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THIRD PARTY CONSENT AND CONTAINER SEARCHES IN THE HOME

Harlan Thomas Mechling*

Abstract: Circuit courts disagree as to whether law enforcement officers have a duty to inquire about a resident’s actual authority to consent to searches of ambiguous containers in a common area. Two circuit courts use the *ambiguity* approach and two circuit courts use the *obviousness* approach. The ambiguity approach articulated by the D.C. Circuit in *United States v. Peyton* provides protection for individuals’ rights while placing a minimal burden on law enforcement officers. In *Peyton*, the D.C. Circuit held that law enforcement officers have a duty to ask clarifying questions if ownership over a container is *ambiguous*. The ambiguity approach advanced by the *Peyton* court is a well-balanced approach to handling third party consent cases. The obviousness approach, which allows officers to search any containers that do not obviously belong to someone other than the consenting party, gives too much power to police and may infringe on the absent tenant’s reasonable expectation of privacy. The ambiguity approach is superior to the obviousness approach, but to properly safeguard Fourth Amendment rights, the Supreme Court should adopt a bright-line rule requiring law enforcement officers to inquire before searching *any* container in a common area, regardless of the level of ambiguity. This solution will reduce the administrative costs of case-by-case inquiry into the amorphous concept of ambiguity and advance the common law tradition of protecting the privacy of individuals in their home.

INTRODUCTION

Davon Peyton, a young adult, lives in a one-bedroom apartment with his grandmother.¹ Both Peyton and his grandmother are on the lease—she lives in the bedroom, and Peyton lives in a corner of the living room.² The police suspect Peyton has something illegal in the apartment, but they do not have a search warrant or even probable cause to request one.³ One day, when the police know that Peyton is not home, officers knock on the door and ask Peyton’s grandmother if they can search the

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1. *See* *United States v. Peyton*, 745 F.3d 546, 549 (D.C. Cir. 2014). In the district court, Peyton referred to his grandmother as “grandmother” and “great-grandmother.” In the Circuit Court, Peyton used the term “great-great-grandmother.” *See id.* at 558 n.1 (Henderson, K., dissenting).

2. *Id.* at 549.

3. *Id.*

apartment.⁴ She consents to a search but warns the police that Peyton keeps his private possessions near the bed in the living room.⁵ The police ignore the warning and proceed to search Peyton's space and personal belongings.⁶

Like Peyton and his grandmother, millions of American adults share a living space with intermingled possessions, making it critically important that American residents have clear rules governing the searches of shared living spaces and containers therein.⁷ These searches implicate a judicially created rule known as the "apparent authority doctrine," which permits law enforcement officers to rely on the consent of a person they reasonably believe has authority over the premises.⁸ However, the circuit courts have developed different approaches to applying the apparent authority doctrine to searches of containers in a home. Thus, the outcome of Peyton's case may differ depending on which court hears the case.

Fortunately for Peyton, his case was heard by the D.C. Circuit in *United States v. Peyton*.⁹ Applying the ambiguity approach, the court held that the police officers' conduct violated the apparent authority doctrine. The court explained that Peyton's grandmother's warning created sufficient ambiguity to make it unreasonable for the police to assume her consent extended to Peyton's personal belongings.¹⁰ In contrast, the Second and Seventh Circuits apply the obviousness approach.¹¹ Under this standard, the search would have been proper because the area searched did not have clear signs of Peyton's ownership, such as a label, that would require the police to conclude that it obviously did not belong to the grandmother.¹²

4. *Id.*

5. *Id.*

6. *Id.* at 549–50.

7. Camille Salama, *More American Households Doubling Up as Rents Rise*, ZILLOW (Oct. 10, 2014), <http://www.zillow.com/blog/doubling-up-161820/> [<https://perma.cc/UG4R-3U4K>].

8. *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (creating the apparent authority third party-consent exception).

9. 745 F.3d 546 (D.C. Cir. 2014).

10. *See id.* at 553–54 (noting that Hicks's statement made it unreasonable for the police to believe that Hicks shared use of the closed shoebox).

11. *See United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006) (applying the obviousness approach); *United States v. Melgar*, 227 F.3d 1038, 1041–42 (7th Cir. 2000) (same).

12. *See Snype*, 441 F.3d at 136 ("No officer ever saw Snype carrying the knapsack or red plastic bag. No marks on the bags linked them to him."); *Melgar*, 227 F.3d at 1041–42 ("there were no exterior markings on the purse that should have alerted them to the fact that it belonged to another person.").

The ambiguity approach articulated by the D.C. Circuit is the only approach currently used in the circuit courts that complies with Supreme Court precedent and widely shared social expectations. However, the case-by-case analysis is both administratively cumbersome and difficult to predict.¹³ This Comment advocates a new approach that goes further in protecting individual privacy.

To properly safeguard individuals' constitutional right to privacy in their home, law enforcement officers should have an affirmative duty to clarify the scope of the consenting party's authority by asking if they have actual authority over each container in a common area.¹⁴ Under this approach, if police receive consent to search a living room and then find a backpack, they would have an affirmative duty to ask the consenting party, "Does this backpack belong to you?"¹⁵ Anything short of this bright-line clarification would render the search unreasonable and outside the protection of the apparent authority doctrine.

This Comment presents this argument in five main parts. Part I of this Comment examines the history of the third party consent doctrine through an analysis of landmark Supreme Court cases. Part II explores the Supreme Court's tradition of protecting individuals' privacy rights in their homes and examines modern trends in cohabitation. Part III considers the conflicting circuit court decisions that arose in the wake of the Supreme Court's decision in *United States v. Matlock*¹⁶ and its progeny. Part IV demonstrates that the two approaches currently used by circuit courts fail to adequately protect individuals' privacy expectations in the home. Part V argues that the Supreme Court should abandon the standard-based approach and adopt a bright-line rule for third party consent searches of closed containers.

I. SUPREME COURT PRECEDENT PERMITS SEARCHES BASED ON THIRD PARTY CONSENT

The Fourth Amendment of the United States Constitution protects citizens from "unreasonable searches" and provides that "no Warrants shall issue, but upon probable cause."¹⁷ "An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens

13. See *infra* Part IV.

14. See *infra* Part V.

15. Cf. *Peyton*, 745 F.3d at 553–54 (involving similar facts, albeit with a shoebox instead of a backpack).

16. 415 U.S. 164, 169–72 (1974).

17. U.S. CONST. amend. IV.

subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents.”¹⁸ However, the warrant requirement is not an absolute prerequisite to reasonableness in conducting a search.¹⁹ The warrant requirement is subject to several judicially created exceptions.²⁰

Perhaps the most frequently used exception to the warrant requirement is voluntary consent.²¹ A consent search takes place after an individual voluntarily agrees to let the government conduct a search. These searches are a critical tool used by police when investigating criminal activity.²² A specific sub-set of this exception, third party consent, has continued to evolve over the last four decades.²³ The term “third party consent” refers to situations where one person consents to the search of an area over which he or she shares common authority with another tenant.²⁴ The Supreme Court has evaluated the issue in a variety of ways in an attempt to create a uniform constitutional standard balancing the needs of law enforcement with the individual privacy rights.²⁵ Four prominent Supreme Court cases, *United States v. Matlock*,

18. *Skinner v. Ry Labor Execs*, 489 U.S. 602, 621–22 (1989); *see also United States v. Jeffers*, 342 U.S. 48, 51 (1951) (“The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both ‘houses’ and ‘effects.’”).

19. *Katz v. United States*, 389 U.S. 347, 357 (1967) (noting that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”).

20. *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (noting that “The Fourth Amendment demonstrates a ‘strong preference for searches conducted pursuant to a warrant’”) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)); *Jones v. United States*, 357 U.S. 493, 499 (1958) (“The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn . . .”).

21. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (noting that it is “well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent”).

22. *See Marcy Strauss, Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 214 (2001–02) (noting that “[a]lthough precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year.”).

23. *See WAYNE R. LAFAYE, CRIMINAL PROCEDURE* § 3.10(d) (4th ed. 2004) [hereinafter LAFAYE, CRIMINAL PROCEDURE]; WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.3(a)-(e) (4th ed. 2004) [hereinafter LAFAYE, SEARCH AND SEIZURE].

24. *See United States v. Matlock*, 415 U.S. 164, 169–72 (1974) (recognizing the common authority doctrine).

25. *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (creating the third party consent exception to the apparent authority doctrine); *Matlock*, 415 U.S. at 169–72 (recognizing the common authority doctrine); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (applying the assumption-of-risk test in cases of shared personal property).

Illinois v. Rodriguez,²⁶ *Georgia v. Randolph*,²⁷ and *Fernandez v. California*,²⁸ demonstrate the nuances of the judicially created apparent authority doctrine. *Matlock* and *Rodriguez* establish the basic rule of the third party consent doctrine, while *Randolph* and *Fernandez* address fact-specific exceptions to the basic rule.²⁹

A. *The Supreme Court Adopted the Apparent Authority Doctrine to Resolve Cases Involving Third Party Consent*

In *United States v. Matlock*, the Supreme Court ruled that someone with common authority over an area may consent to a government search of that area.³⁰ The defendant's living situation in *Matlock* is illustrative of the complexities of modern living arrangements.³¹ The defendant, William Earl Matlock, leased a home and shared the premises with one of the owners and several of the owner's children, including her daughter, Gayle Graff.³² The police suspected Matlock of robbing a federally insured bank.³³ After taking the defendant into custody on his front lawn, the officers detained him in a police car waiting on a nearby street.³⁴ Although the officers were aware at the time of the arrest that the defendant lived in the home, they made no attempt to procure his consent to a search.³⁵ The arresting officers chose to remove the defendant from the area and request consent to search the home from Graff, who was watching from the front door.³⁶ Graff agreed to a search of the house, and officers discovered incriminating evidence in a common area.³⁷

On a grant of certiorari, the Supreme Court upheld the search.³⁸ The Court clarified that to justify a warrantless search on the basis of voluntary consent, the state is not required to demonstrate that consent

26. 497 U.S. 177 (1990).

27. 547 U.S. 103 (2006).

28. 134 S. Ct. 1126 (2014).

29. *Id.* at 1134–36; *Randolph*, 547 U.S. at 115–20; *Rodriguez*, 497 U.S. at 186; *Matlock*, 415 U.S. at 169–72.

30. *Matlock*, 415 U.S. at 169–72.

31. *Id.* at 166–68.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 177.

was given specifically by the defendant, only that permission to search has been obtained from a third party who possessed common authority over the premises—like Graff.³⁹ Additionally, the Court determined that under living arrangements in which two or more individuals share a home, it is reasonable to recognize that any of the co-tenants have the right to consent to a search and that the other co-tenants have “assumed the risk that one of their number might permit the common area to be searched.”⁴⁰ Therefore, by sharing a home with Graff, Matlock had assumed the risk that Graff might exercise her right to allow the police to search the premises.⁴¹

Sixteen years later, the Court substantially expanded third party consent power to include the consent of any third party who officers reasonably believe possesses common authority over the premises.⁴² In *Illinois v. Rodriguez*, a woman claiming to be the victim of an assault at the hands of her ex-boyfriend contacted police to report the incident.⁴³ The woman, Fischer, told the police that the defendant, Rodriguez, was asleep inside the apartment where she and Rodriguez lived together, and that she would be willing to let them inside to arrest Rodriguez.⁴⁴ In reality, Fischer no longer lived in the apartment—a fact not known to the officers.⁴⁵ Upon arrival, Fischer granted the officers entrance to the apartment where they discovered Rodriguez sleeping, as well as evidence of drugs and drug paraphernalia.⁴⁶ In examining the effect of Fischer’s apparent authority to give consent, the Court reasoned that the Fourth Amendment does not require law enforcement conducting a search under an exception to the warrant requirement to always be correct in their assessment of the situation, but only to act reasonably given the circumstances.⁴⁷ The Court remanded the case to the appellate court to determine whether law enforcement reasonably believed that Fischer possessed the necessary authority to grant the search.⁴⁸

39. *Id.* at 169–72.

40. *Id.*

41. *Id.*

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

43. *Id.* at 179–80.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 186.

48. *Id.* at 189.

B. *The Supreme Court Addressed Fact-Specific Exceptions in the Years Following Rodriguez*

In 2006, the Supreme Court in *Georgia v. Randolph* crafted a new, fact-specific exception to its landmark holding in *United States v. Matlock*.⁴⁹ The Court held that a present co-tenant's objection to a search of his home is controlling, even if the other co-tenant is present and consents to the search.⁵⁰ In other words, *Matlock* established that a present roommate can consent to a search of a house, but *Randolph* says that same consent can be blocked by different co-tenants if they are present and assert their Fourth Amendment rights.⁵¹

Eight years after *Randolph*, the Supreme Court decided *Fernandez v. California*, reaffirming its decision in *Rodriguez* that absent residents cannot object to a search—even if the absence is caused by law enforcement removal.⁵² In *Fernandez*, officers knocked on the door of a residence from which they heard screams.⁵³ A woman opened the door and told the officers that she was alone with her son and that no one else was present.⁵⁴ When the officers asked her if she would step outside so that they could conduct a protective sweep of the apartment, Fernandez appeared in the doorway and objected to the sweep.⁵⁵ The officers suspected domestic violence and immediately removed Fernandez from the residence and placed him under arrest.⁵⁶

One hour after the initial arrest, officers returned to the apartment, informed the woman that they had arrested Fernandez, and again asked for permission to search the premises.⁵⁷ The woman consented to the search.⁵⁸ In the apartment, police found gang paraphernalia, weapons, and ammunition.⁵⁹ The Supreme Court held that the search was lawful because Fernandez was removed from the premises for lawful purposes.⁶⁰

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

50. *Id.*

51. *See id.*

52. *Fernandez v. California*, ___ U.S. ___, 134 S. Ct. 1126, 1134–36 (2014).

53. *Id.* at 1130–31.

54. *Id.*

55. *Id.* (internal quotation marks omitted).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1130–31; *People v. Fernandez*, 145 Cal. Rptr. 3d 51, 54 (Cal. Ct. App. 2012), *aff'd*, ___ U.S. ___, 134 S. Ct. 1126 (2014).

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

Matlock and its progeny provide the legal rules governing third party consent cases. The government may rebut the presumption that a warrantless search is unreasonable by showing that someone with authority permitted the law enforcement officers to conduct the search.⁶¹ Such consent need not come from the target of the search; it may come from “a third party who possess[e] common authority over . . . the premises or effects sought to be inspected.”⁶² “Common authority” does not refer to some kind of “technical property interest.”⁶³ It arises simply from

mutual use of the property by persons generally having joint access or control for most purposes, so that it 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.⁶⁴

Even people who do not *actually* use the property can authorize a search if it is reasonable for law enforcement officers to believe they have authority over the property.⁶⁵ Such “apparent authority” is sufficient to sustain a search because the Fourth Amendment requires “not that [officers’ factual determinations] always be correct, but that they always be reasonable.”⁶⁶ To object to a search, a person must be physically present—this objection will overcome the consent of any other resident.⁶⁷ Law enforcement officers may remove the objecting party if they have a lawful reason to do so, and his objection will no longer be effective.⁶⁸

The Supreme Court precedent discussed above informs the discussion of co-tenant consent searches. However, the precedent does not directly address the present issue of whether one housemate may consent to a search of all containers in a common area. The answer to that question requires courts to decide whether an officer can sustain a reasonable

61. *See Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

62. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

63. *Georgia v. Randolph*, 547 U.S. 103, 110 (2006).

64. *Matlock*, 415 U.S. at 171 n.7.

65. *See Rodriguez*, 497 U.S. at 186.

66. *Id.* at 185; *see also id.* at 186 (“Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably.”).

67. *Randolph*, 547 U.S. at 115–20.

68. *Fernandez v. California*, ___ U.S. ___, 134 S. Ct. 1126, 1134–36 (2014).

belief that the consenting party has authority over an item in light of facts that make ownership of the item ambiguous.⁶⁹

II. WHEN DECIDING FOURTH AMENDMENT CASES, THE SUPREME COURT PLACES A HIGH VALUE ON PRIVACY IN THE HOME AND OFTEN CONSIDERS SOCIAL EXPECTATIONS IN ITS ANALYSIS

“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”⁷⁰ The Supreme Court has repeatedly held that individuals are given the most protection from government intrusion when they are in their homes.⁷¹ The Court often supports its reasoning by reference to historical customs and widely shared social expectations.⁷² The number of people in the United States living with roommates has risen dramatically over the last forty years, and the social expectations surrounding roommate relationships have changed with it.⁷³ Thus, the Supreme Court would be warranted in revisiting precedent and adopting a new rule to govern third party consent cases over closed containers.

69. *United States v. Peyton*, 745 F.3d 546, 553–54 (D.C. Cir. 2014).

70. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

71. *Baith v. State*, 598 A.2d 762, 764 (Md. Ct. Spec. App. 1991) (internal quotation marks omitted); *see also* *Michigan v. Clifford*, 464 U.S. 287, 296–97 (1984) (“We frequently have noted that privacy interests are especially strong in a private residence.”); *Payton v. New York*, 445 U.S. 573, 585–86 (1980) (“[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” (quoting *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972))).

72. *See, e.g., Florida v. Jardines*, __ U.S. __, 133 S. Ct. 1409, 1415–18 (2013) (“[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search”); *Randolph*, 547 U.S. at 114 (“Since the co-tenant wishing to open the door to a third party has no recognized authority in law or *social practice* to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.”) (emphasis added); *id.* at 120 (“But nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident’s objection.”).

73. *See infra* section II.C.

A. *The Supreme Court Has Traditionally Maximized Personal Privacy by Providing Individuals the Highest Possible Levels of Protection in their Homes*

In the common law tradition, a man's home is his castle.⁷⁴ The castle metaphor refers to the home as the "exemplary site of personal liberty from state intrusion and control. The state's authority stops at the threshold."⁷⁵ This principle is essential to third party consent searches because it suggests that the Court is reluctant to allow third parties to erode individuals' right to privacy in their homes. The Supreme Court has followed the common law tradition by extending heightened protections to the home under the Fourth Amendment⁷⁶: "when it comes to the [F]ourth [A]mendment, the home is first among equals."⁷⁷

Given the Court's home privacy concerns, it has carved out special rules that apply in the context of home searches by law enforcement officers.⁷⁸ For example, the police cannot take a drug-sniffing dog onto the porch of an individual's home, even though pedestrians are traditionally allowed to walk up to someone's door and knock.⁷⁹ In *Florida v. Jardines*,⁸⁰ the police suspected that Jardines was growing marijuana inside his home.⁸¹ An officer and a drug-sniffing dog approached Jardines's front door with the intent to discover evidence that could support a finding of probable cause for a warrant.⁸² The dog sniffed around the door and signaled to the officer that narcotics were present inside the home.⁸³ The Court held that this constituted an illegal

74. JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS CHANGING PRIVACY 2–5 (2009); see also *Randolph*, 547 U.S. at 115 ("We have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's home is his castle.'") (citing *Miller v. United States*, 357 U.S. 301, 307 (1958)).

75. SUK, *supra* note 74, at 5.

76. *Baith*, 598 A.2d at 764; see also *Clifford*, 464 U.S. at 296–97 ("We frequently have noted that privacy interests are especially strong in a private residence."); *Payton*, 445 U.S. at 585–86 ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (quoting *United States v. U.S. District Court*, 407 U.S. 297, 313 (1972))).

77. *Jardines*, __ U.S. __, 133 S. Ct. 1409, 1414 (2013).

78. See *id.* at 1415–18 (2013); *Kyllo v. United States*, 533 U.S. 27, 35–40 (2001); *Clifford*, 464 U.S. at 296–97 ("We frequently have noted that privacy interests are especially strong in a private residence."); *Payton*, 445 U.S. at 585–86 ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (quoting *U.S. Dist. Ct.*, 407 U.S. at 313)); *Baith*, 598 A.2d at 764.

79. *Jardines*, 133 S. Ct. at 1415–18.

80. *Id.*

81. *Id.* at 1413.

82. See *id.*

83. *Id.*

search because the officer was trespassing on Jardines's property when the search took place.⁸⁴ The Court recognized that some visitors, like Girl Scouts, have an implied license to approach the front door to knock but held that an officer with a drug-sniffing dog does not have such a license, and therefore trespasses if he approaches one's door with a drug dog.⁸⁵ It grounded this conclusion in social custom, saying that "the background social norms that invite a visitor to the front door do not invite him there to conduct a search."⁸⁶

Similarly, the Court has held that using sense-enhancing technology to observe the inside of a home is unlawful, even if law enforcement officers are using this technology from a lawful vantage point.⁸⁷ In *Kyllo v. United States*,⁸⁸ the Court considered the propriety of police use of thermal-imaging technology to detect a marijuana grow operation. Officers suspected Kyllo of growing marijuana inside his home and used a thermal-imaging device—not available to the public—to determine whether Kyllo was using high-powered indoor lights to simulate artificial sunlight.⁸⁹ Using this device, they discovered an unusual amount of heat emanating from the garage.⁹⁰ The police used this evidence to obtain a search warrant which led to the discovery of 100 marijuana plants inside the home.⁹¹ The Supreme Court ruled that even the thermal imaging of Kyllo's home from a lawful vantage point constituted a warrantless search, holding that a person has a heightened expectation of privacy within his home.⁹²

As *Jardines* and *Kyllo* illustrate, the Supreme Court has voiced strong concerns over warrantless government searches that occur inside or even *near* the home.⁹³ In the context of third party consent searches, the government typically conducts a warrantless search *within* the home.⁹⁴ It follows that the Supreme Court would be highly skeptical of any third party consent searches by the government that do not strictly adhere to

84. *Id.* at 1415–18.

85. *Id.*

86. *Id.*

87. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

88. *Id.*

89. *Id.* at 29–31.

90. *Id.*

91. *Id.*

92. *Id.* at 40.

93. *Id.*; *Florida v. Jardines*, __ U.S. __, 133 S. Ct. 1409, 1415–18 (2013).

94. *See, e.g., United States v. Peyton*, 745 F.3d 546, 553–54 (D.C. Cir. 2014); *United States v. Snype*, 441 F.3d 119, 126–27 (2d Cir. 2006).

the rule it advanced in *Rodriguez*—that officers can rely on third party consent only when they reasonably believe that the consenting party has authority over the premises.⁹⁵ This reasonableness inquiry should be informed by Supreme Court precedent establishing that the Fourth Amendment applies most strictly in the home.⁹⁶ Thus, when officers face ambiguity, the third party consent analysis should be weighted in favor of protecting individual rights.⁹⁷

B. The Supreme Court Has Traditionally Considered Social Customs and Expectations in its Analysis of Fourth Amendment Cases

In seminal Fourth Amendment cases, the Supreme Court has placed a high value on social customs.⁹⁸ For example, in *Georgia v. Randolph*, the Supreme Court based the primary legal rationale for its decision on a concept it referred to as “widely shared social expectations.”⁹⁹ The Court reasoned that law enforcement cannot enter a residence if a present co-tenant objects to a search because no “social practice” supports allowing one co-tenant to get her way over another objecting co-tenant.¹⁰⁰ Applying this restrictive standard, the Court invalidated the search of the Randolph home and carved a limited exception to the common authority rule that it deemed more aligned with the particularities of social norms.¹⁰¹

The origin of the social expectations concept within Fourth Amendment law traces back to *Katz v. United States*.¹⁰² Under the *Katz*

95. See *Jardines*, 133 S. Ct. at 1415–18; *Kyllo*, 533 U.S. at 40.

96. *Jardines*, 133 S. Ct. at 1414 (“[W]hen it comes to the [F]ourth [A]mendment, the home is first among equals.”).

97. See Michael C. Weiber, *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, 634 (1993) (“Thus, in balancing the interests of the government and the individual, [Justice Marshall] concluded that the weight clearly falls on the side of protecting defendant’s rights.”).

98. See, e.g., *Jardines*, 133 S. Ct. at 1415–18; *Georgia v. Randolph*, 547 U.S. 103, 115–20 (2006).

99. *Jardines*, 133 S. Ct. at 1415–18; *Randolph*, 547 U.S. at 111.

100. *Randolph*, 547 U.S. at 114.

101. *Id.* at 115–20.

102. 389 U.S. 347 (1967). In *Katz*, the Court held that the government’s activities in electronically listening to and recording defendant’s words spoken into telephone receiver in public telephone booth violated the defendant’s privacy and thus constituted a “search and seizure” within the Fourth Amendment. *Id.* Justice Harlan’s concurring opinion set forth a twofold test for determining whether an expectation of privacy exists: first, a person must have a subjective expectation of privacy, and second, that expectation must be one that society is prepared to recognize as “reasonable.” *Id.* at 361 (Harlan, J., concurring).

ruling, to make a valid claim of protection under the Fourth Amendment, a criminal defendant must demonstrate that he or she had a personal expectation of privacy in the place where the search occurred, and that this expectation is “one society is prepared to recognize as ‘reasonable.’”¹⁰³ The Court in *Rakas v. Illinois*¹⁰⁴ explained that in order to legitimize an expectation of privacy under *Katz*, it must refer to a “source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”¹⁰⁵ In *Rakas*, the Court used social custom to analyze the rights of the occupants of a motor vehicle, none of whom possessed any property or possessory interest in the vehicle or the evidence seized within.¹⁰⁶ The Court held that because the defendants failed to demonstrate a legitimate expectation of privacy in the searched automobile, they therefore lacked a capacity to claim the protection of the Fourth Amendment.¹⁰⁷

The next notable application of the social expectations analysis arose in the context of standing in *Minnesota v. Olsen*.¹⁰⁸ In *Olsen*, the Court explicitly held that an overnight guest in a friend’s home had a legitimate expectation of privacy there, and thus possessed the requisite legal standing to assert a violation of his Fourth Amendment protections.¹⁰⁹ By simply recognizing the “everyday expectations of privacy that we all share” the Court firmly established that an overnight houseguest shares not only in his host’s home, but also in his expectation

103. *Id.*

104. 439 U.S. 128 (1978).

105. *Id.* at 144 n.12.

106. *Id.* at 129–50.

107. *Id.* at 148. In describing the defendant’s constitutional standing, the Court stated that:

They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were “legitimately on [the] premises” in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched.

Id.

108. 495 U.S. 91 (1990).

109. *Id.* at 99 (“From the overnight guest’s perspective, he seeks shelter in another’s home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth, ‘a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.’”).

of privacy therein.¹¹⁰ These cases illustrate that in the Fourth Amendment context, the Court will look to social expectations to inform its analysis. In resolving the circuit split on third party consent, the Court should once again look to social expectations, recognizing that roommate relationships, and the social expectations that surround these relationships, have changed over the last several decades.¹¹¹

C. *Since the Supreme Court's Decision in Matlock, the Number of Americans Living with Roommates Has Risen Sharply*

The number of young adults living with a roommate has increased while married household arrangements wane.¹¹² The share of young adults living with a roommate rose from 6% in 1968 to 27% in 2012.¹¹³ Meanwhile, the share of young adults who are married and living in their own homes plummeted from 56% in 1968 to 23% in 2012.¹¹⁴

This dramatic rise in the share of adults living with roommates may be related to a variety of factors.¹¹⁵ For example, the number of adults cohabiting outside of marriage has increased significantly.¹¹⁶ A study conducted by the University of Minnesota suggests that from the year

110. *Id.* at 98–99 (“That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy. The houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest.”).

111. *See infra* section II.C.

112. *See* Richard Fry, *For the First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements for 18- to 34-Year-Olds*, PEW RES. CTR. (May 24, 2016), <http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-with-parents-edges-out-other-living-arrangements-for-18-to-34-year-olds/> [<https://perma.cc/Q7CF-8M7B>] [hereinafter Fry, *Living With Parents*]. Those trends correlate with an increase in rent prices: today, Americans making the median national income should expect to pay almost a third of their income on rent, marking an all-time high. Salama, *supra* note 7. Many states follow the rule that all assets acquired during marriage are considered “community property.” U.S. INTERNAL REVENUE SERV., *Basic Principles of Community Property Law*, IRS.GOV, https://www.irs.gov/irm/part25/irm_25-018-001.html [<https://perma.cc/Z5E3-NP5K>]. As a result, this Comment, and the studies cited within, treat married spouses different than roommates. Furthermore, the concerns surrounding privacy rights being inadvertently eroded by a third party are generally less prevalent when the two people in question are involved in an intimate personal relationship such as a marriage. *See* *United States v. Matlock*, 415 U.S. 164, 166–67 (1974) (finding that the consenting party had no actual authority and tried to have the actual resident arrested).

113. *See* Fry, *Living with Parents*, *supra* note 112.

114. *See id.* Note that the Pew Research Center tabulations do not consider married couples to be roommates for the purposes of this study. *See id.* fig.3. Thus, any reference to roommates in this Comment refers to unmarried, cohabiting adults.

115. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/> [<https://perma.cc/44EL-NRME>].

116. *Id.*

1960 to 2000, the percentage of unmarried couples living together has increased by more than tenfold.¹¹⁷ Another factor contributing to the overall rise in cohabitation is the trend of adults living with parents.¹¹⁸ In 2014, for the first time in more than 130 years, adults ages eighteen to thirty-four were slightly more likely to be living in their parents' homes than they were to be living with a spouse or partner in their own household.¹¹⁹

A 2005 study of adult living arrangements found that Black and Hispanic persons are the most likely to live at home with parents.¹²⁰ Record-high shares of young Black and Hispanic adults lived in the home of a parent in 2014: 36% for each group.¹²¹ For young Black adults, living with a parent is now the most common arrangement, as only 17% were living with a spouse or romantic partner in 2014.¹²² For young Hispanic adults, living with a parent is also the dominant arrangement, as 30% were living with a spouse or significant other in 2014.¹²³ By comparison, 30% of young white adults lived at home with a parent. The high rate of cohabitation in the Black and Hispanic communities suggests that third party consent cases will affect individuals from these communities at a disproportionately higher rate. Thus, the problems with the third party consent law addressed later in this Comment may affect minority populations more than white populations.

The growth of public housing in the late twentieth century has also contributed to the prevalence of shared living arrangements. There are approximately 1.2 million households living in public housing units in America, managed by some 3300 housing agencies.¹²⁴ Experts speculate that there is a large population of people living in public housing units that go unreported.¹²⁵ These so-called "ghost tenants" are tenants who

117. Catherine Fitch et al., *The Rise of Cohabitation in the United States: New Historical Estimates*, MINN. POPULATION CTR. U. OF MINN. (March 2005), <http://users.hist.umn.edu/~ruggles/cohab-revised2.pdf> [<https://perma.cc/ZE62-Y7FJ>] (figs.1 & 2).

118. Fry, *Living With Parents*, *supra* note 112.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. U.S. DEP'T OF HOUS. & URBAN DEV., *HUD's Public Housing Program*, HUD.GOV, https://portal.hud.gov/hudportal/HUD?src=/topics/rental_assistance/phprog [<https://perma.cc/G6E7-WLBZ>].

125. Joe Anuta, *How Many People Live in the City's Public Housing? The Answer Is in the Trash*, CRAIN'S (October 29, 2015), http://www.crainsnewyork.com/article/20151029/REAL_

are off the records, sometimes sleeping in living rooms or other cramped spaces with other tenants.¹²⁶ In New York City, which is home to the largest public housing authority in North America,¹²⁷ “ghost tenancy” is especially problematic. 400,000 people officially live in New York City’s traditional public housing units, but the New York City Housing Authority estimates that an additional 100,000 or more reside there secretly.¹²⁸ Thus, the population living in New York City’s publicly owned housing could be twenty-five percent higher than the official count provides.¹²⁹

The rising ghost tenant problem, and the greater cohabitation phenomenon it illustrates, complicates application of the third party consent doctrine and raises significant questions about whether courts should rely on third party consent without requiring police to inquire further. Given the ghost tenant problem, courts should consider whether it is reasonable for law enforcement to assume that individuals answering the door have authority to consent to searches. Courts should also consider whether the analysis changes if a legal tenant answers the door and law enforcement officials seek to search space that is obviously inhabited by someone other than the consenting party.

Given the rise in shared living spaces and ghost tenants, it is critically important that United States residents have clear rules governing third party consent to searches of shared living spaces.¹³⁰ The current legal framework, particularly in the Second and Seventh Circuits, requires law enforcement to inquire about the scope of the consenting party’s authority only in special situations.¹³¹ This means that law enforcement officers sometimes do not know if the items they searched actually

ESTATE/151029852/how-many-people-live-in-the-citys-public-housing-the-answer-is-in-the-trash [https://perma.cc/BLW8-2LWF] (“The waste-collection data suggest the Housing Authority’s actual ranks are at least 100,000 larger than the official number.”).

126. Jake Blumgart, *The Ghost Tenants of New York City*, SLATE (Mar. 3, 2016), http://www.slate.com/articles/business/metropolis/2016/03/new_york_city_public_housing_could_have_more_than_100_000_ghost_tenants.html [https://perma.cc/KZZ2-FXQT]. Given the confined scope of this Comment, it does not attempt to resolve the “Ghost Tenant” issue. Rather, the issue is raised here to show the complexity of the third party consent issue given modern living arrangements.

127. *Facts About NYCHA*, N.Y. CITY HOUS. AUTH. (Apr. 11, 2016), <https://www1.nyc.gov/assets/nycha/downloads/pdf/factsheet.pdf> [https://perma.cc/KK56-J9LX].

128. Blumgart, *supra* note 126.

129. *See id.*

130. *See id.*

131. *See* United States v. Snype, 441 F.3d 119, 136–37 (2d Cir. 2006); United States v. Melgar, 227 F.3d 1038, 1041–42 (7th Cir. 2000).

belong to the consenting party or an absent roommate.¹³² Thus, individuals who live with roommates are at a greater risk of having their belongings searched by police without their consent.

III. CIRCUIT COURTS ARE SPLIT REGARDING THE DUTY OF LAW ENFORCEMENT TO CLARIFY AUTHORITY OVER CONTAINERS IN A SHARED SPACE

The apparent authority doctrine permits searches based on third party consent where the officers conducting the search “reasonably believe” that the person who has consented to the search has authority over the premises.¹³³ But when police encounter closed containers in a common area, the apparent authority doctrine becomes difficult to apply.¹³⁴ Because millions of Americans live with roommates, and therefore share authority over common areas, it is essential that Americans have clear rules governing consent searches of closed containers in those areas.¹³⁵

Circuit courts disagree as to whether law enforcement has an affirmative duty to ask the consenting party if he or she has actual authority over an ambiguous item in a common area.¹³⁶ The Second and Seventh Circuits require law enforcement to ask about ownership of a container in a common area only if the container obviously does not belong to the consenting party.¹³⁷ The Sixth Circuit and the D.C. Circuit require law enforcement to ask about ownership of a container if ownership is at least ambiguous.¹³⁸ This Comment seeks to resolve the legal conflict by requiring law enforcement to ask before searching *any* container in a common area. Such an approach places the informational burden on the party best situated to bear it—the government.¹³⁹

132. See *United States v. Peyton*, 745 F.3d 546, 553–54 (D.C. Cir. 2014).

133. *Illinois v. Rodriguez*, 497 U.S. 177, 189 (1990).

134. Compare *Peyton*, 745 F.3d at 553–54, and *United States v. Taylor*, 600 F.3d 678, 681–82 (6th Cir. 2010), with *Snype*, 441 F.3d at 119, and *Melgar*, 227 F.3d at 1041–42.

135. *Salama*, *supra* note 7.

136. Cf. *Peyton*, 745 F.3d at 553–54; *Melgar*, 227 F.3d at 1041–42.

137. *Melgar*, 227 F.3d at 1041–42 (holding that obvious ownership is indicated by exterior markings that should alert officers that it is owned by another person); *Snype*, 441 F.3d 119 (same).

138. See *Peyton*, 745 F.3d at 553–54; *Taylor*, 600 F.3d at 681–82.

139. See *infra* Part IV. The police are best situated to bear the burden of asking clarifying questions because they have a responsibility to protect citizens, a responsibility that should include protecting citizens from having their privacy rights eroded by others. See U.S. DEP’T OF JUSTICE CMTY. RELATIONS SERV., PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS (2003), <https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicing/final092003.pdf> [<https://perma.cc/2B4F-8T6N>] [hereinafter DOJ PRINCIPLES OF GOOD POLICING]

A. *The Second and Seventh Circuits Have Adopted the Obviousness Approach, Which Allows Officers to Rely on Third Party Consent Even When Ownership of the Item Is Ambiguous and Uncertain*

The cases discussed in this section demonstrate the obviousness approach: law enforcement officers have an affirmative duty to clarify ownership of a container only if the container obviously belongs to someone other than the consenting party.¹⁴⁰ The Second and Seventh Circuits have adopted the obviousness standard, meaning officers do not need to clarify ownership of ambiguous items in a common area.¹⁴¹

According to the Second Circuit, a female resident's open-ended consent can extend to her male overnight guest's room and belongings.¹⁴² In *United States v. Snype*,¹⁴³ FBI officers obtained an arrest warrant for Vernon Snype¹⁴⁴ and forcibly entered Jennifer Bean's apartment to arrest him.¹⁴⁵ On the floor of the bedroom where Snype was arrested, officers found a knapsack that contained evidence linking him to a robbery.¹⁴⁶ After removing Snype from the apartment, officers sought Bean's consent to search her residence, which she voluntarily gave.¹⁴⁷ At a suppression hearing, she explained that she had never met Snype before her boyfriend asked if he could spend the night at her apartment.¹⁴⁸

Despite the fact that Snype was an overnight guest, his motion to suppress was denied.¹⁴⁹ On appeal, the Second Circuit considered whether Bean's consent was sufficient for police to search the containers in the residence.¹⁵⁰ The court first noted that "her open-ended consent would permit the search and seizure of any items found in the apartment with the exception of those 'obviously' belonging to another person."¹⁵¹ Thus, Snype could not merely assert that there was no reasonable basis

("[T]he police, by virtue of the authority that society vests in them, have overarching responsibility for the outcome of encounters with citizens.").

140. *Snype*, 441 F.3d at 126–27.

141. *See id.* at 136–37; *Melgar*, 227 F.3d at 1041–42.

142. *Snype*, 441 F.3d at 136–37.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 136.

150. *Id.* at 136–37.

151. *Id.* at 136.

for searching the containers; he bore the burden of presenting evidence that established the containers “were obviously and exclusively his.”¹⁵² Because the containers were not marked and the room in which they were found housed objects “ranging from children’s toys to a laptop computer found inside a carrying case,” the court concluded that the defendant failed to demonstrate that he obviously and exclusively owned the containers.¹⁵³

According to the Seventh Circuit, a person’s open-ended consent can extend to all closed containers in a room, even those hidden underneath a mattress.¹⁵⁴ In *United States v. Melgar*,¹⁵⁵ the police arrived at a hotel room looking for counterfeit checks and asked several women in the room for permission to search their purses.¹⁵⁶ An officer then asked the woman renting the room for her consent to search the room, which she voluntarily gave.¹⁵⁷ The police looked under a mattress and discovered an unmarked floral purse that contained a counterfeit check and an identification form indicating the defendant—not the consenting woman—was the purse’s owner.¹⁵⁸

The Seventh Circuit heard the appeal from the District Court, which denied Melgar’s motion to suppress.¹⁵⁹ After determining that the consenting woman had the apparent authority to consent to the search of the hotel room, the Seventh Circuit turned its attention to the question of whether she had apparent authority over the purse:

In a sense, the real question for closed container searches is which way the risk of uncertainty should run. Is such a search permissible only if the police have positive knowledge that the closed container is also under the authority of the person who originally consented to the search . . . or is it permissible if the police do *not* have reliable information that the container is *not* under the authorizer’s control.¹⁶⁰

152. *Id.*

153. *Id.* at 136–37.

154. *United States v. Melgar*, 227 F.3d 1038, 1041–42 (7th Cir. 2000).

155. *Id.*

156. *Id.* at 1039–40.

157. *Id.*

158. *Id.* at 1040.

159. *Id.* at 1041.

160. *Id.* (emphasis in original).

Ultimately, the court found that “the police had no reason to know that the floral purse they found under the mattress did not belong to [the consenting party].”¹⁶¹

In sum, the Second and Seventh Circuits have extended a co-tenant’s open-ended consent to closed containers in a common area, except those that obviously do not belong to that co-tenant.¹⁶² In the absence of an officer’s positive knowledge that a container belongs to another, or some other clear manifestation of privacy, officers can rely on someone’s open-ended consent to search any container in a common area.¹⁶³

B. The Sixth Circuit and the D.C. Circuit Have Adopted the Ambiguity Approach, Which Requires Officers to Inquire About Actual Authority When Ownership of an Item Is Ambiguous

Two circuit courts have adopted the ambiguity approach, holding that law enforcement officers are required to clarify ownership of ambiguous items in a common area.¹⁶⁴ By adopting this ambiguity standard, the Sixth and the D.C. Circuits have narrowed the scope of a resident’s open-ended consent to include only those items and areas that do not raise any questions of ownership in the minds of a reasonable officer.¹⁶⁵ The Sixth Circuit reasoned that “[t]he government cannot establish that its agents reasonably relied upon a third party’s apparent authority if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry.”¹⁶⁶

The Sixth Circuit held that prior false assertions of authority generated sufficient ambiguity to trigger the officer’s duty to inquire.¹⁶⁷ In *United States v. Purcell*,¹⁶⁸ after the police arrested Frederick Purcell, his girlfriend, Yolande Crist, consented to a search of their hotel room.¹⁶⁹ The police observed two duffel bags and a backpack in the room, and Crist stated that one contained a firearm.¹⁷⁰ She also indicated

161. *Id.*

162. *See id.* at 1041–42; *United States v. Snype*, 441 F.3d 119, 136–37 (2d Cir. 2006).

163. *See Melgar*, 227 F.3d at 1041–42; *Snype*, 441 F.3d at 136–37.

164. *See United States v. Peyton*, 745 F.3d 546, 553–54 (D.C. Cir. 2014); *United States v. Taylor*, 600 F.3d 678, 681–82, 685 (6th Cir. 2010); *United States v. Purcell*, 526 F.3d 953, 963–64 (6th Cir. 2008).

165. *See Peyton*, 745 F.3d at 553–54; *Taylor*, 600 F.3d at 681–82.

166. *Purcell*, 526 F.3d at 963.

167. *Id.* at 964–65.

168. *Id.*

169. *Id.* at 956–58.

170. *Id.* at 957–58.

that one of the duffel bags was hers, and upon searching it, an officer found marijuana and men's clothing.¹⁷¹ During his search, the officer "realized that Crist had misstated her ownership of the bag, [but] he did not ask her to verify whether she owned any of the other bags in the room" before continuing to search them.¹⁷²

The court acknowledged that Crist had the apparent authority to consent to a search of the room, but noted that "apparent authority cannot exist if there is ambiguity as to the asserted authority and the searching officers do not take steps to resolve the ambiguity."¹⁷³ Once the officer discovered men's clothing in the bag claimed by Crist, "ambiguity clouded [her] authority to consent to the search of the backpack."¹⁷⁴ As such, the police were obligated to obtain additional consent to search the other items in the room.¹⁷⁵

The Sixth Circuit reached a similar result in a different case, holding that a woman's open-ended consent did not extend to a spare bedroom filled with men's clothes.¹⁷⁶ In *United States v. Taylor*,¹⁷⁷ police had an outstanding arrest warrant for the defendant, Mark Taylor, but did not have a search warrant for the apartment where they believed he was staying as a guest.¹⁷⁸ Officers arrived at the apartment and were met by Sabrina Arnett, the tenant, who allowed police to search the apartment for Taylor.¹⁷⁹ After arresting Taylor upstairs, and removing him from the premises, officers returned to the second floor, where they had previously noticed a spare bedroom with "men's clothes lying about."¹⁸⁰ They entered the spare bedroom, searched the closet, and found a men's shoebox containing a handgun and ammunition.¹⁸¹

On appeal, the Sixth Circuit first noted the circumstantial ambiguity: the closet contained a mix of men's and children's clothing, and "nothing in the closet indicated that the items within it belonged to Arnett or were regularly used by her."¹⁸² The court determined that a

171. *Id.* at 958.

172. *Id.*

173. *Id.* at 963.

174. *Id.* at 964.

175. *Id.* at 965.

176. *United States v. Taylor*, 600 F.3d 678, 681–82, 685 (6th Cir. 2010).

177. *Id.*

178. *Id.* at 679.

179. *Id.*

180. *Id.*

181. *Id.* at 679–80.

182. *Id.* at 681–82.

reasonable person would have doubts about the ownership of the shoebox and added that the district court had found that “the police would likely not have opened the closed shoebox if they believed it belonged to Arnett. Rather, they opened the shoebox precisely because they believed it likely belonged to Taylor.”¹⁸³ The court found the police officer’s failure to cure the factual ambiguity was fatal to Arnett’s apparent authority to consent.¹⁸⁴

Similarly, in *United States v. Peyton*,¹⁸⁵ the D.C. Circuit held that a grandmother’s open-ended consent did not extend to her grandson’s personal space.¹⁸⁶ Peyton and his eighty-five-year-old grandmother, Martha Hicks, were residents of a one-bedroom apartment in Washington, D.C.¹⁸⁷ Peyton’s bed and personal property were in the living room, and Hicks used the bedroom.¹⁸⁸ Four officers went to the apartment when they knew that Peyton would be gone and asked Hicks to consent to a search of the apartment.¹⁸⁹ As one of the officers approached Peyton’s bed, Hicks “told them that that part of the living room was ‘the area where [Peyton] keeps his personal property.’”¹⁹⁰ One of the officers then picked up a shoebox next to Peyton’s bed, opened it, and found drugs and other incriminating evidence.¹⁹¹

The D.C. Circuit held the search was unlawful because Hicks did not have actual or apparent authority over Peyton’s shoebox.¹⁹² According to the court, Hicks’s statement about Peyton’s “personal property” should have alerted the police that it was unreasonable to believe she had authority over Peyton’s belongings.¹⁹³ Hicks’s statements created ambiguity as to the ownership of the shoebox, triggering the officer’s duty to inquire.¹⁹⁴

In summary, the circuit courts have developed two standards to examine officers’ conduct when they encounter ambiguous containers during a search based on third party consent. These standards attempt to

183. *Id.* at 682.

184. *Id.* at 679, 685.

185. 745 F.3d 546 (D.C. Cir. 2014).

186. *Id.* at 549, 553–54.

187. *Id.* at 549.

188. *Id.*

189. *Id.*

190. *Id.* (alteration in original).

191. *Id.* at 549–50.

192. *Id.* at 554–55.

193. *Id.*

194. *Id.*

reconcile the heightened expectations of privacy afforded to closed containers with law enforcement's need to conduct an efficient, thorough search of the premises.¹⁹⁵ On the one hand, courts employing the obviousness standard permit a closed-container search when an officer lacks positive knowledge that a container does not belong to the consenting party.¹⁹⁶ On the other hand, courts employing the ambiguity standard use positive knowledge in another way—when the circumstances present any degree of uncertainty or ambiguity, law enforcement must obtain positive knowledge that the container in question belongs to the consenting party.¹⁹⁷

IV. THE AMBIGUITY APPROACH IS SUPERIOR TO THE OBVIOUSNESS APPROACH, BUT BOTH APPROACHES FAIL TO ADEQUATELY PROTECT INDIVIDUALS' PRIVACY EXPECTATIONS IN THE HOME

The ambiguity approach provides greater privacy protections than the obviousness approach,¹⁹⁸ but neither approach adequately protects individuals from unreasonable government searches of containers in their home. The obviousness approach is not consistent with the apparent authority doctrine because it does not use the concept of reasonableness to constrain the scope of police searches.¹⁹⁹ The ambiguity approach uses reasonableness to constrain the scope of police searches, but still leaves open the potential for police to search a container that does not actually belong to the consenting tenant.²⁰⁰ Thus, the ambiguity approach is more consistent with *Rodriguez*—but neither standard adequately protects the rights of individuals to be free from unreasonable searches in their home.

195. *See id.* at 552–54.

196. *See* *United States v. Snype*, 441 F.3d 119, 136–37 (2d Cir. 2006); *United States v. Melgar*, 227 F.3d 1038, 1041–42 (7th Cir. 2000).

197. *See Peyton*, 745 F.3d at 553–54; *United States v. Taylor*, 600 F.3d 678, 681–82, 685 (6th Cir. 2010); *United States v. Purcell*, 526 F.3d 953, 963–64 (6th Cir. 2008).

198. *Compare Peyton*, 745 F.3d at 553–54 (protecting an absent tenant's privacy in his container) with *Snype*, 441 F.3d at 136–37 (allowing the police to search an overnight guest's containers without his consent).

199. *See Snype*, 441 F.3d at 136–37 (holding that the police can search any containers that do not obviously belong to someone other than the consenting party).

200. *See Peyton*, 745 F.3d at 553–54 (holding that the police can search any container when ownership of the container is not ambiguous).

A. *The Obviousness Approach Is Not Consistent with the Apparent Authority Doctrine*

The obviousness approach is not consistent with the apparent authority doctrine because it allows law enforcement to search an unmarked container even if it is unreasonable for officers to believe the consenting party has authority over the container.²⁰¹ For example, imagine that the police knock on the door of a two-bedroom apartment because they suspect that someone in the apartment is selling drugs. A man with a long beard wearing a Donald Trump campaign shirt opens the door. The police ask for permission to search the apartment, and the man responds, “Go ahead and search the place, my roommate, Anna, is at a Women’s Rights march—she left all her stuff here and won’t be home for hours.” On a couch in the living room, officers find a pink purse on top of a rainbow-colored blanket.

In light of the man’s statement about his female roommate leaving her belongings in the apartment, it seems like a reasonable officer would have doubts about whether the bearded man wearing the Trump shirt has authority over the pink purse in the living room.²⁰² Thus, under the apparent authority doctrine—which is grounded in an officer’s reasonable belief that the person has authority to consent—the officers should be prohibited from searching the purse.²⁰³ Yet, the fact that it is unreasonable does not prevent police from searching the purse if the jurisdiction has adopted the obviousness standard.²⁰⁴ Under the obviousness approach, when given open-ended consent to search a common area, law enforcement officers can search anything that does not have clear exterior markings indicating obvious and exclusive

201. *But cf. Snype*, 441 F.3d at 136–37 (holding that the open-ended consent of a female resident extends to the search of a knapsack and red plastic bag found in the spare bedroom where a male house guest was arrested); *Melgar*, 227 F.3d at 1041–42 (holding that the open-ended consent of a female occupant extends to a purse found under a mattress in a hotel room used by multiple women, one of whom had two purses).

202. The *Washington Law Review* and the author of this Comment do not support making broad generalizations about groups of people based on their appearance or political beliefs. This hypothetical references political and gender-based stereotypes to illustrate a very delicate point about ambiguity and uncertainty in the mind of a reasonable officer during a search.

203. *See Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (establishing the apparent authority doctrine and suggesting that “[e]ven when [an] invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry”).

204. *See Snype*, 441 F.3d at 136–37; *Melgar*, 227 F.3d at 1041–42.

ownership by another party.²⁰⁵ Because the purse here does not have exterior markings linking it to another person, law enforcement officers in obviousness jurisdictions can search the purse without asking clarifying questions.²⁰⁶

The obviousness approach, by allowing officers to search a container even when a reasonable officer would not believe that the consenting party has authority over the container, stretches the apparent authority doctrine beyond its constitutional limits.²⁰⁷

1. *Case Law Demonstrates that the Obviousness Approach Is Inconsistent with the Apparent Authority Doctrine*

The Supreme Court has urged officers to be skeptical when relying on third party consent.²⁰⁸ As the *Rodriguez* Court put it:

Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. As with other factual determinations bearing upon search and seizure, determination of consent to enter must “be judged against an objective standard: would the facts available to the officer at the moment . . . ‘warrant a man of reasonable caution in the belief’” that the consenting party had authority over the premises?²⁰⁹

The Second and Seventh Circuits may claim to be applying the apparent authority doctrine, but the obviousness standard appears to give law enforcement more power than what the Supreme Court’s apparent authority doctrine intends: the obviousness standard allows the police to ignore ambiguity that would defeat an officer’s reasonable belief.

The application of the obviousness approach in *Snype* and *Melgar* illustrates the consequences of the broad obviousness approach. The Second Circuit in *Snype* authorized a search under circumstances that

205. See *Snype*, 441 F.3d at 136–37 (holding that the bag did not obviously belong to Snype because “[n]o marks on the bags linked them to him” and he failed to produce evidence “demonstrating that these items were obviously and exclusively his.”); *Melgar*, 227 F.3d at 1041–42 (holding that the purse did not obviously belong to another woman because there were “no exterior markings on the purse that should have alerted them to the fact that it belonged to another person”).

206. See *Snype*, 441 F.3d at 136–37 (allowing the police to search containers that lack exterior markings indicating obvious ownership by another person); *Melgar*, 227 F.3d at 1041–42 (same).

207. *But see Snype*, 441 F.3d at 136–37 (endorsing the obviousness approach); *Melgar*, 227 F.3d at 1041–42 (same).

208. See *Rodriguez*, 497 U.S. at 188.

209. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)) (alteration in original).

raised serious doubts about the ownership of the items seized.²¹⁰ Upon realizing Snype stayed in the spare bedroom, a reasonable officer should have substantial doubts as to whether all of the items in the room belonged to Bean.²¹¹ Here, it seems likely that the police searched the knapsack and other items precisely because they thought those items belonged to Snype—not because officers believed the items belonged to Bean.²¹² Similarly, the Seventh Circuit in *Melgar* authorized the search of a purse found in a room used by multiple women, when only one woman consented to a search.²¹³ To constitutionally search the purse under the mattress, the police must have reasonably believed it belonged to the consenting party.²¹⁴

In *Snype* and *Melgar*, ownership of the items searched was at least ambiguous. A cautious application of the apparent authority doctrine would council further inquiry into the consenting party's authority before proceeding with the search.²¹⁵ In both cases, the police should have been aware that the consenting party might not have actual authority over the items searched, but continued their searches because the ambiguity did not rise to the level of obvious ownership by another party.²¹⁶ The obviousness approach ignores the constraints placed on police by the apparent authority doctrine and threatens to undermine the Court's protection of individuals' privacy in their home.

210. *See id.*

211. *See* United States v. Peyton, 745 F.3d 546, 553 (D.C. Cir. 2014). (“The police] knew that Hicks and Peyton both lived in the small apartment, and they were thus on notice that some spaces in the apartment might be used exclusively by Peyton.”).

212. *See* United States v. Taylor, 600 F.3d 678, 681–82 (6th Cir. 2010) (“[N]othing in the closet indicated that the items within it belonged to [the defendant’s girlfriend] or were regularly used by her . . .”). The court determined that a reasonable person would have doubts about the ownership of a shoebox found in the closet and added that “the police would likely not have opened the closed shoebox if they believed it belonged to [the girlfriend]. Rather, they opened the shoebox precisely because they believed it likely belonged to [the defendant].” *Id.* at 682 (quoting the district court’s finding of fact).

213. *See Rodriguez*, 497 U.S. at 185–86 (establishing the apparent authority doctrine).

214. *Id.*; *cf.* United States v. Melgar, 227 F.3d 1038, 1041–42 (7th Cir. 2000).

215. *Contra Melgar*, 227 F.3d at 1041–42; United States v. Snype, 441 F.3d 119, 136–37 (2d Cir. 2006).

216. *See Snype*, 441 F.3d at 136–37; *Melgar*, 227 F.3d at 1041–42.

B. The Ambiguity Approach Is Consistent with the Apparent Authority Doctrine and Superior to the Obviousness Approach Because It Is More Aligned with Social Norms and the Court's Tradition of Protecting the Home Against Unreasonable Searches

The Supreme Court has expressed a preference for caution and restraint in applying the apparent authority doctrine.²¹⁷ In *Rodriguez*, the seminal case establishing the apparent authority doctrine, the Court emphasized the importance of heightened scrutiny in apparent authority cases.²¹⁸ This preference for a limited application is also evident in the doctrine itself: police reliance on third party consent is valid under the apparent authority doctrine only if it is reasonable.²¹⁹ Because the standard based approaches used by the circuit courts are an extension of the apparent authority doctrine, these approaches should, at a minimum, subject police conduct to the same level of scrutiny as the apparent authority doctrine. At present, only the ambiguity approach produces results consistent with the apparent authority doctrine. By limiting searches to containers that clearly and unambiguously fall within the scope of authority, the ambiguity approach is consistent the *Rodriguez* Court's emphasis on restricting searches to areas where an officer reasonably believes actual authority exists.²²⁰ In contrast, the obviousness approach permits officers to search containers even where it is unreasonable to believe actual authority exists.²²¹

217. See *Rodriguez*, 497 U.S. at 188–89 (“[W]hat we hold today does not suggest that law enforcement officers may always accept a person’s invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. As with other factual determinations bearing upon search and seizure, determination of consent to enter must “be judged against an objective standard: would the facts available to the officer at the moment . . . ‘warrant a man of reasonable caution in the belief’” that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists.”) (citation omitted).

218. See *id.* (explaining that police need to be cautious even when the consenting party has explicitly asserted authority).

219. *Id.*

220. See *United States v. Peyton*, 745 F.3d 546, 553–54 (D.C. Cir. 2014); *cf. Rodriguez*, 497 U.S. at 185–86.

221. See *supra* section IV.A.

1. *The Sixth and D.C. Circuits' Ambiguity Approach to the Apparent Authority Doctrine Is Consistent with the Principles Expressed in Rodriguez*

The ambiguity approach is the most consistent with the apparent authority doctrine: if there is ambiguity regarding ownership, it is not reasonable for law enforcement officers to believe the consenting party has ownership of the item.²²² The ambiguity approach subjects police conduct to the same level of constraint as the apparent authority doctrine.²²³ The apparent authority doctrine requires that an officer have a reasonable belief that the consenting party has authority over the area to be searched;²²⁴ the ambiguity approach explains that an officer cannot reasonably believe a party has authority if there are circumstances that raise uncertainty or ambiguity about ownership.²²⁵ Thus, the ambiguity approach does not alter the apparent authority doctrine, it merely uses different language to explain the same concept.

The Sixth and D.C. Circuit Courts' analysis in *Taylor* and *Peyton* recognize the ambiguity approach as an extension of the apparent authority doctrine.²²⁶ In *Taylor*, the Sixth Circuit held that the presence of men's clothing in a spare bedroom made ownership over the men's shoebox ambiguous.²²⁷ This ambiguity made it impossible for the officers to reasonably believe that the men's shoebox belonged to Sabrina Arnett, the woman who consented to the search. In the language of *Rodriguez*, the court therefore limited the scope of the search to only those areas in which it was reasonable to believe Arnett had authority.

The D.C. Circuit's conclusion in *Peyton* is also consistent with the apparent authority doctrine as expressed in *Rodriguez*.²²⁸ As the court noted, "it was not reasonable for the police to believe that Hicks shared use of the closed shoebox" given her "clear statement that there was an area of the room that was not hers."²²⁹ Even without Ms. Hicks's

222. See, e.g., *Peyton*, 745 F.3d at 553–54.

223. See *Rodriguez*, 497 U.S. at 185–86 (establishing the apparent authority doctrine); *Peyton*, 745 F.3d 553–54 (recognizing that an officer's reasonable belief cannot survive when facts are introduced making ownership of an item ambiguous).

224. See *Rodriguez*, 497 U.S. at 185–86 (establishing the apparent authority doctrine).

225. See *Peyton*, 745 F.3d at 553–54.

226. See *id.* (rooting its analysis in the reasonableness of the officer's belief that the consenting party had actual authority); *United States v. Taylor*, 600 F.3d 678, 681–82, 685 (6th Cir. 2010) (same).

227. *Taylor*, 600 F.3d at 681–82.

228. See *Peyton*, 745 F.3d at 553–54; cf. *Rodriguez*, 497 U.S. at 185–86.

229. *Peyton*, 745 F.3d at 554.

statement, there was likely enough ambiguity to trigger a duty for the police to inquire: “They knew that Hicks and Peyton both lived in the small apartment, and they were thus on notice that some spaces in the apartment might be used exclusively by Peyton.”²³⁰ Under these circumstances, a reasonable person would have serious doubts as to whether the grandmother, Hicks, had authority over all containers next to the second bed.²³¹ By applying the ambiguity approach, the Sixth Circuit in *Taylor* reached a conclusion that is consistent with the Supreme Court’s expression of the apparent authority doctrine in *Rodriguez*.²³²

Regardless of whether the court asks if ownership is ambiguous or if it is reasonable for officers to believe Hicks had authority, the conclusion will be the same, because both standards examine police behavior with the same level of scrutiny.²³³ If the Court determines that ownership of a container is ambiguous, it essentially holds that a reasonable officer should have doubts about Hicks’ actual authority over the container. Those doubts, in turn, make it unreasonable for an officer to rely on Hicks’ consent. Courts applying the ambiguity approach should always reach a conclusion consistent with the apparent authority doctrine because both tests are tethered to an officer’s reasonable belief about actual authority.²³⁴

In contrast, the obviousness approach permits a far less searching inquiry, one that is not tethered to an officer’s reasonable belief.²³⁵ The obviousness approach requires only that police confine their search when a container obviously does not belong to the consenting party.²³⁶ Case law demonstrates that to obviously belong to another party the container must have exterior markings linking it to another person or the police must see another person carrying the item.²³⁷ This is an extremely

230. *See id.* at 553.

231. *Id.* at 554.

232. *See Rodriguez*, 497 U.S. at 185–86.

233. *See Peyton*, 745 F.3d at 553–54 (applying the ambiguity approach); *cf. Rodriguez*, 497 U.S. at 185–86 (applying the apparent authority doctrine).

234. *See United States v. Purcell*, 526 F.3d 953, 963 (6th Cir. 2008) (“[A]pparent authority cannot exist if there is ambiguity as to the asserted authority and the searching officers do not take steps to resolve the ambiguity.”).

235. *See United States v. Melgar*, 227 F.3d 1038, 1041–42 (7th Cir. 2000) (applying the obviousness approach); *cf. Rodriguez*, 497 U.S. at 185–86 (applying the apparent authority doctrine).

236. *See Melgar*, 227 F.3d at 1041–42 (applying the obviousness approach).

237. *See United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006) (“No officer ever saw Snype carrying the knapsack or red plastic bag. No marks on the bags linked them to him.”); *Melgar*, 227

relaxed standard—it permits officers to conduct searches in the face of doubts and uncertainty as long as officers do not disregard blatant evidence discounting authority.²³⁸ Consider the potential outcome of *Peyton* had it been decided under the obviousness standard: despite Hicks’ warning that she shared a space with Peyton, the officers’ search of Peyton’s belongings would have been permissible because the items did not *obviously* belong to Peyton. The items were not labeled, and the police did not see Peyton holding them.²³⁹ As this hypothetical illustrates, the obviousness approach permits officers to search containers even when doing so is inconsistent with the reasonable belief standard at the heart of the apparent authority doctrine.

2. *The Ambiguity Approach Is Superior to the Obviousness Approach Because It Conforms to Social Norms and the Court’s Tradition of Protecting Privacy in the Home.*

The ambiguity approach is superior to the obviousness approach because it provides stronger protections to individuals in their homes.²⁴⁰ According to the Supreme Court, “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”²⁴¹ The language of the Fourth Amendment creates a broad range of protections for individuals’ “persons, houses, papers, and effects,”²⁴² but the constitutional safeguard against unreasonable searches and seizures is most strictly applied in situations where a government official searches a home.²⁴³

F.3d at 1041–42 (“[T]here were no exterior markings on the purse that should have alerted them to the fact that it belonged to another person.”).

238. *See supra* section IV.A (demonstrating how the obviousness approach is not consistent with the apparent authority doctrine).

239. *See supra* note 237 and surrounding text (examining the obviousness standard); *United States v. Peyton*, 745 F.3d 546, 553–54 (D.C. Cir. 2014).

240. *Cf. Silverman v. United States*, 365 U.S. 505, 511 (1961); *Peyton*, 745 F.3d at 553–54 (protecting the absent co-tenant’s right to be free from an unreasonable warrantless search).

241. *Silverman*, 365 U.S. at 511.

242. U.S. CONST. amend. IV.

243. *See City of Seattle v. See*, 67 Wash. 2d 475, 483, 408 P.2d 262 (Wash. 1965), *rev’d*, 387 U.S. 541 (1967) (“The requirements of the Fourth Amendment receive their strictest application when a dwelling house is involved in a search.”) (quoting REX D. DAVIS, *FEDERAL SEARCHES AND SEIZURES* 8 (1964)). *See generally* *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that warrantless use of heat-imaging technology was an unlawful search of a home); *Minnesota v. Olson*, 495 U.S. 91 (1990) (upholding the right of overnight guests to challenge the constitutionality of a warrantless entry into home); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (invalidating entry into home at night and without a warrant to arrest individual for driving while intoxicated absent more

As discussed in section III.A, the Court has carved out special rules that apply to home searches, expressly granting individuals heightened Fourth Amendment protections within their homes.²⁴⁴ The obviousness approach allows law enforcement officers to rely on the consent of a third party to search containers in a common area, even where police do not have a reasonable belief that the third party has the proper authority.²⁴⁵ Thus, the obviousness approach runs counter to the Supreme Court's goals of protecting privacy rights in the home. In contrast, the ambiguity approach, which requires officers to inquire before searching a container if there is any degree of ambiguity over the ownership of items, is more consistent with Supreme Court precedent expressing heightened Fourth Amendment protections in the home.²⁴⁶

In addition to tracking Supreme Court precedent, the ambiguity approach is superior to the obviousness approach because it is more closely aligned with modern privacy expectations. In the context of shared living spaces, modern social expectations require that law enforcement officers ask questions before searching any container in a common area, because police should not assume that open-ended consent extends to all containers.²⁴⁷ As the D.C. Circuit explained in *Donovan v. A.A. Beiro Construction Co.*,²⁴⁸ “[w]hile authority to consent to search of a common area extends to most objects in plain view, it does not automatically extend to the interiors of every enclosed space within the area.”²⁴⁹

Imagine a college student, Greg, living in a four-bedroom apartment with a group of friends. One day, Greg leaves his backpack on the couch in the living room, expecting that his roommates will not go through the backpack while he is gone. After all, it is a common understanding among the roommates that nobody has permission to look inside the backpack of an absent roommate—even if the roommates are all in the common area together.²⁵⁰ While Greg is gone, the police knock on the

significant exigent circumstances); *Chimel v. California*, 395 U.S. 752 (1969) (refusing to extend search incident to a lawful arrest to include warrantless search of defendant's entire house).

244. *See, e.g.*, *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 1414–18 (2013); *Kyllo*, 533 U.S. at 35–40.

245. *See United States v. Snype*, 441 F.3d 119, 136–37 (2d Cir. 2006).

246. *Cf. Jardines*, 133 S. Ct. at 1415–18.

247. *Cf. United States v. Peyton*, 745 F.3d 546, 552–54 (D.C. Cir. 2014).

248. 746 F.2d 894 (D.C. Cir. 1984).

249. *Id.* at 901–02; *see also United States v. Karo*, 468 U.S. 705, 725 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (“A homeowner’s consent to a search of the home may not be effective consent to a search of a closed object inside the home.”).

250. *Cf. Donovan*, 746 F.2d at 901–02.

door and ask one of Greg's roommates if they can search the apartment. Greg's roommate does not have permission to go through Greg's backpack, so it follows naturally that he cannot consent to a search of Greg's backpack.²⁵¹ However, under the obviousness approach, the police will *assume* that he has authority over the backpack as long as it does not have exterior markings linking it to Greg.²⁵²

The obviousness approach allows police officers to exploit a judicially created loophole in Fourth Amendment jurisprudence and behave in ways that offend widely shared beliefs about privacy and housemate relationships. Although the ambiguity approach is more closely aligned with modern social expectations and Supreme Court precedent than the obviousness approach, it still leaves open the possibility that the police will search an absent tenant's container without his consent. Thus, the Court should adopt a bright-line rule requiring police to ensure that actual authority exists before searching containers in the home.

V. THE SUPREME COURT SHOULD ADOPT A BRIGHT-LINE RULE REQUIRING LAW ENFORCEMENT TO INQUIRE BEFORE SEARCHING ANY CONTAINER IN A COMMON AREA

The standard-based approaches developed by the circuit courts should be overruled in favor of a bright-line rule requiring the police to ask questions before searching *any* container in a shared living space.²⁵³ Trends in cohabitation and modern social expectations warrant revisiting the apparent authority doctrine.²⁵⁴ There has been a sharp increase in the percentage of unmarried, non-partner roommates sharing a home,²⁵⁵ and, at the same time, there are more adults living with their parents than in

251. *Cf. Peyton*, 745 F.3d at 552 (“The fact that a person has common authority over a house, an apartment, or a particular room, does not mean that she can authorize a search of anything and everything within that area.”).

252. *Cf. United States v. Snype*, 441 F.3d 119, 136–37 (2d Cir. 2006); *United States v. Melgar*, 227 F.3d 1038, 1041–42 (7th Cir. 2000).

253. *Cf. Weiber*, *supra* note 97 (advocating for a test that “would ask whether a person actually has express or implied common authority over the premises and is thus able to consent to a search of the premises”). Weiber calls this test the “common authority in fact” test. *Id.* He contends that “[t]he test would prevent a defendant’s right to security in his home or property from being violated without some notice, and would protect a third party’s interest in shared property from being imposed upon by a criminal co-inhabitant” and that it “would not significantly reduce law enforcement effectiveness.” *Id.* at 641.

254. *See Fry, Living With Parents*, *supra* note 112.

255. Salama, *supra* note 7.

any time in recent history.²⁵⁶ It is now common for Americans to live with one or more roommates, with the percentage of adults living with roommates increasing from just over 25% in 2000 to 32% in 2012.²⁵⁷ In light of this significant increase in the percentage of adults living with roommates, the Supreme Court should introduce a bright-line rule requiring law enforcement to inquire about actual authority before searching any container in a common area.²⁵⁸ “[T]his test avoids the hazards of the reasonableness test by allowing only a party who has actual or implied shared authority over the premises to consent to a search.”²⁵⁹ It would also improve judicial economy, lower the burden on law enforcement to make legal determinations on the spot, and eliminate the incentive for law enforcement to ask fewer questions.²⁶⁰

A. *The Recommended Bright-Line Approach Would Allow the Supreme Court to Protect Privacy Rights Better than the Ambiguity Approach and Bring the Law into Conformity with Social Norms*

The ambiguity approach is the most consistent with the Court’s articulation of the apparent authority doctrine in *Rodriguez*, but it still opens the door for a co-tenant to inadvertently consent to a search of items that do not belong to her. The practical effect of the standard-based approaches, like the ambiguity and obviousness approaches, is the creation of a strong incentive for police to ask for consent only once,

256. See Fry, *Living With Parents*, *supra* note 112.

257. Salama, *supra* note 7.

258. Cf. *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”); *United States v. Davis*, 332 F.3d 1163, 1169 n.4 (9th Cir. 2003) (“By staying in a shared house, one does not assume the risk that a housemate will snoop under one’s bed, much less permit others to do so.”).

259. Weiber, *supra* note 97, at 636.

260. See *id.* at 620. (“The Supreme Court’s rule tends to discourage government agents from conducting an extensive investigation of the facts before entering property.”); George E. Dix, *Promises, Confessions, and Wayne LaFave’s Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 229 (1993) (“[T]he bright line nature of the rule permits easier judicial application.”); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith*,” 43 U. PITT. L. REV. 307, 320–33 (1982) (addressing the many advantages to bright-line rules). In the Fourth Amendment context, the Court has sometimes preferred bright-line rules to provide clear boundaries for individuals to know the scope of their rights and for law enforcement officers to know the scope of their authority. See, e.g., *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).

because open-ended consent grants an incredibly broad scope.²⁶¹ This makes it simpler for the officers to do their job but incentivizes officers to ask fewer questions and rely on incomplete information.²⁶²

Under the ambiguity approach, law enforcement can obtain open-ended consent from someone who appears to live at an apartment and then search any items over which ownership is not ambiguous.²⁶³ But just because ownership over an item is not ambiguous does not mean that it definitely belongs to the consenting party—many roommates could have similar taste in clothes or similar types of backpacks that would not alert an officer to ownership by another party. The ambiguity approach protects absent tenants from unreasonable searches when the item raises uncertainty in the officer's mind, but it does not protect absent tenants from unreasonable government searches when the item is plain and does not raise suspicion as to ownership.

The proposed bright-line approach would protect privacy in the home but would go beyond the ambiguity approach used in *Peyton, Taylor*, and *Purcell* by requiring law enforcement officers to inquire before searching any container in a common area inside a home. Under this rule, absent co-tenants are protected from unreasonable searches regardless of whether a police officer believes that an item could reasonably belong to the consenting co-tenant. It requires the police to ensure that the consenting co-tenant has actual authority before searching closed containers. This bright-line approach reflects modern attitudes about cohabitation because it acknowledges that co-tenants do not have joint authority over every container in the residence.²⁶⁴

B. *A Bright-Line Rule Offers Valuable Benefits to Law Enforcement, Lawyers, and Judges*

Modern constitutional criminal procedure prefers bright-line categorical rules that are “easily administrable” by officers in the

261. Cf. *United States v. Snype*, 441 F.3d 119, 136–37 (2d Cir. 2006); *United States v. Melgar*, 227 F.3d 1038, 1041–42 (7th Cir. 2000).

262. See *Snype*, 441 F.3d at 126–27 (where officers searched the knapsack found in the bedroom where Snype was arrested, but avoided asking any questions that would reveal the fact that the knapsack belonged to Snype and not the woman who consented to the search); *Melgar*, 227 F.3d at 1039–40 (where officers, in a room with multiple women, searched a purse without asking any questions that would reveal the true owner of the purse).

263. Cf. *Snype*, 441 F.3d at 136–37; *Melgar*, 227 F.3d at 1041–42.

264. *Donovan v. A.A. Beiro Construction Co.*, 746 F.2d 894, 901–02 (D.C. Cir. 1984) (“While authority to consent to search of a common area extends to most objects in plain view, it does not automatically extend to the interiors of every enclosed space within the area.”).

field.²⁶⁵ The term “bright-line” has been used primarily in Fourth Amendment discourse to describe “‘standardized procedures’ . . . which may ‘be applied to all cases of a certain type, regardless of particular factual variations.’”²⁶⁶ “The advocates of bright-line rules essentially believe that the rules provide easy to follow guidelines for law enforcement, defense lawyers, prosecutors, and judges alike.”²⁶⁷ Bright-line rules have several alluring features: “they are more easily administrable by officers” because they offer “simplified administration, predictability, and the diminution of the need for on-the-spot judgment calls that may be colored by subjective differences between officers.”²⁶⁸ Professor Wayne R. LaFave “has been the most outspoken advocate for the adoption of bright-line rules in criminal procedure,”²⁶⁹ describing the advantage of a bright-line rule in terms of probability that an officer applying the rule will reach the correct conclusion:

And thus, as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former.²⁷⁰

Furthermore, bright-line rules allow “easier judicial application,” reducing “the time and effort spent by judges, lawyers, and litigants administering the legal requirement and maximiz[ing] consistent and thus ‘fair’ application of the rule.”²⁷¹

In several Fourth Amendment cases, the Court has utilized bright-line rules.²⁷² The most prominent of such cases is the landmark decision

265. Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1464–65 (2011).

266. LaFave, *supra* note 260, at 322–23.

267. Andrew McLetchie, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit’s Bright-Line Test for Determining the Voluntariness of Consent*, 30 HOFSTRA L. REV. 225, 228 (2001). *See also* Daniel T. Gillespie, *Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 LOY. U. CHI. L.J. 1, 3 (1999) (noting that bright-line rules facilitate the application of the law).

268. Fan, *supra* note 265, at 1465.

269. McLetchie, *supra* note 260, at 227.

270. LaFave, *supra* note 260, at 321.

271. Dix, *supra* note 260, at 229.

272. *Coolidge v. New Hampshire*, 403 U.S. 443, 453–55 (1971) (explaining that the basic constitutional rule is that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment”); *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

*Mapp v. Ohio*²⁷³ extending the federal exclusionary rule to state court proceedings.²⁷⁴ In *Mapp*, a woman was charged for possessing obscene materials, but the Court suppressed the evidence because the police lacked probable cause to search for such materials in her apartment.²⁷⁵ The exclusionary rule developed in *Mapp* provides that any evidence obtained in contravention of the Fourth Amendment is inadmissible as substantive evidence against a criminal defendant.²⁷⁶ Another example of a bright-line Supreme Court holding is found in *Coolidge v. New Hampshire*,²⁷⁷ where the Court held that the warrantless search and seizure of an unoccupied car was a per se violation of the Fourth Amendment.²⁷⁸

Perhaps the most famous example of a judicially mandated bright-line rule in criminal procedure comes from *Miranda v. Arizona*.²⁷⁹ In *Miranda*, the Supreme Court held that statements made by the suspect during custodial interrogation are admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney, the right against self-incrimination, and that the defendant not only understood these rights, but voluntarily waived them.²⁸⁰ These rights came to be known as the *Miranda* rights and became part of routine police procedure to ensure that suspects were informed of their constitutional rights.²⁸¹ *Miranda* fits within and yet stands out as a particularly strong example of bright-line rules within Fourth Amendment jurisprudence.

273. 367 U.S. 643 (1961).

274. *See id.* at 657.

275. *See id.* at 654–55.

276. *Id.*

277. 403 U.S. 443 (1971).

278. *See id.* at 453–55.

279. 384 U.S. 436 (1966).

280. *See id.* at 478–79.

281. *See* DANIEL T. GILLESPIE, MICH. CRIM. L. & PROC. § 18:121 (2d ed. 2017) (describing the rights as the “*Miranda* rights” and explaining their significance).

C. *The Minimal Burden of Asking Clarifying Questions Should Be Borne by Law Enforcement Officers Because They Are Well-Trained and Well-Situated to Protect the Rights of Absent Parties*

The burden of asking clarifying questions should be placed on the party best situated to bear this responsibility—the government.²⁸² As the *Rodriguez* Court put it, “[t]he burden of establishing . . . common authority [over property] rests upon the State.”²⁸³ While there are potential objections to this approach, the objections do not outweigh the numerous advantages outlined in this Comment.²⁸⁴ Training police to ask questions in every situation increases the chance that all evidence seized will be admissible in court.²⁸⁵ Also, the burden of asking these questions is quite small and does not outweigh the value of protecting criminal defendants’ rights.²⁸⁶ In fact, the questions that officers would be asking under a bright-line approach would be similar to the warnings that police are required to provide under *Miranda* in the context of custodial interrogations.²⁸⁷

One potential objection to this approach is that it would be laborious for law enforcement to implement because officers would be burdened with the duty to inquire about potentially hundreds of containers in a home.²⁸⁸ This rule only requires that officers, when confronted with a closed container, ask if it belongs to the person who consented to the

282. See DOJ PRINCIPLES OF GOOD POLICING, *supra* note 139, at 6 (“[T]he police, by virtue of the authority that society vests in them, have overarching responsibility for the outcome of encounters with citizens.”).

283. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

284. See *supra* Part IV.

285. *Cf.* *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961). Asking clarifying questions would help reduce the amount of evidence excluded under the exclusionary rule because officers would be less likely to seize evidence that is “off-limits” if they had more information about the evidence they were seizing.

286. See *Weiber*, *supra* note 97, at 638 (“Even though the test would slow down law enforcement activities, this is a relatively small price to pay for the added protection to criminal defendants’ rights which the test provides.”); *id.* at 605 (“This test would require that a person who consents to the search actually have common authority over the place or item searched. . . . Additionally, such a test would not significantly impede law enforcement efforts.”); *cf.* *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966). The burden of asking clarifying questions is seemingly lower than the burden of reading a person her *Miranda* rights; *Miranda* rights consist of a paragraph of information whereas asking a question can be done in a single short sentence, such as “Is this your backpack?”

287. See *Miranda*, 384 U.S. at 478–79.

288. See Frank J. Stretz, *An Objective Solution to an Ambiguous Problem: Determining the Ownership of Closed Containers During a Consensual Search*, 61 DEPAUL L. REV. 203, 220–21 (2011).

search. Complying with this rule would be as simple as asking, “is this your shoebox?” or “do you use these drawers?”²⁸⁹

The burden to clarify the scope of the search should be on the government, rather than the consenting party, because the burden of establishing the existence of apparent authority rests on the government.²⁹⁰ After all, the government is trying to circumvent the warrant requirement by asking for consent to conduct a search.²⁹¹ Thus, it follows that the police should also bear the burden of clarifying the scope of an individual’s open-ended consent when the police seek to search a closed container.²⁹²

Putting the burden on individuals to clarify the scope of their consent is unreasonable because unlike the police, individuals do not have training on Fourth Amendment consent searches,²⁹³ and individuals do not have an incentive to provide detailed clarifications without prompting.²⁹⁴ If consenting parties do not limit the scope of their

289. *Cf.* *United States v. Purcell*, 526 F.3d 953, 958 (6th Cir. 2008) (“Agent Rolfsen moved toward the duffel bags by the door and pointed to ‘a green brown bag’ and asked Crist ‘[i]s it this bag?’”) (alteration in original).

290. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (“As we stated in *Matlock* . . . , ‘[c]ommon authority’ rests ‘on mutual use of the property by persons generally having joint access or control for most purposes. . . .’ The burden of establishing that common authority rests upon the State.”) (second and third alterations in original).

291. *See id.* at 190 (Marshall, J., dissenting) (“Because the sole law enforcement purpose underlying third-party consent searches is avoiding the inconvenience of securing a warrant, a departure from the warrant requirement is not justified simply because an officer reasonably believes a third party has consented to a search of the defendant’s home.”).

292. *Cf.* Marc L. Edmondson, *Scope of Consent Searches: Are Police Officers and Judges Misguided by the Objective Reasonableness Test?*, 57 MO. L. REV. 1057, 1072 (1992) (“Perhaps a more palatable and workable rule would be to break the types of consent searches into three categories: (1) a general consent search, (2) a consent search with an expressed object, and (3) a consent search with an expressed object that focuses on containers. Under this approach, the specificity of the request determines the permissible scope of the search.”).

293. For instance, Seattle police officers are trained on the rules surrounding consent searches. *See* SEATTLE POLICE DEPT., SEATTLE POLICE DEPARTMENT MANUAL § 6.180 (updated Mar. 1, 2017), <https://www.seattle.gov/police-manual/title-6—arrests-search-and-seizure/6180—searches-general> [<https://perma.cc/2VPC-G98M>] (“Consent is valid if the third person has equal authority over the business or residence and it can be concluded the absent person assumed the risk the cohabitant (roommate) might permit a search.”). *See also* Weiber, *supra* note 97, at 620 (“Because of their training and jobs, the police will naturally have a superior ability to ask questions which, when read to the jury, will make it appear as if the police were reasonable in believing that the consenting party had authority to allow the search. Additionally, the police will know which questions not to ask—especially those which may reveal that a party does not have the requisite authority to allow a search.”).

294. *Cf.* *United States v. Peyton*, 745 F.3d 546, 553–54 (D.C. Cir. 2014) (where the defendant’s grandmother told police that the defendant kept his belongings in the living room, but did not clarify which objects actually belonged to the defendant); *United States v. Taylor*, 600 F.3d 678, 679–80 (6th Cir. 2010) (where the tenant consented to a search but did not tell police that she lacked

consent, then they are potentially eroding the privacy rights of their roommates.²⁹⁵ The courts should not create a system that places the burden of clarifying the scope of authority on a party that has no incentive to properly limit consent and a high potential to erode the rights of others.²⁹⁶ Instead, the courts should require the government to clarify the scope of the consenting party's authority because the government is better positioned than individuals to understand Fourth Amendment implications.²⁹⁷

Another potential objection to this approach is that it would make it harder for law enforcement officers to collect evidence.²⁹⁸ Switching from a standard-based approach to this bright-line rule would narrow the scope of potentially collectible evidence.²⁹⁹ This is particularly true in jurisdictions using the obviousness approach because law enforcement will no longer be afforded the wide latitude of the illogical obviousness standard—officers will only be able to collect evidence that falls within the consenting party's actual authority.³⁰⁰ However, this will not *unfairly* constrain police officers during investigations because officers should not knowingly obtain evidence outside the scope of the consenting party's authority in the first place.

authority over her male guest's belongings in the spare bedroom); *United States v. Snype*, 441 F.3d 119, 127 (2d Cir. 2006) (same); *United States v. Melgar*, 227 F.3d 1038, 1041–42 (7th Cir. 2000) (where one person consented to a search but did not clarify for the police the exact items over which he or she did not have authority).

295. *Cf. Snype*, 441 F.3d at 136–37.

296. *See Weiber*, *supra* note 97, at 626–27 (“[A] defendant cannot know that a stranger or party in whom no common authority rests may consent to a search . . . [A] criminal defendant has no ability to shield his privacy interests because he cannot know when someone who lacks sufficient authority over his property will permit a search. The relationship between a third party who lacks authority and the defendant is, by definition, too attenuated for the defendant to recognize the risk of a search.”); *Peyton*, 745 F.3d at 553–54 (where the court protected the rights of the absent co-tenant and put the burden of clarifying the scope of consent onto the police).

297. *See Peyton*, 745 F.3d at 553–54; *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991) (“[T]he government’s burden to establish that a third party had authority to consent to a search . . . cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to ‘mutual use’ by the person giving consent, ‘then warrantless entry is unlawful *without further inquiry*.’” (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990)) (emphasis added in *Whitfield*).

298. *See Stretz*, *supra* note 288, at 204 (“Such a rule would essentially freeze the legitimate exercise of police authority, spark an inestimable amount of litigation over hairsplitting ambiguities, and make officers unduly fearful of the unintended legal consequences lurking under every lid.”).

299. *Cf. Snype*, 441 F.3d at 136–37 (where officers were permitted to search anything not obviously belonging to another party, which encompassed everything in the apartment).

300. *Contra id.*

Although this bright-line rule might result in “lost” evidence, the Fourth Amendment itself has imposed the cost.³⁰¹ This situation is closely analogous to Supreme Court Justice Potter Stewart’s comments in his law review article concerning the exclusionary rule.³⁰² As Justice Stewart explained, the exclusionary rule maintains the status quo that would have prevailed if the Fourth Amendment requirements had been obeyed:

Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the [exclusionary] rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place.³⁰³

Because the proposed bright-line rule only requires law enforcement officers to clarify the scope of consent, the cost of “lost” evidence is properly credited to the Fourth Amendment itself, rather than the bright-line rule.³⁰⁴

If exigent circumstances exist, such as an imminent risk that the evidence would be destroyed, then the government will have an exception to the warrant requirement and will be able to search the container immediately.³⁰⁵ Thus, the only situation in which this proposed rule would prevent law enforcement officers from getting evidence they need would be when there are no exigent circumstances and the officers

301. See *United States v. Leon*, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting) (“[T]he [Fourth] Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself that has imposed this cost.”).

302. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392–93 (1983) (“The exclusionary rule places no limitations on the actions of the police. The fourth amendment does. The inevitable result of the Constitution’s prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. . . . [That] is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.”).

303. *Id.* at 1392.

304. See *id.*

305. The need “to prevent the imminent destruction of evidence” has long been recognized as a sufficient justification for a warrantless search. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Georgia v. Randolph*, 547 U.S. 103, 116 n.6 (2006); *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

do not have a warrant. A container that law enforcement officers could not search under this rule should not be viewed as “lost” evidence because preventing the government from seizing evidence without a warrant is the essential purpose of the Fourth Amendment.³⁰⁶

Critics of the ambiguity approach might argue that law enforcement officers should not be required to ask clarifying questions in this context because they are not required to do so in other contexts. For example, the Supreme Court in *Schneckloth v. Bustamonte*³⁰⁷ and *United States v. Drayton*³⁰⁸ made clear that it will rarely place a duty on law enforcement officers to inform an individual of his right to object to a search.³⁰⁹

Placing a duty on law enforcement officers to clarify the ownership of containers is different than making officers inform a suspect of her right to object to a search.³¹⁰ *Bustamonte* and *Drayton* assert that law enforcement officers have no duty to educate the public about the right to object to a search.³¹¹ But placing a duty on law enforcement officers to inquire before searching a closed container does not require officers to

306. See *Leon*, 468 U.S. at 941 (Brennan, J., dissenting) (“If nothing else, the [Fourth] Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the ‘price’ our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment.”).

307. 412 U.S. 218 (1973).

308. 536 U.S. 194 (2002).

309. *Bustamonte*, 412 U.S. at 227 (“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.”) (italics in original); *Drayton*, 536 U.S. at 206 (“The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.”). In *Bustamonte*, the police pulled over a vehicle containing six individuals for a broken headlight and license plate light. *Bustamonte*, 412 U.S. at 220. The driver was unable to produce a driver’s license, but one of the passengers was able to produce one. *Id.* The passenger consented to a search of the vehicle, and three stolen checks were recovered as a result. *Id.* *Bustamonte* argued that the consent was invalid. *Id.* at 220–21. The Court held that the police do not have a duty to inform individuals of their right to object to a search—the government needs to show only that voluntary consent existed. See *id.* at 246–49. In *Drayton*, police officers boarded a Greyhound bus as part of a drug interdiction effort and interviewed passengers. *Drayton*, 536 U.S. at 197–98. Officers found bags of cocaine on two of the passengers who consented to a search. *Id.* at 198–99. The passengers argued that the search was unlawful because the police engaged in coercive behavior by boarding the bus and not informing the passengers that they could object to a search. *Id.* at 199–200. The Supreme Court held that the search was valid because there was no coercion on the part of the police—the passengers were free to object to the search or exit the bus. See *id.* at 200, 206–07. The Court affirmed the holding in *Bustamonte* that the police have no duty to inform individuals of their right to object to a search. *Id.* at 207.

310. Cf. *Bustamonte*, 412 U.S. at 246–49.

311. See *Drayton*, 536 U.S. at 206–07; *Bustamonte*, 412 U.S. at 246–49.

educate the public about Fourth Amendment rights³¹²—it merely requires officers to ascertain whether the consenting party actually has the authority to grant consent in the first place.

In sum, the Supreme Court should adopt a bright-line rule governing third party consent searches of containers because it would maximize protection for individuals in their homes, and bring the law into conformity with social expectations. Such a rule is beneficial to law enforcement, lawyers, and judges, while placing only a minimal burden on officers.

CONCLUSION

The Fourth Amendment was intended to protect individuals from unreasonable governmental intrusions into their private lives. Circuit courts disagree as to whether law enforcement has a duty to inquire about the extent of a consenting party's actual authority over containers in a common area.³¹³ This is particularly problematic in today's society because millions of Americans take advantage of shared living arrangements.³¹⁴ Of the currently established approaches, the approach taken by the D.C. Circuit in *Peyton* is superior because it provides more protection to individuals than the obviousness approach at almost no additional cost to police.³¹⁵ However, to properly safeguard individuals' Fourth Amendment rights, the Supreme Court should declare an even more protective bright-line rule requiring officers to inquire before searching *any* container in a common area.³¹⁶ A bright-line approach goes even further than the ambiguity approach in maximizing Fourth Amendment protections; it replaces an amorphous standard with a clear rule that is simple for law enforcement, judges, and lawyers to apply.

312. *Cf.* United States v. Peyton, 745 F.3d 546, 553–54 (D.C. Cir. 2014) (requiring the police to determine the scope of open-ended consent when there is *ambiguity* as to ownership of the container); United States v. Taylor, 600 F.3d 678, 685 (6th Cir. 2010) (same).

313. *See supra* Part IV.

314. *See supra* Part I.

315. *See supra* Part IV.

316. *See supra* Part V.