, however, was Kelley's bedroom. Whether Bakker could constitutionally grant the police permission to enter depends on a second application of the *Matlock* test—this time to the bedroom as a whole.[125] Although courts may differ slightly on the threshold of sufficient authority to meet this standard, it defies logic to construe her unsupported belief that she had a right to enter the room to use the telephone as joint access or control for most purposes over the room. Her access is quite the contrary: perceived limited access for one purpose without exercising control.[126] It would depart significantly from *Matlock*'s rationale to impute that Kelley assumed the risk that his housemate would consent to the search of his bedroom simply because she believed that she could enter to use the phone.

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122 *Id.* at 566 ("Ms. Bakker did have joint access and control, for most purposes, of the residence she shared with Kelley, which was the premises to be searched. She had access not only to the common areas of the apartment, but also to Kelley's separate bedroom where the apartment telephone was located.").

123 *Id.*

124 United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

125 Because the bedroom door was open, it is important to consider plain view principles. If the officer could stand in an area that Bakker could permit him to stand and see the evidence in question, this would not have been a search at all. *See* JAMES B. HADDAD ET AL., CRIMINAL PROCEDURE: CASES AND COMMENTS 447 (6th ed. 2003). For present purposes, this Note assumes that such a plain view search was not available because the Ninth Circuit's opinion neither relied upon nor mentioned this doctrine.

126 The Ninth Circuit's opinion, while seemingly at odds with this standard, did not apply it to the bedroom itself. *Kelley*, 953 F.2d at 566. The court applied the *Matlock* test to the apartment as a whole, then applied some less stringent test to the bedroom itself: whether she "had access." *Id.* Under the proposed rules, Bakker could not permit the officer to enter Kelley's bedroom, but to flesh out the analysis, the author assumes, arguendo, that such authority existed.

Even if Bakker had authority to allow the police to enter Kelley's bedroom, this authority would only permit the police to conduct a plain view search. Any additional search would require further scrutiny of authority to consent.[127] Although the opinion is not specific about the details of the bedroom or the precise location of the evidence, the evidence found on the chair would likely be in plain view. It would therefore be subject to seizure if there were probable cause to believe that it was either contraband or evidence of a crime.[128] The evidence found in the closet may or may not have been visible in plain view from elsewhere in the bedroom because the closet door was open. If it was in plain view, it would be subject to the same analysis as the evidence on the chair. If not, Bakker could not consent to the search of the closet unless the *Matlock* test was met with respect to the closet.

In *Kelley*, the police did ask clarifying questions,[129] but that alone is not enough for apparent authority to consent.[130] The question becomes whether it was reasonable for police to act on Bakker's responses to these clarifying questions in conducting a warrantless search.[131] The apparent authority analysis examines first, whether there was apparent authority to consent to the search of the bedroom and then, whether the same was true of the closet. The analysis considers whether the police officer's mistake in finding sufficient authority to enter Kelley's room was a mistake "'of [a] reasonable [man], acting on facts leading sensibly to [his] conclusions of probability.'"[132] This approach also questions whether the police had sufficient information for a reasonable person to make this determination or whether a reasonable person would have inquired further. It was unreasonable to perceive sufficient authority over the bedroom closet based on use of the telephone, and the officer should have further inquired whether Bakker had actually even entered Kelley's bedroom.

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127 What constitutes an additional search would be judged under *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987).

128 *See id.* at 326–27.

129 *Kelley*, 953 F.2d at 564. It was because of that questioning that there was a factual basis in the court's opinion for the above analysis.

130 *See* Illinois v. Rodriguez, 497 U.S. 177, 187 (1990).

131 The *Kelley* court never reached this analysis because it was unnecessary after it found actual authority to consent.

132 *Rodriguez*, 497 U.S. at 186 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

C. United States v. Aghedo

In *United States v. Aghedo*, homeowner and resident, Adeniji Dairo, permitted the FBI to search a room in her home in which Raymond Aghedo was staying.[133] She had significant access to Aghedo's room, and he was not paying rent.[134] She was allowed to enter the room when Aghedo was not present.[135] Dairo cleaned the room and kept clothes in the dressers.[136] The relevant evidence was found beneath the mattress and box spring.[137] The court held that Dairo had actual authority to consent to the search because her access to the room was plenary and unlimited.[138]

Applying these rules to those facts, the first consideration is whether Dairo could permit the FBI to enter the home. That threshold is met because she was the homeowner and a resident. The next consideration is whether Dairo could permit the FBI to enter the bedroom in which Aghedo was staying. Her access to the room was significant and she was allowed to enter at her pleasure, so she met the *Matlock* test. Storing clothes in the dresser should also give Dairo authority to permit the FBI to search the dresser. It does not matter whether she was using some or all of the drawers. By virtue of having access to the dresser she could consent to the search of any part of it.[139] Because Dairo could enter to clean, and that presumably included cleaning the area around the bed, she could consent to a search of that narrowly defined area. Thus, this result finding valid consent comports with the Seventh Circuit's holding in *Aghedo*.[140]

Because there was actual authority to consent, it is not relevant whether there was apparent authority. Had there not been actual authority, a court could find it problematic that the FBI did not ask Ms. Dairo specifically about her access to the bed area. Alternatively, a court could also reasonably find the statement about complete and plenary access to the room sufficient to cover all relevant areas. This

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133 United States v. Aghedo, 159 F.3d 308, 309 (7th Cir. 1998).

134 *Id.* That Aghedo was not paying rent does not necessarily defeat his expectation of privacy in the room in which he was staying, because an overnight guest maintains an expectation of privacy in his temporary quarters. Minnesota v. Olson, 495 U.S. 91, 96–97 (1990). Furthermore, actual authority to consent is based on actual use of the property rather than formal property law. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

135 *Aghedo*, 159 F.3d at 309.

136 *Id.* at 309–10.

137 *Id.* at 309.

138 *Id.* at 310.

139 The different drawers would be a metaphysical subtlety that this Note does not consider relevant and the Court is unwilling to assess. *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969).

140 *Aghedo*, 159 F.3d at 310.

would be a close case where courts could reasonably reach different conclusions.

V. Addressing Objections

This Part addresses several potential objections to these rules: that the rules will prove too difficult to implement in practice, that the costs of excluded evidence are too high, that the rules run counter to the jurisprudential trend of loosening restrictions on constitutional violations, and that clarifying questions should not be required in this context just as they are not required when a suspect ambiguously involves his *Miranda* rights.

A. Too Difficult Practically?

One potential objection to these rules is that they are too difficult for police officers to implement.[141] To consider that objection, it is important to consider exactly what this Note asks of the police. First, police officers must ask clarifying questions to determine the scope of authority. Second, they must separately analyze each narrowly defined area to be searched. Neither of these steps is actually difficult to follow in practice.

It will not be difficult for an officer to know what questions to ask. The only required questions are those that a reasonable person would ask to judge authority to consent. That may seem complicated at first, but the required questions will be on the order of "Do you live here?" or "Is this your bedroom?" How difficult would it have been for the police in *Rodriguez* to ask Fischer if she lived in the house they wished to search?[142] It assumes far too little of police to think that

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141 In the Fourth Amendment context, the Court has, in some instances, preferred bright-line rules to provide clear boundaries for individuals to know the scope of their constitutional rights and for law enforcement officers to know the scope of their authority. *See, e.g.*, New York v. Belton, 453 U.S. 454, 459–60 (1981) (creating a bright-line rule that police officers may search the entire passenger compartment of a vehicle as a search incident to a lawful arrest if the arrestee was a recent occupant of the vehicle); United States v. Robinson, 414 U.S. 218, 235 (1973) (creating a bright-line rule that officers may search an arrestee incident to every lawful arrest without considering the likelihood of finding evidence or a weapon); Chambers v. Maroney, 399 U.S. 42, 50–52 (1970) (creating a bright-line rule that police may search an automobile without a warrant as long as there is probable cause). *But see, e.g.*, Ohio v. Robinette, 519 U.S. 33, 35 (1996) (refusing to create a bright-line rule that for consent to search to be valid, police officers must notify the subject of that search of his right to refuse).

142 *See* Tammy Campbell, Illinois v. Rodriguez*: Should Apparent Authority Validate Third-Party Consent Searches?*, 63 U. COLO. L. REV. 481, 498–99 (1992). This shows how one clarifying question would ensure that defendants' rights are not violated by perceiving consent from those who obviously, upon basic inquiry, do not have authority to give it. It may often be that simple to determine a clear lack of authority. It would not have been difficult for police to use Ms.

officers cannot integrate these questions into their standard procedure or that it would be too difficult for them to ask these ordinary questions. For a standardized practical solution, police departments could create a standard set of questions for officers to ask that will be reasonable in most instances.[143]

The requirement of acting reasonably comports with *Rodriguez*,[144] so the rule proposed here cannot be much more difficult than what that case required of police. It continues to provide leeway for police officers because no evidence should be suppressed for lack of apparent authority if an officer makes a reasonable mistake in determining what question to ask.[145] In fact, requiring clarifying questions for every consent search will actually provide further protection for officers from the exclusionary rule. Previously, an officer was required to ask clarifying questions whenever authority was ambiguous,[146] but, if police follow these rules, evidence would no longer be suppressed for failure to ask questions in an applicable situation.

Another potential difficulty for officers is that they will have to make difficult decisions to assess authority to consent to the search of narrowly defined areas. It is true that police officers attempting a search will have to exercise discretion in making this determination. An officer must determine whether, based on the answers to his clarifying questions, the *Matlock* test is met.[147] Although that may seem like an ambiguous determination for an officer to make, it is the same determination that officers must currently make.[148]

The operable differences are that the officer will act with more information from the responses to his questions, and he will need to make this determination about several narrowly defined areas. Although it may seem more difficult for an officer to make this determi-

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Fischer's statements to get a warrant to search for evidence. The only law enforcement benefit derived from Ms. Fischer allowing the search was avoiding the procedural inconvenience of obtaining a warrant.

143 These standard questions would be similar to the department-issued standardized cards from which most police officers read the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966).

144 *See* Illinois v. Rodriguez, 497 U.S. 177, 185–86 (1990) (holding all that is required of officers is that they act reasonably).

145 This portion of the rule also follows the holding in *Rodriguez* that a reasonable mistake in assessing authority to consent should not merit application of the exclusionary rule. *Id.*

146 *Id.* at 188–89.

147 *See* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

148 *Id.* This determination is also similar to the one an officer must make under *New York v. Quarles*, 467 U.S. 649, 658–59 (1984), to determine if there is a sufficient threat to public safety to justify not giving *Miranda* warnings.

nation several times, it is easier to judge whether a person appears to have authority over a closet after you ask him if he uses it than it is to assess consent over a broad area without information under the current indeterminate standard.[149]

B. What About the Cost of Lost Evidence?

A second potential objection to these rules is that they will exclude relevant, probative evidence because more evidence would be considered obtained illegally and would thus likely be inadmissible. This criticism is valid in the small number of cases where evidence would be excluded under these rules that would not have been excluded under certain interpretations of the current rules. But the benefits of these rules outweigh the infrequently incurred cost of lost evidence.[150] Further, this limitation preserves third-party consent as a "'jealously and carefully drawn exception,'"[151] and the range of admissible evidence only appears narrowed in comparison to courts that have run far afield of *Matlock*.[152] Losing probative evidence is an important cost to consider, but the only evidence that could be lost here is evidence illegally obtained by overexpanding the scope of an exception to the warrant requirement. Police could still get a warrant and seize the same evidence or they could wait until someone with seemingly sufficient authority to consent will permit the search. It is only in the marginal case where police attempt neither of these options and unreasonably disregard the bounds of the third-party consent doctrine where relevant evidence may be excluded.

Moreover, similar to Justice Brennan's argument in *United States v. Leon*,[153] perhaps it is not the clarification of the third-party consent exception but rather the Fourth Amendment itself that imposes the cost of lost evidence.[154] Stated differently, we should not consider the

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149 *See supra* Part II.

150 *See infra* Part VI.

151 Georgia v. Randolph, 547 U.S. 103, 109 (2006) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

152 *Compare* United States v. Kelley, 953 F.2d 562, 566 (9th Cir. 1992) (holding that use of telephone in housemate's bedroom was sufficient mutual use to allow consent to search housemate's closet), *and* Wisenhunt v. State, 122 S.W.3d 295, 301 (Tex. App. 2003) (holding that consenting party led officer to defendant's bedroom and that was sufficient to constitute apparent authority to extend the consent search to that room), *with* Matlock v. United States, 415 U.S. 164, 166–67 (1974) (holding that the consenting party had sufficient authority to consent to a search of the only closet in the bedroom in which she slept).

153 United States v. Leon, 468 U.S. 897 (1984).

154 *See id.* at 941 (Brennan, J., dissenting).

evidence lost because the Fourth Amendment never permitted it to be seized in the first place.

C. Contrary to Jurisprudential Trend?

A third potential objection is that these rules oppose the Supreme Court's trend of loosening restrictions on or consequences to law enforcement for constitutional violations. Since the Supreme Court first incorporated the exclusionary rule against the states in *Mapp v. Ohio*,[155] the steady jurisprudential trend has been to permit to be admitted increasingly more evidence obtained illegally by narrowing the scope of the exclusionary rule.[156] This Note is not arguing against that trend because the scope of the exclusionary rule is not here addressed. Rather, this Note argues that the third-party consent exception should be clarified and interpreted more narrowly than it has been in some lower courts.[157]

One reason for the divergent trends in the judicial treatment of the third-party consent exception and the exclusionary rule is that the consent exception is a waiver of a constitutional right,[158] and the Court must not expand the exception so much as to undermine the Fourth Amendment right itself.[159] In contrast, the exclusionary rule is a mere prophylactic,[160] and therefore can be manipulated for policy reasons.[161]

D. Why Require Clarifying Questions in This Context But Not in Another Context?

A fourth potential objection is that the Supreme Court does not require police to ask clarifying questions when a crime suspect ambiguously invokes his right to counsel. The Court suggested in *Davis v. United States*[162] that police ask clarifying questions in this context, but

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155 Mapp v. Ohio, 367 U.S. 643, 655 (1961).

156 *See, e.g.*, *Leon*, 468 U.S. at 923 (creating good-faith exception to the exclusionary rule); Illinois v. Krull, 480 U.S. 340, 349–50 (1987) (extending good faith exception to include reasonable reliance on statute); Rakas v. Illinois, 439 U.S. 128, 133–34 (1978) (narrowly defining standing to raise Fourth Amendment issue).

157 *See supra* Part II.

158 *See* Zap v. United States, 328 U.S. 624, 628 (1946).

159 *See* Ybarra v. Illinois, 444 U.S. 85, 104 (1979) (Rehnquist, J., dissenting) (noting that the exceptions to the Fourth Amendment warrant requirement must be narrowly drawn or they "could swallow the warrant requirement itself").

160 *See Leon*, 468 U.S. at 906.

161 *See id.* at 907–08.

162 Davis v. United States, 512 U.S. 452 (1994).

never actually required them.[163] In *Davis*, the ambiguous invocation came after a suspect had already waived his rights under *Miranda v. Arizona*,[164] so it seems reasonable to place the burden on the suspect to unambiguously invoke his right to counsel, rather than on the police to clarify. Despite the factual situation, the Court still noted that clarifying questions were good policy even where the burden of clarification properly rested on the suspect.[165] Additionally, four members of the Court in *Davis* opined that clarifying questions should be required in such cases,[166] and the Court's statement not requiring them was merely dicta, because the police asked clarifying questions.[167]

Furthermore, the rules considered in this Note only discuss the requirements for reasonable compliance with an exception to the warrant requirement of the Fourth Amendment. That differs from determining whether a defendant's *Miranda* rights were violated because there is no alternative means to procure a confession—it must come from the defendant's mouth. Concerning the third-party consent exception, a clarifying question requirement might make it less likely for the police to obtain consent. The lack of consent, however, would not defeat all opportunity to obtain the desired evidence as it does when a confession is excluded. Here, the police would just need to get a warrant, and the only potential loss in asking clarifying questions would be the convenience of not having to go before a magistrate to prove probable cause.[168]

There may be a slight cost in the loss of probative evidence, but there is good reason to label it slight. The only evidence suppressed would be where the police chose not to obtain a warrant,[169] no actual authority to consent existed, and the police either acted unreasonably in asking questions to determine authority to consent or acted unreasonably in judging the responses to those questions. Moreover, these

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163 *Id.* at 461–62.

164 Miranda v. Arizona, 384 U.S. 436 (1966).

165 *Davis*, 512 U.S. at 461–62.

166 *Id.* at 467 (Souter, J., concurring in the judgment). Several law enforcement advocacy groups also supported this position in *Davis*. *Id.* at 467 n.2 (citing Brief for Americans for Effective Law Enforcement, Inc., et al. as Amici Curiae Supporting Respondents at 5, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949)).

167 *See id.* at 461–62 (majority opinion).

168 *See* Illinois v. Rodriguez, 497 U.S. 177, 192 (1990) (Marshall, J., dissenting) (noting that the sole law enforcement purpose underlying consent searches is avoiding the inconvenience of the warrant process).

169 If the police attempt to obtain a warrant and are denied by a magistrate, it is foolhardy to complain that the government has lost evidence that it rightfully should have in its possession.

rules are no more difficult for law enforcement officers to apply than the status quo.

VI. Advantages of This Approach

These objections must be measured against the need for the proposed rules and their practical and doctrinal benefits. First, the rules will enhance uniformity across circuits because the current state of the law is unclear. Second, they will preserve the Founders' intent to protect the sanctity of the home from unwarranted governmental intrusion. Third, they comport with widely shared social expectations and accommodate modern living arrangements. Fourth, they eliminate the incentive for police not to ask questions to determine the scope of authority to consent.

A. Uniformity

The first benefit of the proposed rules is greater uniformity across circuits. If a court applies a lenient standard to determine when there is sufficient access to someone's bedroom as a whole to consent to a search, that standard would not necessarily defeat the expectation of privacy that the resident may have in certain intimate areas to be judged separately. Moreover, the differences in scope of the analyzed areas and the presumptions employed were at least as responsible for the circuit split as were different standards for sufficient access.[170] With the uniformity that these rules would bring to these first two differences, courts can develop the bounds of "access for most purposes" case by case in a more consistent fashion and address that cause of inconsistency. The *Matlock* language is still vague, but it would be nearly impossible to formulate a more specific standard that was worded to encompass every potential shared living arrangement.

B. Preserves Founders' Intent to Protect the Home

Second, these rules reinvigorate protection of privacy in the home—the original purpose of the Fourth Amendment.[171] Without the analytical process they create, courts could come strikingly close

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170 *See supra* Part II.A.

171 *See supra* Part I; United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ."). This protection is still an essential component of the Fourth Amendment. *See* Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("It is beyond dispute that the home is entitled to special protection as the center of the private lives of our people. Security of the home must be guarded by the law in a world where privacy is diminished by enhanced surveillance and sophisticated communication systems.").

to permitting the very ill against which the Fourth Amendment was meant to protect, the general warrant.

Kelley already comes strikingly close to the arbitrary deprivation of liberty that "breathed into this nation the breath of life."[172] The Ninth Circuit allowed the police to search Kelley's bedroom closet without appearing before a magistrate to demonstrate probable cause and receive a warrant specifically identifying the place to be searched and items to be seized.[173] The sole basis for that search was that the house had only one telephone, which was located in Kelley's room, and his housemate assumed that she would be permitted to use it. The proposed analysis would prevent a court from reaching the same result in *Kelley* or similar cases where the consenting party's access was merely hypothetical and negligible.

These rules treat everyone who maintains a subjective expectation of privacy equally under the Fourth Amendment. The home is the center of a person's private life,[174] and the bedroom is the center of privacy in the home. If financial circumstances compel a person to live with other unrelated people, allowing his housemates to authorize a search too freely would undermine his constitutional right to be free from unreasonable search and seizure in his most private place.[175] The strength of the paramount right to security in one's home that preceded the Fourth Amendment should not depend on a person's financial circumstances.[176]

C. *Adapts the Law to Changes in Modern Living Arrangements to Meet Widely Shared Expectations*

Third, these rules would account for changes in the variety of living arrangements and meet current social expectations. The central requirement of a search, deriving directly from the text of the Fourth Amendment, is reasonableness.[177] It is no longer reasonable to enter

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172 Adams, *supra* note 22, at 276.

173 United States v. Kelley, 953 F.2d 562, 566 (9th Cir. 1992).

174 *Carter*, 525 U.S. at 99 (Kennedy, J., concurring).

175 The Fourth Amendment protections apply most forcefully in the home. Payton v. New York, 445 U.S. 573, 585–90 (1980). The presumptive unreasonableness of warrantless searches of a home should not be easily cast aside by attenuated application of the third-party consent exception to the warrant requirement.

176 This assumes that the person demonstrates a subjective expectation of privacy regarding his effects. Otherwise, under traditional Fourth Amendment jurisprudence, police intrusion upon these effects would be no search at all. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

177 *See* Illinois v. Rodriguez, 497 U.S. 177, 183 (1990) ("What [the defendant] is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur

a shared dwelling and begin walking into different bedrooms without inquiring as to whose bedroom is whose. Widely shared social expectations dictate even more caution before opening an enclosed space like a dresser or a closet. They require additional questions as to whether it is really the consenting party's closet and whether it is really permissible to enter.

The rise in housing prices has forced people to share residences much more frequently than when the Court decided *Rodriguez* eighteen years ago.[178] *Rodriguez* noted that ambiguous circumstances could exist where it would be unreasonable to find apparent authority to consent without further inquiry.[179] What has changed since that ruling is that apparent authority to consent has become inherently ambiguous, and further inquiry is now always necessary.

The starting point in Fourth Amendment analysis is whether the subject of the search has a subjective expectation of privacy that society judges as objectively reasonable.[180] In the case of shared living arrangements, it would be unfair to impute that any person sharing his residence waives his subjective expectation of privacy in all of his possessions and assumes the risk that they may be searched. Widely shared social expectations dictate the opposite and provide strong indicia of objective reasonableness.

People who share a residence may lose an expectation of privacy from their housemates in some portions of their residence, but they would be appalled to learn that they have lost the reasonable expectation of privacy in their entire residence and have assumed the risk that the entire premises may be searched without cause or their consent.[181]

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unless he consents; but that no such search will occur that is 'unreasonable.'" (quoting U.S. CONST. amend. IV)).

178 See comparison of HOBBS & STOOPS with 2005 Census Data, *supra* note 94 and accompanying text. A recent Harvard University study confirms the impact of the increase in housing prices on residential arrangements in the United States. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2006, at 25 (2006), *available at* http://www.jchs.harvard.edu/publications/markets/son2006/son2006.pdf ("Affordability problems are spreading rapidly. Fully one in three American households now spends more than 30 percent of income on housing, and one in seven spends more than 50 percent. The growing shortage of affordable units forces millions of families to make difficult choices to pay for housing—sacrifice other basic needs, make long commutes, and/or live in crowded or inadequate conditions."). Since 1990, the average renter's gross rent has increased by three percent of his income. *Id.* at 31.

179 *Rodriguez*, 497 U.S. at 188.

180 *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

181 Some authors argue that people do not really understand or guard against the risk that spaces that they share with others will be open to anyone but that other person. *See* Kagehiro & Laufer, *Social Psychology*, *supra* note 46, at 43–45. Accordingly, they argue that the assumption

Widely shared social expectations dictate that a person should not go through the belongings of another where the owner subjectively demonstrates an intent to maintain privacy. This Note applies that expectation to third-party consent searches.

Matlock's holding was justified by assumption of the risk,[182] but this doctrine should be cautiously applied to portions of a shared residence in the case of housemates. It is applicable only in areas where the subjective expectation of privacy is actually lowered by allowing another person significant access.[183] The scope of the assumption of risk doctrine is protected by assessing joint access and control for most purposes in several different steps. The person sharing a studio apartment maintained a subjective expectation of privacy in his dresser, and it would be unreasonable to consider him to have assumed the risk of a police search without a warrant or his consent.[184] That same person, however, decided to keep some of his belongings in a shared desk. He demonstrated no subjective expectation of privacy in the desk, so it is reasonable to deem him as having assumed the risk of a police search upon his roommate's consent.

D. *Eliminates Incentive for Police Not to Inquire Further, but Still Only Requires Reasonableness*

Fourth, the rule for apparent authority to consent advocated here eliminates the incentive for police officers not to ask clarifying questions that might reveal a lack of authority to consent and eliminates the incentive to judge authority based on incomplete information.[185] Currently, police are best served not to ask questions because the answers could reveal information upon which they could no longer rea-

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of the risk doctrine in *Matlock* is therefore not consistent with human psychology. *Id.* Though this Note does not go so far as to argue that application of the assumption of the risk doctrine is invalid here, this Note does argue that the Kagehiro & Laufer articles support the assertion that the doctrine should only be applied in limited fashion and not to the entire residence. It is unfair and unreasonable to deem someone as having assumed the risk that certain areas of their private space will be open to others unless they in fact make it open to another.

182 United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

183 I recognize the argument that as a matter of psychology, people may not really understand and perceive this risk. *See* Kagehiro & Laufer, *supra* note 46, at 44. But it does seem reasonable to impute this doctrine when the subjective expectation of privacy has been demonstrably lessened.

184 *See supra* Part IV.A.

185 *See* Michael C. Wieber, *The Theory and Practice of* Illinois v. Rodriguez*: Why an Officer's Reasonable Belief About a Third Party's Authority to Consent Does Not Protect a Criminal Suspect's Rights*, 84 J. CRIM. L. & CRIMINOLOGY 604, 626 (1993) (arguing that "[a]gents continue to lack the incentive to adequately investigate and discover the true state of affairs").

sonably rely.[186] It would not have been difficult for police to ask Ms. Fischer in *Rodriguez* if she lived in that apartment,[187] but because police did not ask, the court upheld the search of Mr. Rodriguez's home based on the apparent authority of someone with whom he no longer lived.[188]

The proposed rules encourage police officers to judge authority to consent based on actual information instead of conjecture. In encouraging police to gather additional information, these rules do not go so far as to require police always to be correct but only always to act reasonably. These rules are not overly stringent in requiring all possible questions—they require only that officers ask the questions that a reasonable person would ask to determine the scope of authority to consent. Reasonableness is still sufficient.

Conclusion

Actual authority to consent to search a shared residence should be clarified to require separately analyzing each area or object to be searched, and apparent authority to consent should not exist unless officers ask clarifying questions. These rules promote the original purposes of the Fourth Amendment, enforce widely shared social expectations, and prevent the strength of Fourth Amendment protections from depending on wealth.

The proposed rule for actual authority to consent is consistent with *Matlock* itself. It does, however, resolve a split in authority over how to interpret *Matlock*, which will make Fourth Amendment jurisprudence less dependent on where a particular defendant lives. Lower federal and state courts can and should adopt this approach without any need for a mandate from courts above.

The clarifying question requirement is also largely consistent with *Rodriguez*. But the factual determination that residential arrangements are inherently ambiguous is one that lower courts may not be comfortable making without guidance from higher courts. If that is so, this rule for apparent authority may require a Supreme Court ruling to become law.

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186 *Id.*

187 Campbell, *supra* note 142, at 498–99.

188 Illinois v. Rodriguez, 497 U.S. 177, 183 (1990).