

January 01, 2011

Reconsidering a parent's "apparent" authority in intergenerational co-residence: the need for a paradigm shift in evaluating parental consent to search adult children's bedrooms

Hillary B. Farber
Northeastern University

Recommended Citation

Farber, Hillary B., "Reconsidering a parent's "apparent" authority in intergenerational co-residence: the need for a paradigm shift in evaluating parental consent to search adult children's bedrooms" (2011). *Criminology and Criminal Justice Faculty Publications*. Paper 2.
<http://hdl.handle.net/2047/d20002400>

Reconsidering a Parent’s ‘Apparent’ Authority in Intergenerational Co-Residence: The Need for a Paradigm Shift in Evaluating Parental Consent to Search Adult Children’s Bedrooms

Hillary B. Farber¹

TABLE OF CONTENTS

Introduction..... 2

Third Party Consent – An Overview..... 8

The Creation and Development of the Third Party Doctrine 8

Emergence of the Apparent Authority Doctrine – Illinois v. Rodriguez 13

Georgia v. Randolph - The New Relevance of Social Norms and Customary Understanding among Cohabitants 16

Adult Children and Parents Living Together is Not an Atypical Living Arrangement 27

Historical Background..... 27

Recent Trends in Parent-Adult Child Living Arrangements 32

Proposal..... 38

Conclusion..... 40

¹ Assistant Professor, School of Criminology and Criminal Justice; Visiting Assistant Professor of Law, Northeastern University School of Law.

After an eight-month federal investigation did not turn up sufficient evidence to obtain a search warrant of Ray Andrus' home, federal agents knocked on Ray Andrus' home hoping to conduct a consent search.² However, at 8:45 a.m. on Friday August 27, 2004, fifty-one year old Ray Andrus was at work, and not at his residence.³ Ray Andrus' father, 91 year old Dr. Andrus, answered the door in his pajamas and invited the agents into the home.⁴ During conversation, the agents learned that Ray lived in the center bedroom, did not pay rent, and lived with his parents to help care for them.⁵ When asked if Dr. Andrus had access to his son's bedroom, he replied "yes," and said he "felt free to enter the room when the door was open, but always knocked if the door was closed."⁶ Based on this information, the agents asked Dr. Andrus for consent to search the house, including Ray Andrus' bedroom, to which Dr. Andrus agreed.⁷ The agents immediately went into Ray Andrus' bedroom and began searching his computer for files containing images of child pornography.⁸ Within five minutes forensic experts had retrieved images of child pornography and ultimately Andrus was charged with knowingly possessing images of child pornography.⁹

Firmly established precedent makes clear that a parent has authority and control over his/her minor child, which includes responsibility for the discipline, care and well being of the child.¹⁰ Not surprisingly, most courts have concluded that a parent's consent to a police search of the residence for evidence of a minor's criminal activity is a reasonable and natural extension

² United States v. Andrus, 483 F.3d 711, 713 (10th Cir. 2007).

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Dr. Andrus signed a consent to search form. See Id.

⁸ See Id.

⁹ Although much of the court's focus was on the legality of the search of the computer, the fact pattern is illustrative of the legal presumption that because 51 year old Ray Andrus is living with his father, Dr. Andrus had authority to consent to a search of Ray's bedroom.

¹⁰ *Parham v. J. R.*, 442 U.S 584 (1979).

of a parent's control over his minor child's moral training.¹¹ Relying upon the agency theory of third party consent, courts have held that parents have superior authority over their households; effectively authorizing them to grant permission to police to search anywhere on the premises, including their child's bedroom.¹² As one court stated, parents' rights are "superior to the rights of the children who live in [the] house."¹³ Where there is far less consensus is whether the parental authority rationale applies when the child is an adult. Many courts that have considered the validity of parental consent to search areas of the home exclusively used by an adult child, such as an office or a bedroom, have extended the superior authority rationale to adult children living with their parents.¹⁴ These courts have determined that the mere fact that the third party is the parent creates a "presumption of control" that essentially permits police to rely on parental consent without further inquiry into the parent's relationship to the home, the child's bedroom,

¹¹ U.S. v. DiPrima, 472 F.2d 550, 551 (1st Cir. 1973).

¹² See e.g. Colbert v. Com, 43 S.W.3d 777, 783 (Ky. 2001)(finding that mother had superior authority over 19 year old son and son's property), N.J. v. Douglas, 498 A.2d 364 (N.J. Sup. Ct. 1985)(mom had authority to consent to the search of her adult son's bedroom based and highlights the parent's authority as head of the household or owner of the property, as an exercise of parental authority over the minor or as a cotenant or common resident); Tate v. State, 363 A.2d 622, 626 (Md. Ct. Spec. App. 1976) (defendant's mother, as sole owner of the premises, had authority to consent to search of bedroom of her 17-year-old son); U.S. v. Block, 590 F.2d 535 (4th Cir. 1978)(court found that the mother had common authority as the 'head of the household' and defendant was a mere guest occupant of the room in his mom's home. Court further noted that mother did not have authority to consent to a search of a locked footlocker in the room because the defendant had a high expectation of privacy in the footlocker), United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997) ("A third-party consent is also easier to sustain if the relationship between the parties-parent to child here, spouse to spouse in others - is especially close"); Vandenberg v. Superior Court, 8 Cal. App. 3d 1048,1055 (Cal. Ct. App. 1970) (father's consent to police search of 19-year-old son's bedroom was valid because it was a "reasonable and necessary extension of a father's authority"); and State v. S.B., 758 So.2d 1253, 1255 (Fla. Dist. Ct. App. 2000) (nonresident father, by virtue of his ownership and authority to enter home in which his juvenile son lived, could consent to search of home).

¹³ State v. Kinderman, 136 N.W.2d 577, 580 (Minn. 1965).

¹⁴ See, e.g., State v. Miller, 799 A.2d 462 (Md. Ct. Spec. App. 2001) (court determined that father had properly consented even though the defendant who lived in the basement was present because there was a familial relationship between the defendant and his father, father was head of household, and father expressed a desire to have any drugs removed from his premises); Com. v. Basking, 2009 PA Super 67, 970 A.2d 1181 (2009) (court did not give weight to age of 20-year-old defendant where consent to search third floor was instead based on mother's apparent authority despite the fact that she admitted to not having been up to defendant's floor in years); State v. West, 514 S.E.2d 257 (Ga. Ct. App. 1999) (court did not consider defendant's age, but upheld warrantless search based on authority of mother even though 19-year-old son used a lock on his door).

and property therein.¹⁵ A smaller number of courts have been less favorable toward presuming parental control and dominion over the household when the child is above the age of majority.¹⁶ These courts have required police to determine the parent's relationship to any areas within the home that reasonably could be designated for the exclusive use of one occupant before relying upon the parent's consent to search.¹⁷

This Article argues that all courts should require a rigorous inquiry by police when seeking consent from parents to search an adult child's bedroom, or another area of the home occupied exclusively by an adult child who resides in the home. Police should be required to ascertain the parent's relationship to the home, and to the particular rooms in the home, before requesting consent to search the premises.¹⁸ A parent who fails to demonstrate common authority or mutual use of the specific area to be searched should not be considered to have provided valid consent under the law. This is a rule that could be easily understood by police, is not too onerous on police, and protects the privacy interests of all occupants of the home as required by the Fourth Amendment. Adult children living with their parents should not have a lesser expectation of privacy than if they lived with anyone other than their parent.¹⁹

¹⁵ See Jason Miller, *When is A Parent's Authority Apparent? Reconsidering Third Party Consent Searches of an Adult Child's Private Bedroom and Property*, 24 CRIM. JUST. 34-37 (2010).

¹⁶ See *Martin v. United States*, 952 A.2d 181 (2008); Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 4 Search & Seizure (4th ed. 2009), § 8.4(b).

¹⁷ For example, a bedroom, an office, a bathroom or any other area that could be understood to be for the sole use of one single occupant. See *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. 1991) ("An adult offspring who pays nothing to his parents might nevertheless enjoy exclusive use of a room within the home" and "agents faced with such situations must make further inquiries before engaging in warrantless searches.").

¹⁸ This article is mainly concerned with officer reliance on parental consent when the adult cotenant is not present. In *Randolph*, both co-occupant, husband and wife, were present, and Scott Randolph refused police entry, while Janet Randolph welcomed it.

¹⁹ See, *State v. Vinuya*, 32 P.3d 116, 127-8 (Haw. Ct. App. 2001), where the court concluded that, despite the fact the 23-year-old defendant was living with his parents, the mother could not consent to a warrantless search of his bedroom based on parental or common authority alone; and his expectation of privacy was one that society was prepared to recognize. See also, Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 4 Search & Seizure (4th ed. 2009), § 8.3(g).

This is an issue of critical importance today because intergenerational households are the fastest growing living arrangement in the country.²⁰ There are varied reasons for the increased cohabitation between adult children and parents. To be sure, the foreclosure crisis, high unemployment rate, and exorbitant health care costs are causing adults across the generational spectrum to make choices based on their financial means, or lack thereof, which is translating into more adult children either moving back into their parents home, or aging parents seeking refuge in their adult child's home. A 2009 Association for the Advancement of Retired Persons ("AARP") survey revealed that 33% of respondents between the ages of 18 and 49 lived with their parents or their in-laws, 11% of those respondents were between the ages of 35 to 44.²¹ Approximately 15% of respondents not currently living with their parents said that it was likely that they will need to move in with family members or friends or have family members or friends move in with them. Among those who thought it would be likely, the largest percentage - about one-third - said it would be due to a loss of income; 19 percent said a change in job status; and 8 percent cited home foreclosure as the reason.²²

Contemporary demographics concerning intergenerational cohabitation weigh against police making assumptions about a parent's dominion over the home. The United States Supreme Court recently elevated the relevance of social norms and expectations when assessing reasonable reliance on third party consent. In the 2006 case, *Georgia v. Randolph*²³, the Court

²⁰ Examining Household Compositions 8, U.S. census bureau special report 2005.

²¹ *Exclusive AARP Bulletin Poll Reveals New Trends in Multigenerational Housing*, [aarp.org](http://www.aarp.org/about-aarp/press-center/info-03-2009/Multigen_Housing_Poll.html), (March 3, 2009), http://www.aarp.org/about-aarp/press-center/info-03-2009/Multigen_Housing_Poll.html, (last visited Nov. 3, 2010). The survey also notes that 34% of people surveyed said they would likely have to move in with family or friends and that it would be due to a loss of income. *Id.* See also Christie D. Batson & Jennifer R. Keene, *Under One Roof: A Review of Research on Intergenerational Co-residence and Multigenerational Households in The United States*, 4/8 *Sociology Compass* 642, 652 (2000), where the authors predict that "working adults who experience economic hardship are more likely to seek temporary assistance from family members, most often their parents."

²² See Donna Owens, *Multigenerational Living under One Roof*, *Baltimore Sun*, March 22, 2009.

²³ *Georgia v. Randolph*, 547 U.S. 103 (2006).

articulated a new test for assessing reasonableness in third party consent situations. Justice Souter explained that part of assessing reasonableness in the third party context is relying upon a “commonly held understanding” about the authority co-inhabitants possess with respect to one another’s property and privacy concerns.²⁴ The majority even uses the example of an eight year old child who answers the door and invites the caller inside would not be perceived as having the authority to permit anyone to search his parent’s bedroom.²⁵ The Court’s emphasis on the relevance of widely shared social expectations is an important departure from previous cases which are concerned almost exclusively with the assumption of risk borne by anyone sharing property with another.

This normative change in household composition provides a new perspective on the social customs and practices concerning cohabitation in the U.S. A search where police rely upon parental consent to search the adult child’s bedroom without first ascertaining whether the parent had the authority to enter the room him/herself ignores the reasonable possibility that the parent and child may have an agreement as to the circumstances under which the parent may enter the adult child’s room.²⁶ If police were prohibited from presuming that parents who reside with their adult children had authority to consent to a search of the child’s bedroom, police would ask questions and gather information about the parent’s relationship to the premises,

²⁴ See *Id.* at 111.

²⁵ See *Id.*

²⁶ It is not uncommon for adult children and parents who reside together to agree upon spatial boundaries within the home in order to respect and preserve each occupant’s privacy. See, e.g., *Becknell v. State*, 720 S.W.2d 526 (Tex. Crim. App. 1986) (Warrantless search held improper where adult son’s room was padlocked, son cooked and ate meals separately, and father and son had agreement in which father could only enter son’s bedroom when son was present); *People v. Nunn*, 304 N.E.2d 81 (Ill. 1973), *cert. den.*, 416 U.S. 904 (1974) (Court upheld warrantless search even though adult son locked bedroom door and told mother not to enter or let anyone else to enter); *State v. Jenkins*, 39 P.3d 868 (Or. Ct. App. 2002) (Despite adult son having made oral agreement with parents that garage area was “his” and police never inquiring as to use of garage, the court nevertheless upheld warrantless search on grounds of common authority); *Hughes v. Coconut Creek Police Dep’t*, 233 Fed.Appx. 919 (11th Cir. 2007) (Warrantless search of 24-year-old son’s bedroom did not violate his Fourth Amendment rights even though son had his own key, paid rent, and told father not to allow anyone to enter his room.).

including whether the parent and child had an understanding concerning the privacy of the child's room.²⁷ Alternatively, permitting police to presume parents have authority to consent to a search of the adult child's bedroom, even if it is later determined that the parent lacked authority, will uphold searches on grounds that the police reasonably relied on the appearance of authority.²⁸ Such a result neither comports with the Supreme Court's ruling in *Georgia v. Randolph*, nor with the Fourth Amendment's guarantee that a person should be free from unreasonable searches and seizures in their own home.

Part II of this Article introduces the Fourth Amendment's third party consent doctrine and discusses its evolution following the Supreme Court's 1961 decision, *Chapman v. United States*. Part III debunks the 'presumption of parental control' in light of the significant growth in intergenerational co-residence and the precedent setting case of *Georgia v. Randolph*. Part IV reveals how the increase in intergenerational co-residence is indicative of a normative shift in household composition in the U.S. Lastly, Part V sets forth guidelines for police to adhere to before relying on parental consent to search the bedroom of an adult child living with his/her parent.

II. Third Party Consent – An Overview

A. The Creation and Development of the Third Party Doctrine

²⁷ See, e.g. *Commonwealth v. Basking*, 970 A.2d 1181 (Pa. 2009) (police did an inadequate job asking questions of mother).

²⁸ See *Illinois v. Rodriguez*, 497 U.S. 177 (1990); See also, *Pearson v. State of Texas*, 2007 WL 4355269 ("If officers reasonably believed that the third party had common authority over the place to be searched, then their good-faith mistake will not invalidate the search.").

According to researchers, consent searches comprise the largest portion of warrantless police searches.²⁹ This is in part because consent searches offer a number of benefits to police without the costs. For instance, obtaining valid consent allows police officers to bypass the administrative hurdles associated with obtaining and executing a warrant.³⁰ Consent searches are also considered a preferred means of gathering evidence because it is less likely that evidence will be excluded at a suppression hearing.³¹ Most jurisdictions do not even require a request for consent to be based up any suspicion of criminal conduct.³² Lastly, the scope of a consent search can be broader than might otherwise be available to police with a search warrant.³³ As such, consent is the preferred investigative method of police.

Of course, a portion of the total number of consent searches involves consent from third parties.³⁴ The third party consent doctrine was first considered by the US Supreme Court in *Chapman v. United States*.³⁵ In *Chapman*, police officers, acting without a warrant, relied on the landlord's consent to enter a home the landlord rented to the petitioner, Chapman.³⁶ Officers

²⁹ Some scholars have written that consent searches comprise as much as ninety percent of warrantless searches. See, Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005). See also, Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure*, 261 n.5 (4th ed. 2006) (citing Richard Van Duizend et al., *The Search Warrant Process: Preconceptions, Perceptions, and Practices*, 21 (1984) for the statistic that ninety- eight percent of warrantless searches are consent searches).

³⁰ Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV., 27, 46 (2008).

³¹ LaFave, *supra* note 15, § 8.1, at 1.

³² Maclin, at 46.

³³ LaFave, § 8.1, at 2. If an unknowing person consents to a search of their property and does not place any parameters on the scope of the search, such as limiting it to particular compartments in a car or rooms in a house, than police can search anywhere on the property. See *Id.*

³⁴ When we speak of third parties we mean a person other than the target of the investigation who has a reasonable expectation of privacy in the place to be searched who may have actual or apparent authority to issue valid consent for another individual who has an expectation of privacy in the premises.

³⁵ *Chapman v. U.S.*, 365 U.S. 610 (1961).

³⁶ The officers testified that the landlord, [Bridgaman] told them "to go in the window and see what('s) what in there." Bridgaman's version of what he said was: "If it's what I think it is, what it smells like, yes, you can have my permission to go in." *Id.* at 610.

climbed through an unlocked window and searched the premises in Chapman's absence.³⁷ The police seized evidence relating to violations of federal liquor laws.³⁸ The Court invalidated the search on the basis that the landlord, despite being the owner of the property, did not have the authority to grant permission to enter the premises he had leased to his tenant.³⁹ Unpersuaded by the government's argument that because the landlord was the property owner he had authority to consent⁴⁰, the Court expressed concern that strict adherence to private property law would undermine a tenant's guaranteed right under the Fourth Amendment to expect privacy in his own home, even if that home is leased and not owned.⁴¹

A few years later, the Court applied the third party consent doctrine in a case where police officers suspected a man of committing a robbery and conducted a warrantless search of his hotel room based on the hotel clerk's consent.⁴² With neither a search warrant nor an arrest warrant, police went to a hotel where they believed the suspect Stoner was staying.⁴³ Police asked whether Stoner was a registered guest at the hotel.⁴⁴ The night clerk informed police that Stoner was staying at the hotel and that Stoner was not in his room at that time.⁴⁵ Police informed the night clerk that Stoner was believed to have committed a robbery and they were

³⁷ *Chapman*, 365 U.S. at 612.

³⁸ See *Id.*

³⁹ *Id.* at 617.

⁴⁰ The Government does not contend that the search met the standards of the Fourth Amendment, rather, it contends: "Our position is that when the landlord, paying a social call, found good reason to believe that the leased premises were being wasted and used for criminal purposes, he had authority to enter as a matter of right and to bring officers with him for this purpose."

⁴¹ Moreover, 'it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. * * * (W)e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime.' *Chapman* at 616.

⁴² *Stoner v. California*, 376 U.S. 483, 485-86 (1964).

⁴³ *Id.* at 485.

⁴⁴ See *Id.*

⁴⁵ See *Id.*

concerned that he may have a weapon in his hotel room.⁴⁶ Police asked the clerk for permission to enter Stoner's room.⁴⁷ The clerk took police to Stoner's room, unlocked the door and told police "be my guest."⁴⁸ Police searched the room and found a firearm and clothing that were introduced against Stoner at trial.⁴⁹ Stoner objected to the search of his hotel room on the ground that the hotel clerk did not have authority to permit police to enter.⁵⁰ Following its prior ruling in *Chapman*, the Court found no factual basis for any express delegation of authority sufficient to permit a police search of defendant's room.⁵¹ The Court noted that a hotel guest's 'explicit or implicit permission' to allow maids, janitors, and servicemen into the room to perform their prescribed duties is in no way analogous to the purpose with which the hotel clerk and police entered Mr. Stoner's room.⁵²

In *Frazier v. Cupp*, the Supreme Court articulated the "assumed risk" principle, declaring that a joint owner of a duffel bag assumes the risk that his co-user may permit someone else to look inside.⁵³ Petitioner Frazier and his cousin Jerry Lee Rawls shared a duffel bag, which was left in Rawls' home.⁵⁴ When police officers arrested Rawls on murder charges they asked for his clothing.⁵⁵ Rawls directed police to a duffel bag, which was being used jointly by Rawls and his

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *Id.* at 486.

⁵⁰ *Id.* at 487-88.

⁵¹ The record revealed the following police account of their request to the hotel manager to enter Stoner's room:

'We asked him if he would give us permission to enter the room, explaining our reasons for this.

'Q. What reasons did you explain to the clerk?

'A. We explained that we were there to make an arrest of a man who had possibly committed a robbery in the City of Monrovia, and that we were concerned about the fact that he had a weapon. He stated 'In this case, I will be more than happy to give you permission and I will take you directly to the room.'

⁵² Stoner at 489-90.

⁵³ *Frazier v. Cupp*, 394 U.S. 731(1969).

⁵⁴ *Id.* at 740

⁵⁵ *Id.*

cousin Martin Rene Frazier.⁵⁶ Both Rawls and his mother consented to a search of the duffel bag, wherein police found clothing later used at trial against Frazier.⁵⁷ The Court held that, since Rawls was a joint user of the bag, he clearly had authority to consent to its search and Frazier assumed the risk that Rawls would allow someone else to look inside.⁵⁸ The Court was dismissive of Frazier's argument that because Rawls had actual use of only one compartment in the bag, he did not have authority to consent to a search of the entire bag.⁵⁹ Justice Marshall called these facts "metaphysical subtleties" and refused to give them any notable weight in determining consent.⁶⁰ The Court explained that it was reasonable for a police officer seeing a man in possession of property to believe that he has authority to consent to a search of that object.⁶¹ The officer's perceptions that Rawls was the sole owner of the bag, without any indication to the contrary, was reasonable and therefore did not require the officer to ask about any third party interests.⁶² These facts stand in sharp contrast to *Stoner*, where a police officer can be expected to know that a hotel guest reasonably expects his room not to be entered without his permission.⁶³ The scenario that began this Article is akin to *Stoner* in that if the parent does not have mutual use of the bedroom or other area to be searched it is not reasonable for police to assume the parent has authority to grant consent.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See Id.*

⁶⁰ *See Id.* Given the size of the object and the lack of physical barriers between the compartments, the Court's assessment is logical. However, the distinctions between a duffel bag and rooms in a home are more obvious, and to ignore their distinctiveness would not be reasonable.

⁶¹ *See Id.*

⁶² *See Id.*

⁶³ The Court adds that it is customary in hotels for housekeepers and the like to enter the room to provide like services but this hotel clerk's entry was not such a situation.

A year later, in *U.S. v. Matlock*, the Supreme Court sharpened its focus on a third party's relationship to the property for purposes of determining authority to consent.⁶⁴ The Court was clear in pointing out that its analysis would rest on mutual use of the property by persons generally having joint access or control rather than mere property rights. *Matlock* considered whether the voluntary consent of a third party to search the respondent's living quarters was sufficient to make the seizure of incriminating evidence admissible at the co-occupant's trial.⁶⁵ Matlock was arrested in his front yard, and rather than seek his permission to search the premises that he shared with one of the owners and her children, the police placed Matlock in the police car and sought consent to search from his co-tenant, Mrs. Graff.⁶⁶ Mrs. Graff, who had been watching Mr. Matlock's arrest from inside the home, allowed police entry into the home and voluntarily consented to a search of the house.⁶⁷ The police found a large sum of money inside a diaper bag in the bedroom that Matlock and Mrs. Graff shared.⁶⁸ The Court held that a third party who has "common authority over or other sufficient relationship to the premises or effects to be inspected," may voluntarily consent to a search of the premises; and all evidence seized pursuant to that search may be used against the co-occupant.⁶⁹ In a six to three decision, the majority was quick to point out that the authority, which justifies the third-party consent, "rests upon mutual use of the property by persons having joint access or control for most purposes."⁷⁰ The Court determined that Mrs. Graff had actual authority to consent to a search of the home in

⁶⁴ United States v. Matlock, 415 U.S. 164, 171-72 (1974); Sharon E. Abrams, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963, 964 (1984).

⁶⁵ U.S. v. Matlock, 415 U.S. 164, 166 (1974).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 166-67.

⁶⁹ *Matlock*, 415 U.S. at 171.

⁷⁰ See *Id.* at 172 n.7.

which she and the respondent resided, and the officers were not obligated to ask for the respondent's consent even though he was nearby.⁷¹

Matlock had lasting implications for the third party consent doctrine because it firmly established the two grounds upon which consent by a third party was sufficient to allow for a warrantless search.⁷² First, a third party with mutual use of the area to be searched [Graff and Matlock's bedroom] could authorize the search "in his own right." Second, a person sharing property with another assumes the risk that his/her co-occupant would consent to a search of the shared premises.⁷³ Thus, *Matlock's* articulation of the third-party consent doctrine made it easier for police to search a dwelling without a warrant.

B. Emergence of the Apparent Authority Doctrine – Illinois v. Rodriguez

Several years following *Matlock*, the Supreme Court expanded the doctrine of third party consent to situations involving persons who gave police permission to search when actually they did not have authority to do so.⁷⁴ The apparent authority doctrine is a means courts have at their disposal to validate consent that would otherwise be invalid because the third party did not possess actual authority to consent.⁷⁵ For a police officer relying on what he believed was authorized permission to search, the issue was whether the search would be justified based upon

⁷¹ See *Id.* at 177.

⁷² See Maclin, *supra*, note 30.

⁷³ *Id.* Although the Court solidified the third party consent doctrine in *Matlock*, Justice Douglas' dissent poked holes in the majority's opinion and harkened back to a more conservative application of warrantless searches. Justice Douglas pointed out that the respondent paid Mrs. Graff's parents for use of a bedroom in the home. He disapproved of the majority's erosion of the Fourth Amendment, noting that the officers had enough time to secure a search warrant. Additionally, he argued that there were no exigent circumstances, emergency, or danger to justify a warrantless search. See *Matlock* at 179-80.

⁷⁴ *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).

⁷⁵ See, e.g. "[e]ven if the consenting party does not, in fact, have the requisite relationship to the premises, there is no Fourth Amendment violation if an officer has an objectively reasonable, though mistaken, good-faith belief that he has obtained valid consent to search the area." *United States v. Brazel*, 102 F.3d 1120, 1148 (11th Cir.1997).

the officer's reasonable reliance on the third party's authority to consent.⁷⁶ In *Rodriguez*, the complainant Gail Fischer reported to police officers that she was assaulted by the defendant Edward Rodriguez.⁷⁷ At the time of the complaint, Fischer did not reside with the defendant at his apartment, but had in fact moved out approximately one month before the search at issue.⁷⁸ However, she did possess keys to the apartment and left behind furniture and personal affects in the apartment.⁷⁹ Further, although she did spend some nights at his apartment after she moved out, Fischer never went to his apartment by herself nor did she ever invite friends to his apartment.⁸⁰

After requesting police assistance, Fischer accompanied the police to the defendant's apartment and used her keys to gain entry.⁸¹ Although the defendant was asleep inside his apartment, the police used Fischer's consent to enter.⁸² The police then arrested Rodriguez and seized drugs and paraphernalia within the apartment.⁸³ The issue of apparent authority arose because the lower courts found that Fischer did not possess common authority over the premises to grant consent to search the apartment.⁸⁴ Without a basis for Fischer's consent to be valid, the search of Rodriguez's apartment would be Fourth Amendment violation.⁸⁵

In explaining why Fischer's lack of authority did not invalidate the search, the Court analogized to instances where factual mistakes were made, but the Fourth Amendment's

⁷⁶ Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 4 Search & Seizure (4th ed. 2009), § 8.3(g).

⁷⁷ *Rodriguez*, 497 U.S. at 179.

⁷⁸ *Id.* at 180.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

reasonableness requirement upheld the police search.⁸⁶ The Court pointed to instances where a magistrate judge issues a warrant for the search of a house based upon seemingly reliable but factually inaccurate information. In those instances, the owner of the house suffers an inconvenience but it does not constitute a Fourth Amendment violation.⁸⁷ The Court opined:

It is apparent that in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government – whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement – is not that they always be correct, but that they always be reasonable.⁸⁸

The Court concluded that in determining whether the basis for authority to consent exists “is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all that the Fourth Amendment requires is that they answer it reasonably.”⁸⁹

Nonetheless, the Court was cautious to stress that law enforcement officers did not have a free pass to always accept a person’s invitation to enter a premises.⁹⁰ Even if consent is given to search a premises accompanied by an assertion that the person lives there, “the surrounding circumstances could be such that a reasonable person would doubt its truth and not act upon it without further inquiry.”⁹¹ Thus, “determination of consent to enter must ‘be judged against an objective standard,’” and the officer must ask himself if the facts at hand would “warrant a man of reasonable caution in the belief” that the consenting party had

⁸⁶ *Id.* at 184-85.

⁸⁷ *Id.* at 184.

⁸⁸ *Id.* at 185.

⁸⁹ *Id.* at 186.

⁹⁰ *Id.* at 188.

⁹¹ *Id.* at 188.

authority over the premises?”⁹² If not, then warrantless entry without further inquiry is unlawful unless authority actually exists.”⁹³ Furthermore, where an officer encounters ambiguous facts related to a third party’s authority to consent, s/he has a duty to investigate further before relying on the consent.⁹⁴

III. Georgia v. Randolph - The New Relevance of Social Norms and Customary Understanding among Cohabitants

In 2006, the Court was presented with a case that questioned/challenged the fairness of the “assumption of risk” rationale. In *Georgia v. Randolph*,⁹⁵ the Supreme Court considered the issue of whether it is reasonable for police to enter the premises when they are confronted with one occupant who consents to a search of the home, and one who expressly refuses to consent.⁹⁶ Scott Randolph, his wife Janet, and their minor son lived together in Americus, Georgia.⁹⁷ Approximately two months prior to the incident that gave rise to this case, Janet and Scott separated and Janet and their son went to live with her parents in Canada.⁹⁸ Just a few days before the police came to the home, Janet returned to the residence she had shared with Scott.⁹⁹ On July 6, 2001, Janet called police to report a domestic argument she and Scott had, where Scott took their son away.¹⁰⁰ When police arrived at the house Janet told police about their marital problems and reported that Scott was a cocaine

⁹² *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

⁹³ 497 U.S. at 188-89.

⁹⁴ *U.S. v. Kimoana*, 383 F.3d 1215, 1222 (10th. Cir. 2004); *see e.g. U.S. v. Whitfield*, 939 F.2d 1071 (D.C. Cir. 1991) (without further inquiry, police could not rely on mother’s consent to search of defendant son’s bedroom where defendant was 29-years-old).

⁹⁵ *Georgia v. Randolph*, 547 U.S. 103, 106 (2006).

⁹⁶ *See Id.*

⁹⁷ *Id.* at 106

⁹⁸ *See Id.*

⁹⁹ *See Id.*

¹⁰⁰ *See Id.* at 107.

user.¹⁰¹ She also informed police that she had just returned days earlier from her parents' residence, after being away for several weeks.¹⁰² During Janet's discussion with police, Scott Randolph returned to the house with their son, explaining that he had taken his son to a neighbor's house in order to remove him from the argument he and his wife were having.¹⁰³ In the presence of the police officer, Scott denied using cocaine.¹⁰⁴ Janet claimed that there was evidence of drug activity in the house.¹⁰⁵ Officer Murray then turned to Scott and asked him for permission to search the house, Scott plainly refused.¹⁰⁶ The officer then asked Janet Randolph for consent to search the house, which she readily gave.¹⁰⁷ Janet Randolph led the officer upstairs to a bedroom she identified as Scott's, where the officer noticed a drinking straw with a white powdery substance he suspected was cocaine.¹⁰⁸ The officer seized the straw and subsequently charged Scott Randolph with possession of cocaine.¹⁰⁹

The Supreme Court's decision resolved a split among circuits concerning whether one occupant may grant effective consent to police over the objection of a present co-occupant.¹¹⁰

¹⁰¹ See *Id.*

¹⁰² See *Id.*

¹⁰³ See *Id.*

¹⁰⁴ See *Id.*

¹⁰⁵ See *Id.*

¹⁰⁶ See *Id.*

¹⁰⁷ See *Id.*

¹⁰⁸ See *Id.*

¹⁰⁹ See *Id.*

¹¹⁰ See *U.S. v. Rith*, 164 F.3d 1323 (10th Cir. 1999) (father had authority to consent over 18-year old child's denial of consent); *United States v. Morning*, 64 F.3d 531, 533-36 (9th Cir. 1995) (reasonable expectations include "the risk that a co-occupant will allow someone to enter, even if the defendant does not approve of the entry."); *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992) ("Third party consent remains valid even when the defendant specifically objects to it."); *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979) (*per curiam*) (wife's consent held valid over defendant's objection to search); *United States v. Sumlin*, 567 F.2d 684, 687-88 (6th Cir. 1977) (defendant's "female companion" had authority to consent to a search even though defendant expressed refusal). *Georgia v. Randolph* does not address the situation of when the objecting co-occupant is not physically present. See *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008) (defendant co-tenant refused to give consent to search premises after being arrested, and co-tenant's consent to search held invalid); *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) (defendant refused permission to search home computer, wife granted permission later and court held search valid); *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008) (defendant co-occupant objected to search of home and taken to police station, co-occupant's subsequent consent held valid).

The Randolph Court found that the physically present occupant's refusal overrode the consent from the co-occupant, thereby rendering the entry and subsequent search by police unlawful.¹¹¹ Justice Souter, writing for the majority, opined that "customary social understanding" is what should determine whether the officer reasonably relied upon the consent of one occupant over the refusal of another.¹¹² As Justice Souter explained, the question to be answered is not whether the consenting tenant is divested of his property right by the objection of the other tenant.¹¹³ Rather, the question to be answered is whether it is reasonable for the police to rely on one tenant's affirmative response, while simultaneously ignoring the objection of a second tenant, with equal rights to the property.¹¹⁴ The Court answered in the negative, explaining that it is not reasonable for any caller [in this case a police officer] to think he has permission to enter the premises when one of the tenants is physically present and unequivocally refusing to allow the caller in.¹¹⁵ According to the majority, the logical conclusion any reasonable person should deduce from this situation is that he should not go inside.¹¹⁶

The focus on social expectation/norms is a departure from earlier third party consent cases.¹¹⁷ *Georgia v. Randolph* articulates a new standard for assessing when an officer may

¹¹¹ *Randolph*, 547 U.S. at 122-23.

¹¹² *Id.* at 121.

¹¹³ See *Id.*

¹¹⁴ *Id.* Janet Randolph's preferences do not carry any greater or lesser weight than Scott Randolph's preferences when it comes to decisions over who may enter their shared premises.

¹¹⁵ "To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." *Randolph* at 113.

¹¹⁶ See *Id.*

¹¹⁷ See *supra* part II; *U.S. v. Matlock*, 415 U.S. 164 (19)(the consent of one who possesses common authority over the premises is valid against the absent co-occupant); *Illinois v. Rodriguez*, 497 U.S. 177 (if officer reasonably relies on consent given by third party without common authority, consent may be valid against absent co-occupant). In his dissent, Justice Roberts criticizes the ambivalence of the rule advanced by the majority and the way it departs from prior precedent regarding assumption of risk. Roberts finds discord with the majority's conception of "widely shared social expectations" because, as he puts it, when two parties are left to decide the use of their common quarters, it is often difficult for them to come to a clear-cut agreement. As Robert's so succinctly puts it, we are left with a "common stalemate of two gentlemen insisting that the other enter the room first." Thus, according to

reasonably rely on the consent of another occupant.¹¹⁸ This new test has direct bearing on parent-child co-residence and the validity of the ‘presumption of parental control’. The third party consent doctrine has always required that when facts and circumstances present themselves to police that should reasonably cause an officer to doubt the scope of the consenting occupant’s authority, the police have a burden to ask questions to determine the third party’s precise relationship to the area to be searched. Adult children living with their parents should be no exception to the rule.¹¹⁹ First, none of the rationales justifying a parent’s superior authority in a consent search are legally applicable once the child reaches the age of majority. Second, presuming parents have superior authority to consent than the adult co-resident has the potential to lead to unjust results. For example, if an aging parent moved in to his/her adult child’s home to be cared for, one would not expect that the homeowner would thereby have a reduced expectation of privacy in his/her home.

Experts predict that more and more generations of family members will reside together as long as we continue to experience high rates of unemployment, burgeoning medical costs and those affected by the foreclosure crisis are unable to afford new places to live.¹²⁰ As a result of

Roberts, it is difficult for the analysis to be decided on which party has more authority to consent, because a rule based primarily on social expectations will differ with varying social situations. For example, a guest who has traveled a long distance to meet one of the co-tenants would not be as inclined to turn away at the objection of the other tenant. The variety of social situations and “shifting expectations are not a promising foundation on which to ground a constitutional rule.” Randolph at 129-30.

¹¹⁸ See Russell Gold, *Is This Your Bedroom? Reconsidering Third Party Consent Searches Under Modern Living Arrangements*, 76 *George Wash L Rev.* 375 (2008); *Post-Georgia v. Randolph: An Opportunity to Rethink the Reasonableness of Third-Party Consent Searches Under the Fourth Amendment*, 43 *Ind. L. Rev.* 237 (2009); *Protecting Privacy in a Shared Castle: The Implications of Georgia v. Randolph for the Third-Party Consent Doctrine*, 2008 *U. Ill. L. Rev.* 1009 (2008); *Bad Application of a Bad Standard: The Bungling of Georgia v. Randolph’s Third-Party Consent Law*, 44 *Va. U. L. Rev.* 423 (2010).

¹¹⁹ See *Martin v. United States*, 952 A.2d 181, 187-88 (2008) (finds that a parent/adult child household does not reflect a recognizable hierarchy that should infringe on the adult child’s expectation of privacy).

¹²⁰ Sassler et al., *Are They Really Mama’s Boys/Daddy’s Girls? The Negotiation of Adulthood upon Returning to the Parental Home*, *Sociological Forum*, Vol. 23, No. 4, December 2008 (2008), at 673. See Donna Owens, *Multigenerational Living under One Roof*, *Baltimore Sun*, March 22, 2009 (“The recession is having an impact on people of all ages, and the effects are starting to be felt at home,” said Jim Toedtman, vice president of AARP Bulletin, a monthly news publication aimed at those ages 50 and older. “We see more people living under the same

these social and economic conditions, police will encounter multi-generational living arrangements with greater frequency. As is borne out through case law, police will encounter rooms in homes that are occupied and controlled exclusively by an adult child.¹²¹ Sometimes these rooms will be locked and only the adult child will possess the key;¹²² in other instances there may be a tacit agreement between parent and child as to the conditions under which the parent may enter.¹²³ Facts and circumstances that indicate whether there was a reasonable expectation that a parent would not enter the room without the child's permission is often dispositive of whether the parent had actual authority to consent.¹²⁴ For example, in *State v. Cambre*, the court held that the parents had the authority to consent to a search of their son's bedroom.¹²⁵ The court found the parents had common authority because the defendant did not pay rent and buying some groceries was a limited contribution to the household.¹²⁶ Additionally, the bedroom door was not locked and the parents had full access to the room.¹²⁷

roof as their parents and their adult children. As Americans face tougher economic conditions, we'll likely see more of this.").

¹²¹ See, e.g., *State v. Vinuya* (lock on door).

¹²² See *State v. West*, 514 S.E.2d 257 (Ga. Ct. App. 1999) (court did not consider defendant's age, but upheld warrantless search based on authority of mother even though 19-year-old son used a lock on his door).

¹²³ See *State v. Jenkins*, 39 P.3d 868 (Or. Ct. App. 2002) (Adult son having made oral agreement with parents that garage area was his); *Commonwealth v. Basking*, 2009 PA Super 67, 970 A.2d 1181 (2009) (court did not give weight to age of 20-year-old defendant where consent to search third floor was instead based on mother's apparent authority despite the fact that she admitted to not having been up to defendant's floor in years); Cf. *State v. Carsey*, 664 P.2d 1085 (1983) (Arrangement was characterized as an unspoken agreement that defendant's room was under his exclusive control.).

¹²⁴ *Pearson v. State of Texas*, 2007 WL 4355269 (court found that it was not objectively reasonable for the police to conclude the mother had authority to consent to a search of the building mom owned but defendant son stayed in when the mom told police she did not have a key and that defendant was the only one who went out to the building); *U.S. v. Howard*, 984 F. Supp. 31 (D.D.C. 1997) (court found the defendant had a genuine privacy interest in his bedroom as a result of the fact that he paid rent and the expectation was that no other member of the family was allowed to enter without some explicit reason).

¹²⁵ *State v. Cambre*, 902 So. 2d 473 (La. Ct. App. 2005).

¹²⁶ *Id.* at 484.

¹²⁷ *Id.*

Similarly in *U.S. v. Austin*, the stepfather of a 25-year-old defendant gave consent for police to search the third floor of his house where the defendant lived.¹²⁸ The record is filled with details concerning the parents' relationship to the premises, especially the area occupied by the defendant. According to the court, the defendant paid rent, although it is uncertain how much and how consistently.¹²⁹ The defendant's mom and stepfather owned the furniture in the room.¹³⁰ The storage room across the hall from the bedroom was used by the family.¹³¹ The stepfather was not prohibited from going to the third floor.¹³² There were no locks or other obstacles preventing access from the second to third floor.¹³³ The defendant's mom visited the defendant in his room, and testified that she and the stepfather often searched the room for drugs.¹³⁴ Thus, the court found that the stepfather's consent to search was valid.¹³⁵

Whether the police have asked sufficient questions to establish the basis for a parent's or grandparent's consent to search a defendant's bedroom often hinges on the parent or grandparent's conduct to show sufficient access and use of the bedroom. In *Vinuya*, the Hawaii Intermediate Court of Appeals had to consider the validity of searching the defendant's locked bedroom after his mother consented to the search.¹³⁶ Although it upheld the validity of items seized in the common rooms, it treated the defendant's bedroom differently.¹³⁷ There, an emancipated adult lived, and the parents had ceded their use of the bedroom to the defendant

¹²⁸ *United States v. Austin*, 1996 U.S. App. LEXIS 8256, at *1 (6th Cir. 1996).

¹²⁹ *Id.* at *9.

¹³⁰ *Id.*

¹³¹ *Austin*, at *10.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Austin*, at *12.

¹³⁶ 32 P.3d at 122.

¹³⁷ *Id.* at 129-30.

completely.¹³⁸ The Court suppressed the evidence seized from the defendant's bedroom.¹³⁹ Similarly, the Oregon Supreme Court invalidated a police search of an adult child's bedroom in his grandparents' house predicated on the consent of the grandmother. without any inquiry into the grandmother's access to the bedroom.¹⁴⁰ Defendant occupied a bedroom in his grandparents' home for which he paid nominal rent. Defendant did his own cleaning and washing, and neither grandparent ever went into defendant's room, except to alert him that a meal was ready.¹⁴¹ The Court invalidated the search on grounds that the police failed to adequately inform themselves as to the grandmother's use, access, and control of the defendant's room.¹⁴² In another case, the defendant's mother told the police that she had free access to the defendant's bedroom and consented to a search of the bedroom, but refused to sign a consent form.¹⁴³ The trial court found that the defendant did not pay rent and upheld the validity of the police's search.¹⁴⁴ The D.C. Circuit Court of Appeals reversed because the police's "superficial and cursory questioning" of the mother did not establish mutual use as required by *Matlock* and also noted that a parent-child relationship is insufficient to show mutual use when the child is an adult.¹⁴⁵

¹³⁸ *Id.* at 131-32 ("At the time of the search, Vinuya was twenty-three years old-hardly a minor by any stretch of the imagination. Also, Vinuya was employed as a maintenance landscaper, further indication of his emancipation from his parents. In addition, Vinuya had exclusive use of his bedroom, by tacit agreement with his parents and by his practice of locking the door at virtually all times. His parents had, in essence, relinquished their 'common authority' over Vinuya's bedroom, thereby rendering nugatory Mrs. Sardinha's consent to search the room").

¹³⁹ *Id.* at 132.

¹⁴⁰ *State v. Carsey*, 295 Or. 32, 34 (1983).

¹⁴¹ *Id.* at 36.

¹⁴² *Id.* at 45 ("Had the police asked the defendant's grandmother and learned that she and the defendant had no 'joint access or control for most purposes,' the subjective good faith belief that they could make the search if she consented should not avail them, for the factual *Matlock* foundation is lacking. We see no reason for a different result if the police do not ask and proceed upon good faith born of and borne by innocent or deliberate ignorance. Indeed, upholding searches such as this, based upon the subjective good faith of the searching officers, might encourage police to obtain as little pre-search information as possible concerning the consenting party's relationship to the defendant and to their common use, access, or control of the premises to be searched").

¹⁴³ *United States v. Whitfield*, 939 F.2d 1071, 1073 (D.C. Cir. 1991).

¹⁴⁴ *Id.* at 1072.

¹⁴⁵ *Id.* at 1075.

These cases discussed above can be used as examples of the type of inquiry police should be conducting before relying upon the consent of the parent. Surely if a police officer was aware of this detail in the living arrangement between adult child and parent, it would be relatively easy to assess the reasonableness of the officer. Post *Randolph*, these inquiries are necessary to meet the legal standard for assessing reasonable reliance given that police and courts should no longer be permitted to rest upon the presumption of parental control.

A review of the case law leads to the conclusion that the cases discussed above reflecting a responsible degree of inquiry on the part of police are the exception not the rule. More often courts find parental consent valid with far less information than what was made known to police in the cases discussed above. For instance, courts upheld parental consent of a defendant's bedroom in cases where the police witnessed some act by the parent or grandparent that established the reasonableness of assuming joint access and use of the bedroom.¹⁴⁶ One defendant's mother consented to a police search of her 19-year-old's bedroom by procuring a lock to open the door.¹⁴⁷ Although the police did not inquire about the mother's access to her son's bedroom, who lived rent-free, the Georgia Court of Appeals held that the mother's consent was valid because she had a sufficient relationship to the premises that the police were seeking to search based on the living arrangement.¹⁴⁸ Similarly, the police were not required to question a defendant's grandmother before searching the defendant's bedroom when the police simply followed the grandmother into the bedroom as she organized it because it demonstrated she had

¹⁴⁶ *State v. West*, 514 S.E.2d 257, 257 (Ga. Ct. App. 1999); *People v. Manuel*, 2000 WL 33424357 at *2 (Mich. Ct. App. Apr. 21, 2000).

¹⁴⁷ *State v. West*, 514 S.E.2d 257, 257 (Ga. Ct. App. 1999).

¹⁴⁸ *Id.* at 258. The dissent vehemently argued that the majority misapplied *Matlock* and that Supreme Court did not intend "the law of property to govern the other category it created, i.e., 'sufficient relationship' else the latter would swallow up 'common authority' as defined and make it superfluous." *Id.* at 261.

apparent authority to consent to the search.¹⁴⁹ The outcome of these cases did not hinge on the depth of inquiry by the police officers because the mother and grandmother's conduct indicated to the police that they had sufficient access to the defendants' bedrooms.

The increase in cohabitation among parents and their adult children, along with the variety of privacy agreements they enter into, puts police on notice that the parent may not have joint access or mutual use of the child's room. The Fourth Amendment apparent authority doctrine does not require the police to always be correct, but it requires that they act reasonably in their assessment of whether they have authorized consent.¹⁵⁰ What runs contrary to contemporary social norms and a foul of constitutional protections is for police to presume that parents have the authority to consent to a search of their child's bedroom, with whom they reside, in any instance where the child is beyond the age of majority. None of the rationales that permit a parent's consent to trump a child's expectation of privacy are legally applicable once the child becomes an adult.¹⁵¹ In order for police to comply with the *Randolph* social expectation standard, officer must make a reasonable effort to learn what the privacy

¹⁴⁹ *People v. Manuel*, 2000 WL 33424357 at *2 (Mich. Ct. App. Apr. 21, 2000).

¹⁵⁰ See *Rodriguez*, 497 U.S. at 183-84

¹⁵¹ The age of eighteen is widely recognized as the legally significant divider between minor child and adult. States have enacted statutes requiring parental consent for a variety of activities until the child reaches the age of majority. See e.g. (ALA. CODE § 26-21-3 (2010), IDAHO. CODE. ANN. § 18-609A (2010), IND. CODE § 16-34-2-4 (West 2006), KY. REV. STAT. ANN. § 311.732 (2010), MO. ANN. STAT. § 188.028 (West 2004), N.C. GEN. STAT. § 90-21.7 (West 2010), R.I. GEN. LAWS § 23-4.7-6 (2010), WIS. STAT. ANN. § 48.375 (West 2011))(permit a minor to obtain an abortion); (ARIZ. REV. STAT. ANN. § 25-102 (2011), CONN. GEN. STAT. § 46b-30 (2010), FLA. STAT. § 741.0405 (2010), MD. CODE. ANN., [Family Law] § 2-301 (2010), MO. ANN. STAT. § 451.090 (West 2004), N.J. STAT. ANN. § 37:1-6 (West 2002), N.M. STAT. ANN. § 40-1-5 (West 2010)) (requires consent to marry); (ALA. CODE § 22-17A-2(a) (2010), COLO. REV. STAT. § 25-4-2103 (2010), ME. REV. STAT. ANN. tit. 32 § 4327 (2009), MASS. GEN. LAWS ANN. ch. 111, § 211 (2010), S.D. CODIFIED LAWS § 26-10-19 (2010)) (requires parental consent to get piercings, tattoos or "body art obtain a firearm via gift or sale"(ARIZ. REV. STAT. ANN. § 13-3109 (2011); CONN. GEN. STAT. § 19a-232 (2010), LA. REV. STAT. ANN. § 40:2714(E) (2001)(parental consent required to use a tanning facility); (LA. REV. STAT. ANN. § 23:254 (2001))(parental consent to be employed in theatrical performances or exhibitions; (MICH. COMP. LAWS ANN. § 750.42c (West 2002)(parental consent to contract to purchase a vehicle). In addition, at common law minors were not permitted to enter a binding contract unless it was for a "necessity." Admittedly, modern realities mean that adult children over age 18 might be dependent on their parents while some minors live independently from their parents, however, existing laws profoundly alter the legal relationship between parent and child.

arrangement is between parent and adult child concerning the adult child's bedroom. Presuming parental access and/or control falls short of what *Randolph* requires.

Cases where courts have upheld parental consent simply by virtue of the parent's status as the child's parent, regardless of the age of the child are numerous. In *State v. Miller*,¹⁵² the defendant was 26 years old and living in the basement of his father's home. The defendant did not pay rent. There was a lock on the bedroom door, which was generally unlocked. There was a backdoor entrance to the house which the defendant used some of the time. Other family members could go into the defendant's bedroom. The defendant was not present when the police requested consent and the father gave his consent to search the home, including the son's bedroom. The court stated that the police were not required to seek the defendant's consent instead of the father's. The parent, as homeowner, has control over and possession of his/her home. Parents also have an interest in prohibiting contraband from being used or stored in their home. Even though the defendant was an emancipated child, there was no understanding or agreement between him and his father with respect to the defendant's expectation of privacy. The court found that the defendant assumed the risk that his father would consent to a search of his bedroom.

It is widely recognized that a person living with others assumes the risk that his/her co-tenant may admit visitors onto the premises in her absence.¹⁵³ But what is equally recognized is that the third party's consent is limited to common areas and areas under his/her exclusive

¹⁵² 799 A.2d 462 (Md. Ct. Spec. App. 2002).

¹⁵³ Turning to *Matlock* as an example, the Court observed that a common understanding of a woman answering the door of a residence holding a baby is that she likely lives there, perhaps with her child and possibly with others not physically present. It is reasonable to assume that she has authority to admit visitors, and that she may permit a search of any common areas within the residence. *Matlock* at X.

control.¹⁵⁴ This article is concerned with the courts' assessment of when it is reasonable for an officer to believe the third party has joint access or mutual use to the adult child's bedroom or any area not typically identified as "common areas" such as living rooms, kitchens, and hallways. To be sure, it is not reasonable to expect police officers to inquire about the possible existence of an unconventional arrangement among tenants before validly relying upon the consent of the present occupant.¹⁵⁵ Justice Souter uses as an example of an atypical arrangement among co-occupants an agreement where one occupant cannot admit a guest onto the premises without the consent of all occupants.¹⁵⁶ Not only is such an arrangement highly unusual, it is also relatively undetectable to an unsuspecting caller/guest.¹⁵⁷ Moreover, a tacit agreement like this one stands in stark contrast to the presence of multiple bedrooms or separate work quarters in a home which should signal to a reasonable police officer that multiple people may occupy the residence and that these rooms are likely under the exclusive possession of one or more of the other occupants.¹⁵⁸ Moreover, formulating a well-articulated rule that instructs police to inquire as to the parent's relationship to the areas to be searched when an officer encounters a parent and adult child living together will leave no room for speculation about the existence of an unconventional arrangement among occupants. The apparent authority doctrine seeks to strike a balance between a reasonable requirement when relying upon third party consent and not making

¹⁵⁴ Matlock.

¹⁵⁵ *Randolph*.

¹⁵⁶ *Randolph*, 547 U.S. at 111.

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g. *U.S. v. Whitfield*, 939 F.2d 1071 (D.C. Cir. 1991) the mom consented to a search when the defendant's 29-year-old son was not present. The court found that the police agents could not reasonably have believed the mom had authority to consent to the search because they did not have enough information to make that judgment. The defendant's bedroom was not a common area. The court places the burden of inquiring about mutual use by the person giving consent on the government. If the police do not ask enough questions, or if they cannot determine from the information that the person consenting has apparent authority, then warrantless entry is unlawful. Just because there was a parent-child relationship is not dispositive of whether the mom had authority to consent.

a police officer's effort to obtain consent too onerous. A bright-line rule with respect to adult child and parent cohabitation strikes the right balance.

V. Adult Children and Parents Living Together is Not an Atypical Living Arrangement

The Fourth Amendment third party consent doctrine must respond to the changing composition of family households in the twenty first century. Just as any other body of law needs to be flexible in its application to circumstances that outpace existing norms, so to should the third party consent doctrine accommodate current demographics which reveal that parents and their adult children are living together in numbers that are nearing levels that have not been seen since the post-industrial revolution.¹⁵⁹ Police encounter a multiplicity of living arrangements when conducting searches of homes, serving warrants, and other forms of police business. Today, the difference is twofold: 1) there are more households occupied by adult children and their parents, and 2) post-*Randolph* police cannot reasonably presume that simply because a parent lives in the household that he or she has dominion over all rooms and property in the residence.

A. Historical Background

The structure of American families changed dramatically over the past 150 years. One of the most significant changes was the shift from a multigenerational household to that of a smaller, "nuclear family."¹⁶⁰ Social scientists have posited various theories for this change,

¹⁵⁹ Fourth amendment search and seizure law is constantly having to respond to use of new technologies in the digital age that challenge our notions about privacy and civil liberties.

¹⁶⁰ Approximately 70 percent of persons aged 65 or older lived with their children or children-in-law during the mid-nineteenth century. Ruggles, Steven. Multigenerational families in nineteenth-century America. *Continuity and Change* 18(1), 139 at 142, Figure 1. 2003 Cambridge University Press. Compare this to about 58 percent in 1920 and a staggering 10-20 percent in 1990. *Id.*

including the decline of the agricultural-based economy and the emergence of an industrialized society.¹⁶¹ Ownership of land became less of a determinant of wealth as more American workers came to depend on wages for their livelihood.¹⁶² As a result, family structure shifted from one in which family members labored on family farms to one in which the primary motivational factors were wages and accumulation of earned income.¹⁶³ Men and women were no longer tied to an agricultural way of life and began to leave their families in search of industrial jobs in city centers.¹⁶⁴

The sea change in economic and family life also brought about a number of other changes, which, in turn, acted as catalysts for the shift in family structure. For example, the emergence of new job opportunities meant higher wages and a chance for independence by moving away from home to an urban center.¹⁶⁵ The changes in family structure were also affected by the expansion of the American educational system.¹⁶⁶ The correlation between one's education and more highly skilled jobs became more apparent.¹⁶⁷ Children began to spend less and less time on the farm and were more likely to pursue higher paying jobs in more urban areas.¹⁶⁸ American society also saw a fundamental change in gender roles as opportunities grew for women in the workplace.¹⁶⁹ Wage labor provided a way for women to live independently;

¹⁶¹ See *Id.*

¹⁶² Ruggles, note 160, at 161-2.

¹⁶³ *Id.* at 148-9.

¹⁶⁴ See, generally, Ruggles, *supra*, note 160.

¹⁶⁵ *Id.* at 162.

¹⁶⁶ Ruggles, Steven. The Decline of Intergenerational Coresidence in the United States, 1850 to 2000. *American Sociological Review*, 2007, Vol. 72, 964 at 968.

¹⁶⁷ *Id.* at 969.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 985.

away from farms controlled by their fathers, husbands or sons.¹⁷⁰ All of these changes further enhanced the effects of a changing economy on post-industrial family structure.

The paradigms of family life also began to shift as the process of leaving home became associated with transitioning to adulthood.¹⁷¹ Marriage was no longer the driving force behind leaving the family home.¹⁷² Instead, youth began to establish lives away from their immediate family members, an expression of a desire for independence.¹⁷³

By the time the US Supreme Court first considered the third party consent doctrine in the 1960's the pathway to independent living was established for young adults.¹⁷⁴ Among white, middle class American families residential independence was positively viewed as an indicator of physical and emotional maturity normally associated with "adulthood."¹⁷⁵ The trend away from multigenerational households made the need to be concerned with the expectation of adult children living with their parents relatively minimal. Third party consent cases that came before the courts predominantly involved domestic partners, hotel clerks, and overnight guests.¹⁷⁶ Nonetheless, among particular racial and ethnic groups the norm of multi-generational living remained unchanged. Towards the latter half of the 20th century many social scientists began to

¹⁷⁰ Id.

¹⁷¹ Buck, She's Leaving Home: But Why? An Analysis of Young People Leaving the Parental Home, *Journal of Marriage and Family* 55 (November 1993), 863.

¹⁷² Goldscheider, F.K., & DaVanzo, J. (1989), *Pathways to independent living in early adulthood: Marriage, semi-autonomy, and premarital residential independence*, *Demography*, 26, 278-85. Note also that although marriage is no longer one of the major driving forces it still remains a factor in leaving the parental home. Once children reach the age of majority, they marry, produce offspring, and become the heads of their own households. See Naomi Gerstel & Natalia Sarkisian, *Till Marriage Do Us Part: Adult Children's Relationship With Their Parents*, 70 *JOURNAL OF MARRIAGE AND THE FAMILY* 360 (May 2008), where the authors note that one theory of marriage is that it is "a key lynchpin for social ties."

¹⁷³ Goldscheider, supra, note 103.

¹⁷⁴ Settersten and Ray, "What's Going on With Young People Today? The Long and Twisting Path to Adulthood," *The Future of Children*, Vol. 20, No. 1, Spring 2010, 19, at 24.

¹⁷⁵ Sassler et al., supra, note 116, at 670-6. See also, Settersten, supra, note X, at 22 ("Today, more than 95 percent of Americans consider the most important markers of adulthood to be completing school, establishing an independent household, and being employed full-time...")

¹⁷⁶ See *Matlock, Stoner, Minnesota v. Olson*, 495 U.S. 91 (1990).

examine the racial and/or ethnic differences in multigenerational/intergenerational living arrangements among other non-white racial groups. Studies confirmed what was empirical to many; African-Americans and Hispanics are more likely to live in multigenerational households than are non-Hispanic whites.¹⁷⁷ For example, by 1980, 50% of African-American and Hispanic adults lived with family members compared to 35% of whites.¹⁷⁸ In 1984, 45% of unmarried African-American mothers aged 19-26 lived with their own mothers compared to 22% of whites.¹⁷⁹ Among Asian ethnic groups, Vietnamese, Korean, Filipino, and Chinese young adults over 18 are more likely to live with family than whites.¹⁸⁰ One researcher examined data from the 1987-8 National Survey of Families and Households and determined that 40% of African-American parents and 54% of Mexican-American parents were still living with at least one child aged 19 or older, compared to 28% of white parents.¹⁸¹

Cultural preferences for co-residence explain, in part, high rates of multi-generational living among non-white ethnic and racial groups. For instance, traditional gender and family roles are reinforced in Hispanic groups and thus there is more reliance on extended family networks.¹⁸² Some scholars suggest that immigrant families are less likely to value independence and privacy than U.S.-born residents.¹⁸³ Likewise, a sense of obligation to support

¹⁷⁷ White, Lynn. Coresidence and Leaving Home: Young Adults and Their Parents. *Annual Review of Sociology* (1994) 20: 81, 88; Cohen P., & Casper, L. In *Whose Home? Multigenerational Families in the United States, 1998-2000*. *Sociological Perspectives* (2002) 45: 1, 16.

¹⁷⁸ Hernandez LL. 1989. "Nonfamily Living Arrangements Among Black and Hispanic Americans." *Ethnicity and the New Family Economy: Living Arrangements and Intergenerational Financial Flows*. 1989b, pp 17-37. Boulder: Westview.

¹⁷⁹ Hogan D, Hao L, Parish W. 1990. Race, kin, networks, and assistance to mother-headed families. *Soc. Forc.* 68: 797-812.

¹⁸⁰ Kanjanapan W. 1989. The Asian American traditional household. *Ethnicity and the New Family Economy: Living Arrangements and Intergenerational Financial Flows*. 1989b, pp 39-55. Boulder: Westview.

¹⁸¹ Aquilino, W.S. The Likelihood of Parent-Adult Child Co-residence: Effects of Family Structure and Parental Characteristics. *Journal of Marriage and the Family* 52 (May 1990): 405, 411 at Table 1.

¹⁸² Kamo, Yoshinori 2000. Racial and Ethnic Differences in Extended Family Households. *Sociological Perspectives* 43: 211-29.

¹⁸³ Glick at 242.

elderly parents who are recent immigrants may play a larger role in groups with more recent immigration histories, such as Hispanics or Asians.¹⁸⁴ Newly arrived immigrants may also lack extra-familial social networks and thus may depend more on relatives for support.¹⁸⁵ According to one prominent social scientist, “[n]early 14% of all Asians and 12% of Central/South Americans appear to be financially dependent on a co-resident adult child.”¹⁸⁶ It is often a combination of factors including economic hardship, low levels of education, higher unemployment, and lack of citizen status that necessitate co-residence upon their arrival in the United States.¹⁸⁷

Other scholars have suggested a structural explanation for differences in multigenerational co-residence among minorities. According to Batson, “[t]he primary structural causes of such differences include variations in socioeconomic status, immigration, marriage patterns, and health status.”¹⁸⁸ Families with higher socioeconomic status are more likely to exchange financial support, whereas those with financial fewer resources tend to exchange practical help, such as residency.¹⁸⁹ Other structural factors affecting higher rates of co-residence among African-Americans are higher rates of single-motherhood among African-American women and lower income among African-American men.¹⁹⁰ African-Americans are also more likely to live in households with grandparents.¹⁹¹ Many of these factors, however, can be applied across the

¹⁸⁴ Id.

¹⁸⁵ Sanders, J. M., & Nee, V. Immigrant self-employment: The family as social capital and the value of human capital. *American Sociological Review* (1996), 61, 231-249.

¹⁸⁶ Glick at 247.

¹⁸⁷ Duleep, Harriet Orcutt and Mark C. Regets 1997. Measuring Immigrant Wage Growth Using Matched CPS Files. *Demography* 34: 239–49; Kamo, supra, note 12.

¹⁸⁸ Christie D. Batson & Jennifer R. Keene, Under One Roof: A Review of Research on Intergenerational Coresidence and Multigenerational Households in The United States, 4/8 *Sociology Compass* 642, 648 (2000).

¹⁸⁹ Id.

¹⁹⁰ Kamo, Yoshinori 2000. ‘Racial and Ethnic Differences in Extended Family Households.’ *Sociological Perspectives* 43: 211–29; Swartz, Teresa T. 2009. Intergenerational Family Relations in Adulthood: Patterns, Variations, and Implications in the Contemporary United States. *Annual Review of Sociology* 35: 191–212.

¹⁹¹ Fuller-Thomson, Esme, Meredith Minkler and Diane Driver 1997. A Profile of Grandparents Raising Grand-

spectrum of minority groups.

B. Recent Trends in Parent-Adult Child Living Arrangements

Shifts in family household structure are more cyclical than unidirectional and they depend on a number of factors including, employment opportunities, financial independence, and costs of alternative living arrangements.¹⁹² The steady decline in home-leaving exhibited in American post-industrial society began to slow in the 1980s, as adult children stayed in parental households longer and were more likely to return after leaving.¹⁹³ According to the 2000 U.S. Census Bureau, households comprising adult children and their parents were the fastest growing household combination, outpacing households comprising adult children, their children and grandparents by one percent.¹⁹⁴ Between 1990 and 2000 households comprising an adult child and his/her parent grew 33%.¹⁹⁵ In 2000, approximately one third of adult children in their twenties lived with their parents.¹⁹⁶ The number of men aged 25 to 34 years living with their parents has steadily risen since 1997, while the number of similarly aged females reached historically high levels in 2008.¹⁹⁷ Monster's 2009 Annual Entry-Level Job Outlook reports that about 40 percent of 2008 high school graduates still live with their parents and 42 percent of the 2006 graduates surveyed said they are still living at home.¹⁹⁸

children in the United States. *The Gerontologist* 37: 406–11.

¹⁹² See, generally, Ruggles, *The Decline of Intergenerational Coresidence in the United States, 1850 to 2000*, *supra*, note 97. See also, Sassler et al., *supra*, note 116, at 678.

¹⁹³ William S. Aquilino, *The Likelihood of Parent-Adult Child Coresidence: Effects of Family Structure and Parental Characteristics*, 52 *JOURNAL OF MARRIAGE AND THE FAMILY* 405 (May 1990).

¹⁹⁴ Examining American Household Composition: 1990 and 2000, U.S. Census Bureau Special Report 8 (August 2005).

¹⁹⁵ *See Id.*

¹⁹⁶ See Benway, *supra* note X at 672, citing to Daniel T. Lichter & Zhenchao Qian. “*Marriage and Family in a Multiracial Society*,” *The American People: Census 2000*. (2004).

¹⁹⁷ U.S. Census Bureau. 2009. Current Population Survey, March and Annual Social and Economic Supplements, 2009 and Earlier. Available at <http://www.census.gov/cps/>.

¹⁹⁸ See US Department of Labor, Bureau of Labor Statistics, *The Employment Situation*, October 2009.

“Boomerang” has emerged as the term to describe adult children who return to their parents’ homes after finishing college.¹⁹⁹ In recent years, this has become the most widely studied and acknowledged co-residence model, particularly based on the frequent references that stem from popular culture.²⁰⁰ Between 1995 and 2003, adult children residing at home with their parents increased 7%.²⁰¹ According to a 2009 survey, 13% of parents with grown children say one of their adult sons or daughters has moved back home in the past year.²⁰² These numbers correspond with the notion that although today’s young adults are more likely than those in the past to leave home to go to college or establish independence, they are also more likely to return home and live with their parents for some period of time.²⁰³ Notably, there has been an acceleration in the return of “boomerang” children to their parents’ homes as the current recession has set in.²⁰⁴ The economic climate poses a considerable challenge for recent college graduates in finding a permanent job that provides sufficient income for them to live on their

¹⁹⁹ See Benway et al, *supra*, note X discussing the emergence of the “boomerang” child since the 1980s. Psychologist Jeffrey Jensen Arnett has developed the concept of “emerging adulthood” as a new life stage for ages 18 until the late 20s, where the emerging adult seeks to explore identities and experiment, along with the accompanying instability. See Henig, *supra*, note X.

²⁰⁰ See Benway et al, *supra*, note 1 (“News stories, movies, and advice books refer to those who remain in or return to the parental home as . . . kids who have ‘failed to launch,’ and generally portray them as contributing little or nothing to the household while benefiting from the provision of domestic tasks such as cooking and laundry.” *Id.* at 672.)

²⁰¹ U.S. Census Bureau. 2009. Young Adults Living at Home – 1960 to Present, Current Population Survey, March and Annual Social and Economic Supplements, 2009 and Earlier. Accessed online via: <http://www.census.gov/cps/>. The adult children returning home temporarily to live with their parents following graduation from college, loss of employment, difficult finding employment are referred to in the vernacular as “boomerang children.”

²⁰² Recession Brings Many Young People Back to the Nest: Home for the Holidays...And Every other Day, Pew Research Center, November 24, 2009.

²⁰³ “Adult Children Moving Back Home: Don't Let "Boomerang Kids" Derail Your Goals”, Dec. 2, 2010, *available at*: <http://www.newyorklife.com/nyl/v/index.jsp?contentId=13762&vgnnextoid=d0bd47bb939d2210a2b3019d221024301cacRCRD>.

²⁰⁴ Freddie deBoer, *Tough Job Market Forces Families Into Multigenerational Living*, [aarp.org](http://www.aarp.org), (April 3, 2009) http://www.aarp.org/home-garden/housing/info-04-2009/tough_job_market_forces_families_into_multigenerational_living_.html, (last visited Nov. 3, 2010).

own.²⁰⁵ Frequently, the “boomerang” children pay nominal rent or no rent and contribute to chores in these households.²⁰⁶

However, “boomerang” children are not the only adult children who have been forced to live with parents in the current economic climate. The foreclosure numbers over the past 5 years have been staggering. For example, the number of foreclosures soared from 780,000 in 2005 to about 3 million in 2009.²⁰⁷ Recent data shows a slight reduction in foreclosure rates at the end of 2010 with the total number of loans in foreclosure around 2 million.²⁰⁸ The most vulnerable homeowners are often those in their 30s and 40s, where foreclosures have forced them to move back in with their parents long after they thought this was no longer a possibility.²⁰⁹

Similarly, layoffs have affected all age groups, and many workers face an involuntary reduction in hours. According to the Bureau of Labor Statistics, unemployment levels during the end of 2010 hovered around 9.4%.²¹⁰ Even without foreclosure looming, the ensuing financial

²⁰⁵ *Id.*, referring to a study that states that as many as 66% of college graduates plan to move back home, at least briefly upon graduation. Even if the adult children find post-graduate jobs, the cost of living often exceeds their entry level salaries. *Id.* The website adultchildrenlivingathome.com has been created to help parents deal with the stress of young adult children moving back home. *See also, supra* note X.

²⁰⁶ *See* Benway et al, *supra* note X, where the authors discuss their findings regarding the contributions to the household by young adults who have returned to their parents’ homes after interviewing 30 such young adults. *Id.* at 680. The respondents almost always returned home for financial reasons and were frequently dependent on their parents, despite a median annual income of \$17,500 by the respondents. *Id.* Further, the respondents noted that departing their parents’ homes was dependent on financial security, more secure job prospects, and/or marriage. *Id.* at 691.

²⁰⁷ Federal Deposit Insurance Corporation, *Measuring Progress in US Housing and Mortgage Markets*, last updated 4/9/10, available at http://www.fdic.gov/bank/analytical/quarterly/2010_vol4_1/latest.html.

²⁰⁸ Home prices falling in most metro areas, Associated Press, November 30, 2010, available at <http://online.wsj.com/article/AP5e8e32cbabd74da78d7a17af6e870332.html>.

²⁰⁹ Laura Koss-Finder, *Bunking In With Mom and Dad*, *Time.com*, (Feb. 19, 2009) <http://www.time.com/time/magazine/article/0,9171,1880642,00.html>, (last visited Nov. 3, 2010). That article discusses how older adult children are forced to move in with their parents after losing jobs, exhausting funds, and losing their homes. Similarly, an op-ed in the *New York Times* written by an adult child who, along with his fiancée, moved into his parents’ home after the bank foreclosed on his house, and his ensuing frustrations and concerns. *See* Colt Phipps, *Awaiting a Rebound, Back With The Folks*, *THE NEW YORK TIMES* (June 14, 2009).

²¹⁰ *Employment Situation Summary*, Bureau of Labor Statistics, Friday, January 7, 2011. Available at <http://www.bls.gov/news.release/empisit.nr0.htm>.

pressure that families face often force them to pool resources under one roof.²¹¹ As a result of the recession, older adult children, often with children in tow, are moving back in with their parents.²¹²

The upward trend in co-residence is not solely due to adult children moving back in to their parent's home. There has been a recent upswing in elderly parents moving in with their adult children and their grandchildren after decades of declining rates of three-generational households.²¹³ Since the 1980s, fewer elderly are being institutionalized.²¹⁴ As the trend against institutionalization increases, adult children frequently provide care to their elderly parents, including welcoming them into their homes when they develop health problems.²¹⁵

Adult children who live independently from their parents are also providing care to their parents

²¹¹ In 2010, Greg Kaplan constructed a monthly panel of parent-youth co-residence outcomes and used it to document an empirical relationship between co-residency and individual labor market outcomes. Factors taken into account in this study included labor supply, savings decisions and co-residence frequency. Through econometric methods, Kaplan found that labor market shocks are an important determinant of the dynamics of movements in and out of the parental home. This suggests that a recession as large as the 2007-2008 one has the potential to significantly impact the U.S. family structure. Greg Kaplan, *Moving Back Home: Insurance Against Labor Market Risk* (Federal Reserve Bank of Minneapolis Research Dep't, Working Paper No. 667, 2010), available at <http://www.minneapolisfed.org/research/wp/wp677.pdf>.

²¹² An Association for the Advancement of Retired Persons ("AARP") survey revealed that 11% of people aged 35-44 report living with parents or in-laws. *Exclusive AARP Bulletin Poll Reveals New Trends in Multigenerational Housing*, [aarp.org](http://www.aarp.org), (March 3, 2009), http://www.aarp.org/about-aarp/press-center/info-03-2009/Multigen_Housing_Poll.html, (last visited Nov. 3, 2010). The survey also notes that 34% of people surveyed said they would likely have to move in with family or friends and that it would be due to a loss of income. *Id.* See also Christie D. Batson & Jennifer R. Keene, Under One Roof: A Review of Research on Intergenerational Co-residence and Multigenerational Households in The United States, 4/8 *Sociology Compass* 642, 652 (2000), where the authors predict that "working adults who experience economic hardship are more likely to seek temporary assistance from family members, most often their parents."

²¹³ Suzanne M. Bianchi et al, *Intergenerational Ties: Alternative Theories, Empirical Findings and Trends, and Remaining Challenges*, in *Intergenerational Caregiving* (Suzanne M. Bianchi et al, eds. 2008). In another article, the authors discuss that the need for Social Security reform may result in reduced benefits for recipients, which will impact multigenerational households as recipients move in with family members due to increased financial pressures. See Gary V. Engelhardt, Jonathan Gruber, & Cynthia D. Perry, *Social Security and Elderly Living Arrangements*, 2 *THE JOURNAL OF HUMAN RESOURCES* 354, 368 (2005).

²¹⁴ The percentage of people over 75 in nursing homes dropped from 9.6% in 1985 to 6.4% in 2004. Sandra Block, *Elder Care Shifting Away From Nursing Homes*, [USAToday.com](http://www.usatoday.com), (Feb. 1, 2008), http://www.usatoday.com/money/perfi/eldercare/2007-06-24-elder-care-costs_N.htm, (last visited Nov. 3, 2010).

²¹⁵ See Bianchi et al, *supra*, note X. Aquilino, *supra*, note X states that "co-residence of elderly parents and their older adult children is attributed to parents' dependence on children." *Id.* at 406.

at a greater rate, with a heavier burden falling with daughters than with sons.²¹⁶ The economic hardships of independent living also force elderly parents to live with their adult children.²¹⁷ As adult children are increasingly involved in the care of their parents, these elderly parents are playing a greater role in the care of their grandchildren than they did one or two generations ago.²¹⁸ As families are pressed for resources, grandparents often are valuable for their assistance with childcare and household chores.²¹⁹

When adult children and their parents co-reside, issues of privacy and personal space are paramount. To be sure, some children regardless of their age who live under their parent's roof harbor no expectation of privacy in the rooms they inhabit and the property they keep there. As part of the terms of their tenancy, they are subject to the rules of the house, including parental access to their bedroom and inspection of their belongings. Other adult children may have an arrangement with their parents that resembles a landlord-tenant relationship; the child pays rent to his parent and expects that his bedroom and property will be under his control, free from uninvited parental entry and examination.²²⁰ However, the likelihood is that both cohorts of children would feel their personal space was violated if it was the police searching their room as opposed to their mother or father.

²¹⁶ See Bianchi et al, *supra*, note X.

²¹⁷ Batson & Keene, *supra*, note X at 649.

²¹⁸ Pat Curry, *Make Room for Mom*, Builderonline, (April 6, 2009) <http://www.builderonline.com/demographics/make-room-for-mom.aspx>, (last visited Nov. 3, 2010), noting that 25% of baby boomers expect their parents to move in with them.

²¹⁹ See, e.g., Dave E. Marcotte & Ying Wang, *Golden Years? The Labor Market Effects of Caring for Grandchildren*, Discussion Paper No. 2629, Bonn, Germany (Feb. 2007) noting the general upswing in grandparents caring for grandchildren, both in their own households and their adult children's households.

²²⁰ See, e.g., Howard, *supra*, note X (defendant paid rent and no other member of the family was allowed to enter without some explicit reason); *People v. Mortimer*, 46 A.D.2d 275 (N.Y. App. Div. 1974) (21-year-old defendant rented a room in his parents' home); Carsey, *supra*, note X (19-year-old defendant had unspoken agreement with his grandparents that his room was under his exclusive control.); Austin, *supra*, note 124 (6th Cir. Ohio Mar. 11, 1996); Hughes, *supra*, note X (24-year-old paid rent, and told father not to allow anyone to enter his room.).

Living arrangements among adult children and their parents that delineate areas to be considered common and areas under the exclusive control of another are not unique, nor are they now only coming into vogue.²²¹ Designating particular areas of the residence for the exclusive use by either the parent or the child is a common way to maintain control/dominion over one's property and privacy in the activities one engages in within that exclusive space.²²² No matter their spatial proximity, a child and his parent are entitled to manifest an expectation of privacy amidst their co-residence.

V. Suggested Guidelines for Police Inquiry During Consent Searches of Adult Children's Bedrooms

As adult children and their parents are residing together in increasing numbers, police need a clear rule to follow when seeking consent from parents to search areas of the home that may be occupied exclusively by the adult child. Presuming parental control or dominion over the residence simply by virtue of the fact that the third party is the parent is impermissible. Any time police seek parental consent to search the premises where an adult child lives, a thorough inquiry of the parents' relationship to the premises should be conducted. Children residing upon

²²¹ See, e.g. *People v. Nunn*, 304 N.E.2d 81 (Ill. 1973), *cert. den.*, 416 U.S. 904 (1974) (The court found that a mom's consent to search the 19-year-old defendant son's room resulted in an invalid search based on Fourth Amendment grounds. The son had a reasonable expectation of privacy in his room. The son locked the bedroom door and told his mom not to enter and not to allow anyone else to enter. The mom did not object to this request. Even though the mom owned the home, the court found that the defendant reasonably expected that his mom would not enter the room, nor allow others to enter.); *Becknell v. State*, 720 S.W.2d 526 (Tex. Crim. App. 1986) (The father did not have the authority to consent to the search of his son's bedroom because he did not exercise equal control over and equal use of the premises being searched. The father was allowed to go into the defendant's room only when the defendant was there. The room was padlocked and the defendant had the only key to the lock for the last 2-3 years. The defendant also cooked and ate his meals separately from the rest of the family. Thus, the search was invalid). See also, *supra*, note X.

²²² 4 W. LaFave, *Search and Seizure*, § 8.3(a) (4th ed.2009). "Some portions of premises are shared more than others and in different ways; some are shared wholly and some are not at all. Although the uncle may be careful to ask his niece whether he and his cronies can play gin rummy in the living room, he is not so likely to ask whom he may invite into his own room. He may not expect to be consulted about his niece's invitations generally; but he would be startled if she held a meeting of the garden club in his room. It is not always a matter of rooms. His desk may be in the living room. Nor are the labels on the 'premises' always unequivocal. The niece may regularly enter her uncle's room to clean it and open the drawers in his dresser to put the clothes away, without having discretion to allow others to rummage through his clothes...." See *Id.*

the premises without benefit of any formal possessory interest in the premises have a reasonable expectation of privacy of “essentially the same dimensions” as the owner or lessee of the premises.²²³ While acknowledging that it is not the burden of police to investigate every conceivable living arrangement that may exist between co-occupants; reasonableness does require that when police request permission from a parent to search a residence occupied by the parent and his/her adult child, police should be required to determine the scope of authority the parent has over the area to be searched. Strict adherence to a core principle of the Fourth Amendment, specifically that the home is the most sacred of private space, should be given full consideration. Common areas should be differentiated from bedrooms and other areas of the home often used exclusively by one occupant.

While it would be untenable to provide a script to police, certain areas of inquiry can be identified as having strong bearing on consent determinations. For instance, police should conduct inquiry to determine the existence of any explicit or implicit agreement between the parent and child concerning access to child’s bedroom, or any other area construed to belong to the resident child. As this Article has illustrated, it is fairly typical for adult children and their parents to make formal or informal agreements about whether the parent may enter the bedroom when the child is not home.²²⁴ Likewise, parents and their adult children may have a contractual arrangement much like a lessor/lessee which sets forth the terms and conditions of the tenancy,

²²³ 5 W. LaFave, *Search and Seizure*, § 11.3(a) (3d ed.1996). *See also Bumper v. North Carolina*, 391 U.S. 543, 548 n. 11 (1968) (the defendant had standing to challenge the lawfulness of the search of the house his grandmother owned, in light of the fact that the house searched was his home); *State v. Reddick*, 207 Conn. 323, 541 A.2d 1209, 1213 (1988) (holding that an adult son or daughter who is living permanently or staying temporarily within the parental home, as was Reddick so had only been at his mother’s rent free for a few days prior to the search, has a reasonable expectation of privacy in that home).

²²⁴ *See supra* note 26.

including monetary payment and possibly parental access to the child's room.²²⁵ Visible signs denoting privacy, such as locks, should be acknowledged and police should ask parent who placed them there and for what purpose.

Uncertainty as to where common areas end and private space begins may arise when police search multiple floors of a house. For example, in *United States v. Austin*, police searched the third floor of a residency without proper consideration given to the privacy of the adult child living there.²²⁶ A search of a basement bedroom or the third floor of a residence, should trigger a more detailed line of questioning to assess whether the space is occupied by one person, namely the adult child. The rule for apparent authority to consent should require police to ask questions of the parent to clarify the scope of their authority to consent to a search of the bedroom. Because reasonable but erroneous beliefs concerning consent can still validate the search it is important for police to probe into areas that will reveal the true nature of the parent and child's arrangement concerning access and entry to the area to be searched.

Such a requirement is not without precedent. If police wanted to search the bedroom of an adult suspect who lived with three other people, each of whom had their own bedroom, police would not be permitted to rely on the consent of another co-occupant to search the suspect's bedroom unless it was reasonable to believe that the third party had mutual use of the bedroom.²²⁷ Similarly, a hotel guest does not cede his expectation of privacy to the manager to allow anyone except hotel employees into his room for routine services.²²⁸

²²⁵ See e.g., *Hughes v. Coconut Creek Police Dep't*, 233 Fed.Appx. 919 (11th Cir. 2007) (24-year-old son had his own key, paid rent, and told father not to allow anyone to enter his room.); *Mortimer*, *supra*, note 216 (21-year-old defendant rented a room in his parents' home).

²²⁶ See also *supra*, Part III for a discussion of *Austin*.

²²⁷ *Matlock, Rodriguez, Minnesota v. Olson*.

²²⁸ *Stoner v. California* at 489.

Notwithstanding that the consent doctrine is an exception to the Fourth Amendment's warrant requirement, it stands to reason that affording adult children the same expectation of privacy they would be entitled to if they lived not with their parent but with a friend is the proper result. After all, nothing in this proposal limits the parent from acting on his own initiative and searching the child's bedroom upon suspicion of illegal activity. A parent has the prerogative to deliver to the police whatever evidence he/she finds in her child's bedroom. The Fourth Amendment is concerned with the actions of government actors, not private citizens acting in their individual capacity. The focus of this proposal is on parental consent to allow police to search the adult child's bedroom and to that end the concern is over the ease with which police can intrude upon the privacy of adults in their own home by presuming their parents have authority to consent to a search of the adult child's room."²²⁹

VI. Conclusion

America is faced with unprecedented economic uncertainty. With countless numbers of people unemployed and foreclosure rates reaching their highest levels ever, many families are reconsidering intergenerational living as a way to weather the storm. Increasing numbers of adult children are moving back in with their parents. Many of them would expect some degree of privacy and autonomy over their room and belongings. Similarly, parents moving back in with their adult children would expect that they have an equal degree of independence and control over their possessions. The regulation of police behavior is in large measure what the Fourth Amendment, and its counterpart the Exclusionary Rule, aim to accomplish. A set of guidelines for police to follow under circumstances where police wish to search the room of an adult child

²²⁹ "The reliance on a co-tenant's information instead of disputed consent accords with the law's general partiality toward 'police action taken under a warrant [as against] searches and seizures without one.' Randolph at X [internal quotations *United States v. Ventresca*, 380 U.S. 102, 107 (1965)].

living with his/her parents will prevent subordination of individual privacy rights in one's home while simultaneously deterring police from willfully remaining unaware of areas that are under the exclusive control of one occupant. Adult children living with their parents should not have any lesser expectation of privacy than adults who share living quarters with a non-parental figure. If police inquiry recognizes the changing household composition, consent searches would more fully accord with what Justice Souter termed "customary social understanding". Parents and adult children alike would then be afforded the protection they deserve under the Fourth Amendment.