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Public Education and Student Privacy:
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Dormitories at Public Colleges and Universities

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by

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Every year, thousands of students attend public colleges and universities while living in residential facilities provided by the institution. Sometimes referred to as dormitories, other times as residence halls, in either case, a student’s room in the facility provides him or her a venue for privacy that is often lacking on college campuses. In a building where sometimes thousands reside, a student’s dormitory room serves a number of purposes. It provides the student a place to relax, eat, sleep, study, and socialize. Further, the presence of Residence Life staff offers opportunities and activities that enhance a residential student’s educational and social development. It also offers a location for students to keep their most valued possessions, and provides a psychological benefit for students who may be living away from parents for the first time. As one court has noted:

_Although few people who have ever resided in a college dormitory would favorably compare those living quarters to the comfort of a private home, a dormitory room is “home” to large number of students who attend universities …. Because of the very nature of dormitory life, privacy is a commodity hard to come by, however much desired._

Dormitories across the country are different in many ways: some house hundreds of students, while others house thousands; some are segregated by sex, while others are not; some use “suites” to house students, while others retain the familiar barracks-style of living. Regardless of these differences, one thing that remains the same for students living in dormitories at public institutions is the manner in which the Fourth Amendment applies in
these settings. In light of the significant student privacy interests involved, it is critical that college and university administrators understand fully a student’s Constitutional rights under the Fourth Amendment. Failure to respect these rights may result in the institution and its employees being held civilly liable for the violation, and/or any evidence seized being suppressed.3

In summary, this article seeks to provide insight into the current state of the law regarding dormitory searches by officials at public institutions of higher education. The first section of the article provides a brief overview of the Fourth Amendment, while the remaining sections address the Amendment’s application to dormitory rooms and common areas. The issue of searches conducted by Resident Assistants is discussed, as are the various recognized exceptions to the Fourth Amendment’s warrant requirement. With regard to this last point, there are “surprisingly few cases addressing the constitutional validity of searches of college dormitory rooms.”4 In light of this, where legal precedent regarding the application of the Fourth Amendment to a dormitory setting is lacking, I have attempted to use previous holdings on like facilities (e.g., apartments, hotels, and motels) to outline the most likely manner in which courts would analyze the issue.

I. THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
A careful reading of the Fourth Amendment reveals that it contains two (2) distinct clauses, “the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.” Thus, regarding this first clause, the Fourth Amendment “does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.” This clause is “general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders, as well as the innocent ….” The second clause mandates that probable cause exist before warrants may be issued, and that search warrants particularly describe the place to be searched and the things to be seized. These requirements collectively serve a critical purpose in our society, and the clause itself is intended to:

prevent[] the issue of warrants on loose, vague, or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in constitutions or statutes of every State in the Union. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the right for the protection of which it was adopted.

In light of this, it must be remembered that, while there is no absolute prohibition on warrantless searches, the Supreme Court has made clear that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.” In fact, the Supreme Court has repeatedly emphasized its preference for searches conducted pursuant to a valid search warrant, noting that the “resolution of doubtful or
marginal cases in this area should largely be determined by the preference accorded to warrants.”

The operation of these two clauses has, over time, resulted in the establishment of a number of well-established notions that provide the framework within which courts answer Fourth Amendment questions. The first, that warrantless searches are per se unreasonable, has already been mentioned. The second, which will be discussed more fully below, is that the Fourth Amendment “protects people, not places.” The application of the Fourth Amendment has changed over time, and no longer requires a physical intrusion by the government in order for there to be a constitutional issue. Instead, “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected.” And the third is that probable cause, standing alone, cannot justify a warrantless search. Instead, probable cause must exist in conjunction with a warrant or an exception to the warrant requirement (e.g., searches incident to arrest).

When analyzing whether a Fourth Amendment violation has occurred based on an unreasonable search, the first question that must be considered is whether a “search” actually took place. If the action being scrutinized does not constitute a “search,” then the Fourth Amendment does not apply. A “search” occurs when the government violates a subjective expectation of privacy that society considers to be objectively reasonable. This has become more commonly known a “reasonable expectation of privacy.” The test for whether a reasonable expectation of privacy exists is two-pronged: first, the individual must have exhibited an actual (subjective) expectation of privacy; and second, that expectation must be one that society is prepared to recognize as reasonable. If either of these prongs is not met, then an individual does not have an expectation of privacy. So, for example, “conversations in the open
would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.”

The Supreme Court and the various Federal courts have had ample opportunities over the years to address the issue of where individuals have, and do not have, a reasonable expectation of privacy. While such determinations are incredibly fact-dependent, it is possible to generally address a number of areas where the law is firmly settled in this regards. For example, it can be stated with certainty that an individual has a reasonable expectation of privacy inside his or her body. As a result, “a physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.” However, courts have drawn a distinction “between physical evidence below the skin as opposed to outside the skin ….” Thus, while the Fourth Amendment will be implicated by the drawing of blood, or the removal of a bullet from a suspect’s body, it will not be implicated by actions such as compelling voice samples through a grand jury subpoena or obtaining handwriting exemplars.

Similarly, the Supreme Court has held that an individual will have a reasonable expectation of privacy in the interior of the vehicle, at least in those areas of the vehicle not exposed to view from the outside, although that expectation is reduced in light of the pervasive regulation of vehicles. This same protection, however, would not be extended to the exterior of the vehicle, since the “exterior of a car … is thrust into the public eye, and thus to examine it does not constitute a search.” Additionally, a passenger would not be entitled to Fourth Amendment protection in a vehicle which he or she neither owns, nor leases, although the passenger would retain an expectation of privacy in any personal items he or she brought into the vehicle with them.
Additionally, the “Supreme Court has long recognized that individuals have an expectation of privacy in closed containers,” such as briefcases, backpacks, purses, wallets, etc. However, “for there to be a reasonable expectation of privacy, the contents of [the] container should not be apparent without opening.” Thus, “when a container is ‘not closed,’ or ‘transparent,’ or when its ‘distinctive configuration … proclaims its contents,’ the container supports no reasonable expectation of privacy and the contents can be said to be in plain view.”

Lastly, and of most relevance for students living in dormitories, “[i]t is axiomatic that the physical entry of the home is ‘the chief evil against which the wording of the Fourth Amendment is directed.’” Consequently, it goes without saying that an individual will have a reasonable expectation of privacy in his or her home. As the Supreme Court has noted:

At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle.

This protection for “private” residences has been extended to other types of dwellings, including both hotel and motel rooms, as well as rooms in boarding houses.

II. The Expectation of Privacy in Dormitory Rooms

It has been clearly established that college students do not “shed their constitutional rights … at the schoolhouse gate.” Rather, students “have constitutional rights that must be respected,” and they can no longer be considered “members of what Graham Greene’s Secret Police Captain Segura called the ‘torturable class.’” Instead, the “Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures,” including all public institutions of higher education.
In light of these pronouncements, it is unsurprising that the courts have unanimously determined that “a student who occupies a college [or university] dormitory room enjoys the protection of the Fourth Amendment.” As noted by one Federal court:

A dormitory room is a student’s home away from home; and any student may reasonably expect that once the door is closed to the outside, his or her solitude and secrecy will not be disturbed by a governmental intrusion without at least permission, if not invitation. The Fourth Amendment by its very terms guarantees this.

Further, courts have reasoned that dormitory rooms are analogous with apartments or hotel rooms for Fourth Amendment purposes, and should be treated as such in terms of privacy expectations:

A dormitory room is analogous to an apartment or a hotel room. ... The [student] rented the dormitory room for a certain period of time, agreeing to abide by the rules established by his lessor, the University. As in most rental situations, the lessor ... reserved the right to check the room for damages, wear and unauthorized appliances. Such right of the lessor, however, does not mean [the student] was not entitled to have a “reasonable expectation of freedom from governmental intrusion” ...

Finally, the fact that “members of the public may make an occasional dormitory visit does not contravene the ... finding that the living areas of a residence hall are private in nature.” And, although the institution’s ownership of the dormitory is an “important consideration,” it does not, standing alone, dictate a finding that no reasonable expectation of privacy exists for students living in that facility. “Applicability of the Fourth Amendment does not turn on the nature of the property interest in the searched premises, but on the reasonableness of the person’s privacy expectation.”
III. The Expectation of Privacy in Common Areas

While a student’s expectation of privacy in a dormitory room is well-established, there is a
dearth of case law discussing whether that expectation extends into the common areas of a
dormitory, such as lobbies, hallways and stairwells. However, because dormitory rooms are
analogous to apartment or hotel rooms, it is useful to explore how courts have viewed
expectations of privacy in these settings in order to understand how such common would likely
be addressed in a dormitory. That said, the majority of Federal courts have concluded that
“tenants do not have a reasonable expectation of privacy in the common areas of their
apartment buildings.”\textsuperscript{45} Instead, the “only circuit that has recognized a reasonable expectation
of privacy in the common areas of an apartment building, at least when the door is locked, is
the Sixth Circuit.”\textsuperscript{46} Notwithstanding the above, however, all Fourth Amendment questions are
fact-based, and at least one court has held that a student residing in a dormitory will have an
expectation of privacy in the hallway of the building.

Specifically, in \textit{State v. Houvener},\textsuperscript{47} the student attended Washington State University. After
a campus police officer received a report of a theft in the dormitory, the officer initiated a search
of the entire dormitory complex, beginning on either the 12\textsuperscript{th} or 13\textsuperscript{th} floors and continuing until
he eventually reached the student’s room on the 6\textsuperscript{th} floor. After hearing what he believed were
incriminating statements coming from inside Houvener’s room, the officer attempted a ruse to
get the students to open the door. When that failed, he identified himself as a police officer and
ordered the students to open the door. Houvener opened the door, entered the dormitory
hallway as requested, and made, after some questioning, incriminating statements that resulted
in his arrest. He then retrieved the stolen items from his room. At his trial for residential
burglary, the trial court suppressed the evidence seized from Houvener’s dormitory room and
the State appealed that decision. After concluding that the trial court was correct, the appellate court affirmed the suppression of the evidence “because it was unlawfully obtained by police when an officer conducted a building-wide search of the interior hallways of the dormitory without a warrant.”

In reaching its decision, the court focused heavily on the physical layout of the 6th floor of the dormitory, noting that (a) the floor residents share a study area and bathroom; (b) the residents of that floor are “viewed as a living group independent or residents of other floors;” (c) while outsiders can access the lobby of the dormitory, “they may not access any of the floors without a passkey or without the escort of a resident of that floor;” and (d) each “living group is permitted to develop its own visitation schedule for its main lounge and lobbies.” Further, the court distinguished students living together in a dormitory from those tenants in an apartment building, finding that “student residents have a right to privacy in the hallway they share. These students are not strangers - they share close quarters, intimate spaces, and a common academic and social experience.” Interestingly, the court also considered the notion of “curtilage” in its analysis, finally holding that:

In assessing Mr. Houvener’s privacy interest in his living group hallway, the focus is whether, under the circumstances, the hallways should be placed under the home’s “umbrella” of Fourth Amendment protection.” The curtilage has been considered “part of the home itself for Fourth Amendment purposes.” … Because of the intimate nature of the activities in the hallway - most remarkably, towel-clad residents navigating the hallways to and from the shared shower facilities - it is reasonable to hold that this area is protected.

Like all Fourth Amendment questions, whether a student has a reasonable expectation of privacy in a dormitory hallway or common areas may only be answered after careful consideration of the specific underlying facts. Thus, while it can reasonably be said that
students will typically not have a reasonable expectation of privacy in the common areas of a dormitory, that question must ultimately be answered after considering the openness, security, and use of the area in question. So, for example, if (a) access to the area is restricted to residents or others escorted by residents based upon institution or dormitory policies and practices, (b) the area is used for “intimate” activities, such as proceeding to and from shared shower facilities, and (c) the area contains shared areas that are provided for the independent use of students on a particular floor of the dormitory, it is entirely possible that student’s could have an expectation of privacy in the hallways of a dormitory. Alternatively, where (a) access to the hallways of the dormitory is not restricted to residents or escorted guests, (b) shower facilities are provided in individual rooms or suites so that travel throughout the common areas is not required, and/or (c) the general use of the area is not consistent with an independent group living arrangement, a student would likely not be entitled to an expectation of privacy in the common areas of the dormitory.

IV. Private Searches and Resident Assistants

The Supreme Court has repeatedly held that the “Fourth Amendment is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official.”\(^{53}\) Stated more plainly, the Fourth Amendment does not regulate private conduct, regardless of whether that conduct is reasonable or unreasonable. Of course, “the government may not do, through a private individual, that which it is otherwise forbidden to do.”\(^{54}\) Thus, if in light of all the circumstances, a private party conducting a search is doing so as an “instrument or agent” of the government, the Fourth Amendment will apply to that party’s actions.\(^{55}\) Whether a private search has become governmental “necessarily turns on the degree
of the government’s participation in the private party’s activities … a question that can only be
resolved in light of all the circumstances.” In making such a determination, the lower courts
have almost uniformly applied the following two-part test or a close variant: (a) whether the
government knew of or acquiesced in the intrusive conduct, and (b) whether the party
performing the search intended to assist law enforcement efforts or to further his own ends.
While, a court must find both before an agency relationship can be deemed to exist, it is
important to note that the greater the government involvement in the search, the less important
is the private searcher’s intent.

A. Acquiescence

The first factor courts typically consider in determining whether a search is private or
governmental is the extent of the government’s knowledge of, and participation in, the private
actor’s conduct. Within the context of private searches, “knowledge” and “acquiescence”
“encompass the requirements that the government agent must … affirmatively encourage,
initiate, or instigate the private action.” Consequently, a private search can be converted into a
governmental one only where there is “some exercise of governmental power over the private
entity, such that the private entity may be said to have acted on behalf of the government rather
than for its own, private purposes.” In making this determination, courts will “consider
whether the private actor performed the search at the request of the government, or whether the
government otherwise initiated, instigated, orchestrated, encouraged, or participated in the
search.” “Mere knowledge of another’s independent action does not produce vicarious
responsibility absent some manifestation of consent and the ability to control.” Similarly,
simply taking control of evidence “gathered by a private party without the State’s instigation or
direction” does not transform a private search into a governmental one. In order for a private
search to be considered governmental, courts typically require that a government agent be
either involved in the search directly as a participant, or indirectly as an “encourager” of the private person’s search. As one court has noted: “Where [government] officials actively participate in a search being conducted by private parties or else stand by watching with approval as the search continues, [government] authorities are clearly implicated in the search and it must comport with Fourth Amendment requirements.” Implicit in this requirement, of course, is that the government must have knowledge of the private actor’s conduct before it actually occurs. “Where no official of the … government has any connection with a wrongful seizure, or any knowledge of it until after the fact, the evidence is admissible.” Thus, for example, if a law enforcement officer actively sought out and requested that a private citizen conduct a search of a suspect’s property (e.g., his or her computer), this would almost certainly qualify as a governmental search due to the initiation and instigation of the private action. Alternatively, where a private citizen conducts a search without the government’s knowledge and only later provides law enforcement personnel evidence of any crime uncovered during that search, it is likely this situation would not implicate the Fourth Amendment.

B. Intent to Assist

The second factor courts typically consider when analyzing the validity of a private search is whether the private actor intended to assist law enforcement efforts or was, instead, attempting to further his own ends. Of course, there are many reasons why a private citizen might, of their own volition, seek out criminal activity:

A private citizen might decide to aid in the control and prevention of criminal activity out of his or her own moral conviction, concern for his or her employer’s public image or profitability, or even a desire to incarcerate criminals, but even if such private purpose should happen to coincide with the purposes of the government, “this happy coincidence does not make a private actor an arm of the government.”
Further, at least one court has noted that a private individual conducting a search “almost always ... will be pursuing his own ends – even if only to satisfy curiosity – although he may have a strong intent to aid law enforcement.”\(^72\) However, as discussed above, a “private party cannot be deemed a government agent unless it was induced to act by some government action.”\(^73\) “Where the private party has a legitimate independent motivation for engaging in the challenged conduct, the Fourth Amendment would not apply.”\(^74\) Thus, “where the private person is motivated both to assist the government and to further his or her own objectives, the private citizen is not acting as an agent of the government.”\(^75\) Additionally, whether the government offered a reward would be relevant to determining the private actor’s motivation for conducting the search,\(^76\) as would whether the private actor was a confidential informant.\(^77\) Finally, a long-line of cases holds that “an off-duty police officer acts as a government agent where he or she stumbles upon criminal activity and attempts to collect evidence for law enforcement.”\(^78\)

C. **Resident Assistants**

Courts have reached inconsistent conclusions regarding whether to treat Resident Assistants as state or private actors for purposes of dormitory searches. While one Federal court has found a search conducted by a Resident Assistant to be state action,\(^79\) at least two state courts have not.\(^80\) An examination of two of these cases may be instructive.

In *Morale v. Grigel*,\(^81\) the United States District Court for the District of New Hampshire addressed the legality of a series of dormitory searches that occurred at the New Hampshire Technical Institute (NHTI). Following the theft of a stereo in the dormitory, a room-by-room search of the dormitory was conducted by Lane, the Head Resident, and Grigel, a second-year student employed as a Resident Assistant. According to the court, it was clear that “this initial inspection ... was performed under the authority granted Lane and Grigel by NHTI in their
respective capacities as Head Resident and Resident Assistant.” Because Grigel had seen a disclosed ceiling tile in Morale’s room, he determined to search the room for a second time that same evening looking for the stolen stereo. Morale was not present on this second occasion and his door was locked. After attempting to pick the lock to Morale’s door, Grigel obtained Lane’s passkey under false pretenses and again searched the room. On this occasion, Lane was not present and Grigel’s search was conducted “without any actual authority.” Grigel conducted a third search one day later; according to the court, he was “on duty as a proctor at that time and assumed a general authority to search for stolen property.” Accompanied by other students, a search of Morale’s room turned up a film canister with marijuana seeds in it. Upon notifying Lane of this discovery, a fourth search of Morale’s room ensued, with Grigel locating a pipe in a desk. When confronted by these discoveries, Morale acknowledged the items were his.

Ultimately, Morale filed a civil suit under Title 42, United States Code Section 1983 against Lane, Grigel, and numerous others for violations of his constitutional rights. In defense, the claim was made that at least some of these searches were private searches. After a reminder that students do not sacrifice their Fourth Amendment rights while attending college, the court rejected the notion that either Lane or Grigel were acting in a privacy capacity while carrying out these searches. Instead, held the court:

'It is apparent that the marijuana was seized as a result of official action. NHTI is a state institution … and Lane is employed by it. Grigel also was employed by NHTI. Although not paid in the usual manner, Grigel received compensation in the form of a credit toward his room and board costs for his services as Resident Assistant. He was not issued a passkey, but was given the responsibility of supervising the students in the dormitory and rendering any kind of
assistance they needed. I conclude that the searches as conducted by Lane and Grigel were governmental in nature.\textsuperscript{85}

Alternatively, in \textit{State v. Kappes},\textsuperscript{86} the student attended Northern Arizona University and lived in a university-owned and operated dormitory. She had signed a “housing agreement” by which she had agreed to abide by all university regulations, including one that permitted the institution to enter a dormitory room and inspect for cleanliness, safety, or any maintenance issues. These routine inspections were carried out monthly, and notice of each inspection was provided twenty-four (24) hours ahead of time. During one of these inspections by two (2) student Resident Advisors, who entered the room through the use of a master key, a pipe and marijuana butts were observed in plain view on a desk. Two (2) campus security officers were notified and the student was ultimately arrested, charged with, and convicted of misdemeanor possession of marijuana. On appeal, Kappes claimed the evidence used against her had been seized in violation of the Fourth Amendment.

In rejecting her claim, the court initially noted that, “if a law enforcement official initiated the investigation and then gained entry to a student’s room without a warrant, evidence seized thereby would be barred under the fourth amendment.”\textsuperscript{87} Further, the court held that the “same result has followed where the entry is made by a school official who does so at the request of, or in cooperation with, law enforcement officials.”\textsuperscript{88} However, held the court, where, as here, “the entry is made by a student advisor conducting a routine dormitory inspection announced in advance, we cannot say that the intrusion is the result of government action ....”\textsuperscript{89} Instead, the court found that the “purpose of the room inspection is not to collect evidence for criminal proceedings against the student, but to insure that the rooms are used and maintained in accordance with the university regulations.”\textsuperscript{90} Accordingly:
While the actions of the student resident advisors in carrying out room inspections serve the internal requirements of the university, we do not find that they are tainted with that degree of governmental authority which will invoke the fourth amendment. It follows then that the student advisors acting in this capacity do so as private persons rather than government agents for the purpose of the exclusionary rule. Their conduct is not circumscribed by the fourth amendment since its sanctions do not apply to private persons.\textsuperscript{91}

While the results of these cases are inconsistent, at least one significant distinction can be drawn between the two cases, namely: the Resident Assistant in \textit{Morale} had clearly exceeded the scope of his authority and was searching for evidence of criminal activity, while the Resident Assistant in \textit{Kappes} had not. In any event, prudence on the part of campus administrators dictates that Resident Assistants should be considered state actors for purposes of the Fourth Amendment. First, while courts have typically drawn distinctions between routine health and safety inspections and those initiated to ferret out criminal activity, it should be remembered that “searches motivated by something other than the prospect of obtaining evidence of crime [are still] subject to the general Fourth Amendment standard of reasonableness.”\textsuperscript{92} Second, Resident Assistants are so inextricably linked to the institution that it is impossible to separate them. They are, in essence, public employees of the institution, who receive appropriate compensation from the institution, either directly through a stipend or indirectly through the provision of room and board, which may include perhaps even a meal plan. Additionally, Resident Assistants are empowered based upon the delegation of that authority to them by the public institution. In light of these factors, it seems reasonable to expect that the majority of courts will find Resident Assistants to be public actors for Fourth Amendment purposes.
V. Consent Searches

“It is … well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”\textsuperscript{93} Thus, “in situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence.”\textsuperscript{94} In order to withstand judicial scrutiny, a consent search has two (2) basic requirements: First, the consent must have been given voluntarily; and second, the consent must have been given by someone with either actual or apparent authority over the area or item to be searched.

A. \textbf{Voluntariness}

Both “the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.”\textsuperscript{95} In making this determination, courts will look at the “totality of the circumstances” surrounding the giving of the consent, because “it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.”\textsuperscript{96} Courts have considered a variety of factors in determining whether consent to search was voluntarily given, including (a) the age, education, and intelligence of the individual;\textsuperscript{97} (b) the individual’s knowledge of his or her right to refuse consent;\textsuperscript{98} (c) the length of any detention that occurred prior to the giving of the consent;\textsuperscript{99} (d) the repeated and prolonged nature of any questioning that led to the consent;\textsuperscript{100} (e) whether the consent was given in writing;\textsuperscript{101} (f) the use of physical punishment, such as sleep or food deprivation;\textsuperscript{102} (g) whether the individual cooperated in the search;\textsuperscript{103} (h) whether the suspect was in custody at the time the consent was given;\textsuperscript{104} (i) the suspect’s belief that no incriminating evidence will be found;\textsuperscript{105} (j) the presence of coercive police procedures, such as
displaying weapons or using force;\textsuperscript{106} (k) the individual’s experience in dealing with law enforcement officers;\textsuperscript{107} (l) whether the suspect was under the influence of alcohol or drugs;\textsuperscript{108} (m) whether the suspect was notified of his or her Miranda Warnings;\textsuperscript{109} (n) whether the police made promises or misrepresentations;\textsuperscript{110} (o) the location where the consent was given;\textsuperscript{111} (p) whether the defendant had been told that a search warrant could be obtained if consent was not given;\textsuperscript{112} and (q) whether there were repeated requests for consent.\textsuperscript{113} The burden of proving that consent was given voluntarily rests with the government, “is a question of fact to be determined from the totality of the circumstances,”\textsuperscript{114} and “cannot be discharged by showing no more than acquiescence to a claim of lawful authority.”\textsuperscript{115}

B. \textbf{Actual or Apparent Authority}

In addition to being given voluntarily, a valid consent to search must be given by an individual with “actual or apparent authority” over the area to be searched. An individual “whose property is searched”\textsuperscript{116} has “actual” authority to consent to the search; additionally, a third-party “who possesses common authority over or other sufficient relationship to … the effects sought to be inspected”\textsuperscript{117} also has “actual” authority and may provide a valid consent to search. As stated by the Supreme Court:

\begin{quote}
Common authority is, of course, not to be implied from the mere property interest a third-party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements …, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.\textsuperscript{118}
\end{quote}
Alternatively, consent to search an area may be given by one who has “apparent” authority over the area to be searched. “Apparent authority turns on whether the facts available to the officer at the time would allow a person of reasonable caution to believe that the consenting party had authority over the premises.” Stated differently, “apparent authority” exists when consent is given by one whom the officers, at the time of the search, reasonably, albeit erroneously, believed possessed common authority over the area to be searched.

The scope of any authorized consent search “is generally defined by its expressed object,” and courts use an objective reasonableness standard for measuring this aspect of the search. Further, an individual may limit the scope of any consent given, as well as revoke consent at any time. Finally, consent may be given expressly by an individual or may be inferred from his or her words and/or actions.

C. Roommates

As a general rule, “when an apartment, for example, is shared, one ordinarily assumes the risk that a co-tenant might consent to a search, at least to all common areas and those areas to which the other has access.” Further, “[u]nless the complaining co-tenant has somehow limited the other’s access to a piece of property, the consenting co-tenant’s authority extends to all items on the premises.” This is consistent with the Supreme Court’s holding that “the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.”

However, notwithstanding this, third-party consent is not without boundaries, especially when the situation involves shared dwellings and co-tenants who differ on the issue of consent. Specifically, in instances where two roommates are present and have joint control over an area, the consent of one will not overrule the objection of the other. In such instances, the Supreme Court has seen the need to draw “a fine line,” that is wholly contingent upon whether the
potential objector is present or not: “if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.”129 Thus, “a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given … by another resident.”130

Applying this logic to the issue of dormitory rooms, including dormitory “suites,” it becomes clear that a student may voluntarily consent to a search of the room that he or she physically occupies within the structure, along with all common areas (e.g., the sitting area in a dormitory suite with multiple student bedrooms) and other areas within the room or suite to which he or she has access (e.g., a bathroom area). The student may also give consent to search any effects within the room over which he or she “possesses common authority.” However, a student may not consent to a search of the room or any common areas of the suite if a roommate is physically present at the room when the search request is made or is to commence and objects to it.

D. Landlords (and the Institution)

In a variety of circumstances, courts have rejected attempts by police officers to conduct searches based upon consent granted by landlords, hotel clerks, and others standing in similar positions. Thus, a landlord does not “have authority to waive the Fourth Amendment’s warrant requirement by consenting to a search of premises inhabited by a tenant who is not at home at the time of the a police call.”131 Similarly, in Stoner v. California, the Supreme Court rejected the government’s assertion that a hotel night clerk could consent to a search of a tenant’s room, concluding:
No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.\(^{132}\)

Nonetheless, while a landlord or night clerk cannot ordinarily consent to a search of a tenant’s residence, he or she can consent to a search of any unoccupied spaces within the facility,\(^ {133}\) as well as any common areas of the building over which he or she had joint access or control.\(^ {134}\) This becomes relevant because it is generally held that, in the case of a dormitory, “the educational institution’s position is more akin to that of any other landlord.”\(^ {135}\)

This being the case, courts are understandably reluctant to put the student who has the college as a landlord in a significantly different position than a student who lives off campus in a boarding house. The latter student is quite obviously protected by the Supreme Court’s ruling … that a landlord may not consent to a police search of his tenant’s quarters merely because he has some right of entry of his own in connection with his position as landlord. … [T]he same can be said of the college landlord.\(^ {136}\)

Accordingly, it can be said that, while the institution cannot generally consent to a search of a student’s dormitory room, consent could be given to search any unoccupied rooms and any common areas over which the institution has access and control (e.g., the lobby).

E. **Housing Agreements and Implied Consent**

It is axiomatic that an institution of higher education has certain powers that may be exercised in carrying out the institution’s educational mission. Thus, it is clear “that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct.”\(^ {137}\) Of course, if
“it is axiomatic that schools officials have inherent power to promulgate and enforce regulations, it is also axiomatic that this comprehensive authority must be exercised ‘with fundamental constitutional safeguards.’”¹³⁸

Generally, any student living in a dormitory at a public institution is required to sign a standard “housing agreement” form. In almost all instances, these agreements contain a provision permitting the institution to conduct random inspections of dormitory rooms for purposes of ensuring the health and safety of the residential population. As one court has noted:

_Students attending a university require and are entitled to an atmosphere that is conducive to educational pursuits. In a dormitory situation, it is the university that accepts the responsibility of providing this atmosphere. Thus, it is incumbent upon the university to take whatever reasonable measures are necessary to provide a clean, safe, well-disciplined environment in its dormitories._¹³⁹

For these reasons, “[a]dministrative checks of dormitory rooms for health hazards are permissible pursuant to the school’s interest in the maintenance of its plant and health of its students, as are searches in emergencies, such as in the case of fire.”¹⁴⁰ However, while courts have acknowledged that an institution “retains broad supervisory powers which permit it to adopt”¹⁴¹ housing regulations, these regulations may not be overly broad. Instead, inspection provisions in housing regulations are permissible only if the regulation “is reasonably construed and is limited in its application to further the [institution’s] function as an educational institution.”¹⁴²

_The regulation cannot be construed or applied so as to give consent to a search for evidence for the primary purpose of a criminal prosecution. Otherwise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from_
unreasonable searches and seizures as a condition to his occupancy of a college dormitory room.¹⁴³

In other words, “authority granted for a limited purpose does not translate into a general authority to authorize a search.”¹⁴⁴ Thus, while a student’s signature on a housing agreement may constitute “consent to the [institution’s] entry into [the student’s] dormitory room under certain circumstances,”¹⁴⁵ it “cannot be reasonably construed as [the student] having given such consent to others.”¹⁴⁶

Instructive on these points is State v. Hunter,¹⁴⁷ where the court concluded that a warrantless search conducted pursuant to a provision in the housing agreement was constitutional in light of, inter alia, the institution’s “interest in maintaining a safe and proper educational environment ....”¹⁴⁸ In Hunter, the student attended Utah State University, lived in a campus dormitory, and, like other dormitory residents, signed a residential agreement that provided, in relevant part, that:

University officials reserve the right to enter and inspect residence hall rooms at any time. Inspections will occur when necessary to protect and maintain the property of the University, the health and safety of its students, or whenever necessary to aid in the basic responsibility of the University regarding discipline and maintenance of an educational atmosphere. In such cases effort will be made to notify the resident(s) in advance and to have the resident(s) present at the time of entry.¹⁴⁹

After numerous incidents of vandalism and other problems had taken place on the second floor of the dormitory, which University officials attributed to violations of the institution’s alcohol and explosives policies, the residents of that floor, including Hunter, were warned that further occurrences would result in room-to-room inspections would ensue. Following additional violations, campus officials undertook a search of all rooms located on the second
floor. Because Hunter was not present when officials arrived to search his room, a passkey was used to gain entry. Upon entering, stolen university property was discovered. Ultimately, Hunter was charged with misdemeanor theft. He filed a motion to suppress the evidence discovered in his room, which was granted, and the State appealed that decision.

In reversing the trial court, the appellate court began their discussion by noting that “the right of privacy protected by the fourth amendment does not include freedom from reasonable inspection of a school-operated dormitory room by school officials.” Further, the court referred to the Supreme Court’s recognition that “where state-operated educational institutions are involved … [there is a] ‘need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’” In light of these overarching principles, the court found the search a “reasonable exercise of the university’s authority to maintain an educational environment.” “By signing the … housing contract, Hunter agreed to the university’s right of reasonable inspection and waived any Fourth Amendment objections to the university’s exercise of that right.” Additionally, this was “not a case in which university officials took action at the behest of or as part of a joint investigation with the police,” nor was it one in which “university officials attempt to delegate their right to inspect rooms to the police, which would result in the circumvention of traditional restrictions on policy activity.”

To understand this issue more fully, it is beneficial to compare Hunter with Devers v. Southern University, in which the court affirmed a lower court’s ruling that the institution’s housing agreement was unconstitutional. Devers was a student at Southern University and A & M College, located in Louisiana. As a condition of living in residential housing, he signed a rental agreement that provided, in pertinent part, that the “University reserves all rights in connection with assignments of rooms, inspections of rooms with police, and the termination of
room occupancy.” During a dormitory search authorized by the institution’s housing agreement, twelve (12) bags of marijuana were found in Devers’ room. He was arrested, issued an administrative expulsion, and prohibited from entering classes. Ultimately, Devers filed a civil lawsuit alleging his constitutional rights had been violated based upon the search of his dormitory room. After a trial court found the dormitory search policy prima facie unconstitutional, the institution appealed.

In support of the search’s constitutionality, the University argued the safety of students justified the random dormitory searches, and that the regulation at issue was similar to that upheld by the court in Hunter. However, this argument was unpersuasive, as the court distinguished the actions in this case from those in Hunter. First, “Hunter was not a case in which university officials took action at the behest of or as part of a joint investigation with the police.” Further, the university officials in Hunter did not “attempt to delegate their right to inspect rooms to the police, which would result in circumvention of traditional restrictions on police activity.” Additionally, while the regulation in Hunter “specifically stated that the purpose of its inspections [was] for maintenance of university property, the health and safety of students, and maintenance of discipline in an educational atmosphere,” Southern University’s regulation “[did] not specify such a purpose, rather it allow[ed] entry of dormitory rooms accompanied by police without any stated purpose.” In light of these facts, the court rejected the University’s appeal:

The regulation utilized by Southern University clearly authorizes police involvement in the entry and search of the dormitory rooms. With police routinely assisting in the entry and search of a dormitory room, there are no factors which would characterize such an intrusion as a benign “administrative” search. … [A] check of a student’s dormitory room is unreasonable under the Fourth Amendment unless Southern University can show that the search furthers its
functioning as an educational institution. Southern University’s housing regulation, as written, clearly authorizes unconstitutional searches. The search must further an interest that is separate and distinct from that served by Louisiana’s criminal laws.\textsuperscript{162}

Taken together, these cases provide a solid framework in which to analyze the issue of consent as it may be construed from the terms of a residential housing agreement. First, a student may not be forced to waive his or her constitutional rights as a condition of living in a dormitory. Second, the institution still retains the right to conduct appropriate health and safety inspections of dormitory rooms, so long as those searches further a legitimate educational interest of the institution. Third, where the search is performed in conjunction with law enforcement officials, or is designed to locate evidence of general criminal activity, it likely exceeds the scope of the consent given by the student through his or her signature on the housing contract.

F. Uncovering Criminal Evidence During an Administrative Search

While institution officials are permitted to carry out warrantless searches of dormitory rooms for administrative purposes, this raises a question that must be addressed: If, during an authorized administrative search (e.g., for health and welfare), a college or university official uncovers evidence of a crime, such as drugs or drug paraphernalia, what steps should he or she take in response?

In Illinois \textit{v. McArthur,}\textsuperscript{163} the Supreme Court addressed the issue of temporarily seizing an individual’s “residence” in order to obtain a search warrant. The facts of the case are relatively straightforward: Police officers received a request from a woman to accompany her to the trailer she shared with her husband, Charles McArthur, so that she could collect her belongings without his interference. While the wife went inside to collect her possessions, where her husband was present, the police remained outside. After collecting her property, the wife spoke
to one of the officers on the porch of the residence and informed him he should consider searching the trailer because her husband “had dope in there.” She further stated that she had seen McArthur “slide some dope underneath the couch.”

Police sought permission to search the residence from McArthur, which was denied. At that point, one officer left the residence with the wife in order to procure a search warrant, while the second officer remained at the premises. McArthur, who had exited the residence and was on the porch at this time, was notified that he would not be permitted to re-enter the trailer without the police accompanying him. While McArthur entered the residence on 2-3 occasions to either make telephone calls or get cigarettes, the officer remained just inside the door in order to observe McArthur’s actions. A search warrant was obtained approximately two (2) hours later, and the subsequent search turned up marijuana and assorted paraphernalia.

McArthur was charged with misdemeanor possession of drug paraphernalia and marijuana. He sought to suppress the evidence “on the ground that they were the ‘fruit’ of an unlawful police seizure, namely, the refusal to let him reenter the trailer unaccompanied, which would have permitted him, he said, to ‘have destroyed the marijuana.’” The trial court granted McArthur’s suppression motion, and the appellate court affirmed suppression of the evidence. The Supreme Court decided to hear the case in order to determine whether the Fourth Amendment prohibits the temporary seizure of a residence when probable cause exists to believe that evidence of a crime is located therein.

Ultimately, the Court reversed the lower courts and found the seizure of McArthur’s residence to be lawful. After reiterating the “reasonableness” requirement of the Fourth Amendment, the Court outlined various exceptions to the warrant requirement, including “special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like ....” In this instance, the Court found the case involved a “plausible claim of specially
pressing or urgent law enforcement need, i.e., ‘exigent circumstances.’” Further, the Court noted that the “restraint at issue was tailored to that need, being limited in time and scope.” Thus, in determining the reasonable of the officers’ conduct, the Court “balance[d] the privacy-related and law-enforcement related concerns to determine if the intrusion was reasonable.”

In conducting this balancing, the Court found the temporary seizure to be lawful for four (4) reasons: first, the police had probable cause to believe evidence was located in the trailer based upon the wife’s observations; second, it was reasonable for the police to assume that, if McArthur was granted unfettered access to the trailer, he would destroy the drugs before a warrant could be obtained; third, the police actions in this instance (e.g., neither conducting a warrantless search nor arresting McArthur) demonstrated their efforts to “reconcile their law enforcement needs with the demands of personal privacy;” and fourth, the restraint was imposed only for the time necessary for reasonable police officers, acting with diligence, to obtain the search warrant.

In sum, the police officers in this case had probable cause to believe that a home contained contraband, which was evidence of a crime. They reasonably believed that the home’s resident, if left free of any restraint, would destroy that evidence. And they imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In our view, the restraint met the Fourth Amendment’s demands.

The Court’s ruling in McArthur informs the appropriate actions to be taken in situations where institutional officials (e.g., Resident Assistants) uncover evidence of a crime during a routine administrative inspection of a dormitory room. In light of this holding, if a Resident Assistant uncovers evidence of a crime, such as stolen property or other contraband, the prudent course is for the Resident Assistant to cease searching and notify campus law enforcement officials immediately of the discovery. Resident Assistants should be instructed
that, while the discovery of contraband may be used to support probable cause for the issuance of a search warrant, it does not give them license to begin carrying out a general search of the room for additional evidence of criminal activity. Instead, the dormitory room should be secured immediately, and the evidence photographed and left in place. No resident of that room should thereafter be permitted to enter without a law enforcement escort while issuance of a search warrant is pending. Law enforcement officers are within their rights to request consent to search from the individual whose room has been temporarily seized. However, if that request is denied, law enforcement officials must be diligent in attempting to procure a search warrant for the room in order to minimize the intrusion into the student’s personal privacy.

VI. Plain View

“‘It is well established that under certain circumstances, the police may seize evidence in plain view without a warrant.’”¹⁷³ In order to justify a seizure under the “plain view” doctrine, three (3) requirements must be met: first, a law enforcement officer must lawfully be in a position to observe the item to be seized; second, the incriminating nature of the item must be immediately apparent; and third, the officer must have lawful right of access to the object itself.¹⁷⁴

A. Lawful Position to Observe

With regard to the first requirement, a law enforcement officer may be lawfully present to make the observation either because he or she has a valid search or arrest warrant¹⁷⁵ or because an exception to the warrant requirement (e.g., consent) is present.¹⁷⁶
B. **Incriminating Nature Immediately Apparent**

In addition to a lawful vantage point, the “incriminating nature” of the item must also be “immediately apparent.” In essence, an item’s incriminating character is “immediately apparent” if a law enforcement officer has probable cause to believe the item is subject to seizure. Courts use a variety of methods to determine whether an item’s “incriminating nature” was “immediately apparent,” including, for example:

(1) the nexus between the seized object and the items particularized in the warrant; (2) whether the intrinsic nature or appearance of the seized object gives probable cause to associate it with criminal activity; and (3) whether probable cause is the direct result of the executing officer’s instantaneous sensory perceptions.

C. **Lawful Right of Access**

In addition to the above requirements, for the plain view doctrine to apply, “not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.” As noted by the Supreme Court:

*Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.*

Instructive on these points is *Commonwealth v. Neilson*. In *Neilson*, the student lived in a dormitory suite, comprised of four (4) bedrooms, at Fitchburg State College, a public institution. As part of his housing agreement, Neilson signed a document that stated, *inter alia*, that “residence life staff will enter student rooms to inspect for hazards to health or personal safety.” When a maintenance worker overheard a cat inside Neilson’s dormitory suite, he informed college officials, who notified one of the residents of the suite (not Neilson) that “any
cat must be removed pursuant to the college’s health and safety regulations.” Notice was also posted on all four (4) bedroom doors that a “door to door” check would be conducted later that evening in order to ensure the cat had been removed. Neilson was not present for the later search of his room. However:

While searching the defendant’s bedroom, the officials noticed a light emanating from the closet.

The officials, fearing a fire hazard, opened the closet door. There, they discovered two four-foot tall marihuana plants, along with lights, fertilizer, and numerous other materials for marihuana cultivation and use.

Following this discovery, the campus police department was called. Upon arrival, the officers entered Neilson’s room, observed the marihuana plants, took photographs of them, and then seized them as evidence. At his trial, the student moved to suppress all of the evidence seized based on a violation of his Fourth Amendment rights. The trial court agreed, and the government appealed the judge’s ruling. Initially, the court found that Neilson “consented to reasonable searches to enforce the college’s health and safety regulations when he signed the residence contract,” and that the “hunt for the elusive feline fit within the scope of that consent.” Further, stated the court, “when the college officials opened the closet door, they were reasonably concerned about health and safety.” For these reasons, the court determined the initial search to be reasonable, “because it was intended to enforce a legitimate health and safety rule that related to the college’s function as an educational institution.”

However, this did not end the court’s inquiry, in that “the crux of the defendant’s argument [was] that [a] constitutional violation occurred when the campus police searched the room and seized the evidence” without either a search warrant or an exception to the warrant requirement. In finding the search unconstitutional, the court noted the officers entered the dormitory room “without a search warrant, consent, or exigent circumstances.” In light of this,
the court held the plain view doctrine did not apply in this instance, because “the officers were not lawfully present in the dormitory room when they made their plain view observations.” The plain view doctrine would only have justified the officers’ observations of the marihuana if the entry into the room had been made pursuant to a lawful justification (e.g., warrant, consent, or exigent circumstances).

VII. Searches Incident to Arrest

It has long been recognized that a search incident to a lawful custodial arrest “is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” Searches incident to a lawful arrest are permitted for three (3) reasons: (a) to discover weapons on the arrestee or in the area “within his immediate control;” (b) to prevent the destruction or concealment of evidence; and (c) to discover any instruments the arrestee may use to escape. The phrase “within his immediate control” has been construed “to mean the area from within which [the arrestee] might gain possession of a weapon or destructible area,” a limitation “which continues to define the boundaries of the exception.”

In order to have a valid search incident to arrest, two (2) requirements must be met. First, there must be an actual arrest supported by probable cause, as opposed to some lesser form of detention; second, the search must be “substantially contemporaneous” with the arrest. Whether a search was conducted “substantially contemporaneous” with the arrest is a fact-specific determination that focuses on various factors, including where the search was conducted, when the search was conducted in relation to the arrest, and whether the defendant was present at the scene of the arrest during the search. Generally speaking, however, a search will likely be considered to have been “substantially contemporaneous” with
the arrest as long as the administrative processes incident to the arrest and custody have not been completed at the time the search occurs. Finally, it is possible that the search could take place prior to the arrest, subject to certain conditions.

As noted, the scope of a search incident to arrest includes not only the arrestee’s person, but also the area “within his immediate control.” The area under an individual’s “immediate control” is determined at the time of the arrest, and not at the time the search is conducted, and the rule is the same regardless of whether the arrest occurs in a residence, on the street, or in a vehicle. Further, the area within an individual’s immediate control would include containers within the arrestee’s immediate control at the time of the arrest, such as backpacks or briefcases.

Because dormitories have been found to be analogous to other residential settings (e.g., apartments, motels, and hotels), additional aspects of how the law regarding searches incident to arrest might be applied within those types of buildings is appropriate. Initially, it should be noted that, when an arrest occurs inside a residence, the law “does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a search incident to the arrest.” Further, where an arrest occurs outside of a residence, it is not typically permissible to enter the residence itself. As noted by the Supreme Court:

_The Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search. On the contrary, “it has always been assumed that one’s house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.”_

However, some courts have carved out an exception to this general rule, and have permitted law enforcement officers to accompany an arrestee into his or her residence in order to obtain
Illustrative on this point is the Supreme Court’s decision in *Washington v. Chrisman.*

In *Chrisman,* a campus police officer at Washington State University placed a college student under arrest and accompanied him to his dormitory room, where the student wished to go to obtain his identification. Initially, the student entered, while the officer remained in the open doorway. However, according to the Court:

*Within 30 to 45 seconds after [the arrestee] entered the room, the officer noticed seeds and a small pipe lying on a desk 8 to 10 feet from where he was standing. From his training and experience, the officer believed the seeds were marihuana and the pipe was of a type used to smoke marihuana. He entered the room and examined the pipe and seeds, confirming that the seeds were marihuana and observing that the pipe smelled of marihuana.*

The student was charged with possession of controlled substances, and attempted to have the evidence suppressed by claiming the officer violated his Fourth Amendment rights by entering the dormitory room without a search warrant. The student’s motion was denied, and he was subsequently convicted. On appeal, however, the Supreme Court of Washington reversed the conviction, holding the campus police officer’s warrantless entry into the room to be unconstitutional and rendering the seizure of the evidence impermissible. The case was ultimately appealed to the United States Supreme Court.

In reversing the Supreme Court of Washington, the Court found the campus police officer’s actions lawful, since once the officer had arrested the student, he was “authorized to accompany him to his room for the purpose of obtaining identification.” In fact, wrote the Court, “[t]he officer had a right to remain literally at [the arrestee’s] elbow at all times; nothing in the Fourth Amendment is to the contrary.” Further, “the officer’s need to ensure his own safety - as well as the integrity of the arrest - is compelling.” According to the Court:
Every arrest must be presumed to present a risk of danger to the arresting officer. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious. Although the Supreme Court of Washington found little likelihood that [the arrestee] could escape from his dormitory room, an arresting officer’s custodial authority over an arrested person does not depend upon a reviewing court’s after-the-fact assessment of the particular arrest situation.213

Therefore, the Court found that it was reasonable under the Fourth Amendment “for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest.”214 In this instance, the officer was lawfully present in the room, so his plain view observations of the narcotics and associated paraphernalia was appropriate.

VIII. Exigent Circumstances

“The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.”215 Consequently, the Supreme Court recognizes that “exigent circumstances” constitute an exception to the warrant requirement.216 Courts define “exigent circumstances” in various ways; however, for our purposes, the term describes:

those circumstances that would cause a reasonable person to believe that entry … was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.217
The government bears the burden of proving that “exigent circumstances” existed to justify the warrantless search, and must establish that (a) probable cause existed, and (b) that an exigency existed.

The case of State v. Ellis demonstrates how both the plain view doctrine and the exigent circumstances exception have been applied in a dormitory setting. Ellis was a student at Central State University and lived in a campus dormitory. As with others living in residential housing, he “had agreed to recognize and be subject to the safety and security policies and procedures while a resident on the campus.” In fact, safety inspections were conducted on a routine basis, and “were not performed for the purpose of obtaining evidence solely for the purpose of criminal prosecution.” During one such inspection of Ellis’ room, two Resident Assistants observed marijuana in an open drawer. Campus police officers were notified and arrived at the room while the inspection was ongoing. While the officers entered the room, they did not participate in the search. According to the court:

"Police remained inside Defendant’s room and observed while the Resident Assistants continued their search. After the Resident Assistants had completed their search and placed the contraband they discovered in a central location in the room, as the officers had directed, the police then seized and removed that contraband from Defendant’s room."

Ellis was indicted and convicted on one count of trafficking marijuana, as well as another charge, based upon the drugs seized during the search of his dormitory room. He was sentenced to five (5) years of community control sanctions and a $250.00 fine. On appeal, Ellis claimed the marijuana seized from his room should have been suppressed due to a violation of his Fourth Amendment rights.

Initially, the court addressed Ellis’ contention that the safety inspection conducted by the Resident Assistants was impermissible and did not fall within the administrative exception to
the Fourth Amendment. Starting from the premise that the Fourth Amendment “limits only official government action,” \textsuperscript{224} the court noted that the “mere fact that evidence found and obtained during a search by a private person is ultimately turned over to the police does not destroy the private nature of the search …” \textsuperscript{225} Instead, it is only when “a private person acts as the agent of the police … [that] the result is different.” \textsuperscript{226} Thus, “[o]fficial participation in the planning or implementation of a private person’s efforts to secure evidence may taint the operation sufficiently as to require suppression of the evidence.” \textsuperscript{227} In this instance, the court found that “the search the Resident Life staff performed which yielded the marijuana that campus police seized was an administrative search by private persons, and therefore not a search subject to the Fourth Amendment’s warrant requirement.” \textsuperscript{228}

However, this did not dispose of the matter, as Ellis raised a second issue that required the court’s attention. Specifically, he argued that the campus police entry into his room and the subsequent seizure of the marijuana was unconstitutional. After consideration of the issue, the court agreed. When the campus police officers entered Ellis’ dormitory room, they infringed upon an area where he had a reasonable expectation of privacy. \textsuperscript{229} Consequently, the campus police needed either a search warrant or an exception to the warrant requirement in order to lawfully enter Ellis’ room. Because they had neither, the entry into the room was illegal. Therefore, the plain view exception did not apply because the police were not lawfully in a position to observe the marijuana. As noted by the court: “The plain view exception does not apply because police did not observe the contraband until after they had unlawfully entered Defendant’s room, and any intrusion affording the plain view observation must otherwise be lawful.” \textsuperscript{230}

Finally, the court found the officers’ entry could not be justified under the exigent circumstances exception. There was no possibility of the evidence being concealed by Ellis at
that point, nor was there any realistic possibility the evidence would be destroyed.\textsuperscript{231} Instead, the court found the “Resident Assistants were in the room, Defendant was not, and Defendant could have easily been kept out of the room by police and the evidence preserved until police had secured a warrant.”\textsuperscript{232}

\textbf{IX. Conclusion}

There is no question that a student has a reasonable expectation of privacy in a dormitory room. In light of that, administrators at public universities must comply with the Fourth Amendment when conducting searches of those rooms. Because of the institution’s responsibility to provide a safe educational environment, reasonable health and safety inspections of dormitory rooms are generally permitted under the terms and agreements of a student housing agreement. Such agreements will not, however, support general searches by campus officials to locate evidence of criminal activity, even where the institution’s interest are significant.\textsuperscript{233} In fact, overly broad wording in such agreements has been found to be an unconstitutional attempt to coerce a student into waiving his or her Fourth Amendment rights. Finally, there are a variety of exceptions to the search warrant requirement that may be utilized to support a search of a student’s dormitory room. Each has requirements specific to the exception that must be met in order for any subsequent search to be constitutionally permissible.

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1 Athens v. Wolf, 38 Ohio St. 2d 237, 240 (Ohio 1974)


3 See, e.g., Arizona v. Evans, 514 U.S. 1, 10 (1995) (exclusionary rule “operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.”); United States v. Leon, 468 U.S. 897, 916 (1984) (noting “the exclusionary rule [was] designed to deter police misconduct ….”); Elkins v. United States, 364 U.S. 206, 217 (1960) (“Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it.”)

4 People v. Walker, 143 Cal. Rptr. 3d 831, 844 (Cal. Ct. App. 2006)


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

8 Id. (internal citation omitted)

9 Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quotation omitted). See also Johnson v. United States, 333 U.S. 10, 14 (1948) (“When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.”).

10 United States v. Ventresca, 380 U.S. 102, 109 (1965). See also United States v. Leon, 468 U.S. 897, 922 (1984) (“Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.”) (internal brackets and citations omitted); Jones v. United States, 362 U.S. 257, 270-271 (1960) (overruled on other grounds) (“In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the policy, may govern whether liberty or privacy is to be invaded.”).

11 Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 1716 (2009) (“Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment ….”’) (citation omitted) (emphasis in original)

Jones, 375 U.S. at 497 (“It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.”); Agnello v. United States, 269 U.S. 20, 33 (1925) (“Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.”).

Kyllo v. United States, 533 U.S. 27, 33 (2001) (“A Fourth Amendment search does not occur … unless the individual manifested a subjective expectation of privacy in the object of the challenged searched, and society is willing to recognize that expectation as reasonable.”) (internal quotation and parentheses omitted)

Katz, 389 U.S. at 361 (Harlan, J., concurring). See also United States v. Romain, 393 F.3d 63, 68 (1st Cir. 2004) (“Among other limitations, a criminal defendant who wishes to embark upon a Fourth Amendment challenge ‘must show that he had a reasonable expectation of privacy in the area searched and in relation to the items seized.”)


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

Skinner v. Railway Labor Executives’ Ass’n., 489 U.S. 602, 616 (1989). Accord, Schmerber v. California, 384 U.S. 757, 770 (1966) (“Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned ….”)


Schmerber, 384 U.S. at 770


United States v. Dionisio, 410 U.S. 1, 8 (1973)

United States v. Mara, 410 U.S. 19, 21-22 (1973)

New York v. Class, 475 U.S. 106, 114-115 (1986) (“While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one’s home, a car’s interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police.”); Texas v. Brown, 460 U.S. 730, 740 (1983) (plurality opinion) (noting “there is no legitimate expectation of privacy … shielding that portion of the interior of an
automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.”)


27 Class, 475 U.S. at 114

28 Rakas v. Illinois, 439 U.S. 128, 143 (1978) (“There is no legitimacy to a defendant’s expectations of privacy where the area to be searched is in the control of a third party.”); United States v. Baker, 221 F.3d 438, 441-442 (3d Cir. 2000) (“A passenger in a car that he neither owns nor leases typically has no standing to challenge a search of the car.”); United States v. Buchner, 7 F.3d 1149, 1154 (5th Cir. 1993) (“The owner of a suitcase located in another’s car may have a legitimate expectation of privacy with respect to the contents of his suitcase.”)

29 United States v. Runyan, 275 F.3d 449, 464 (5th Cir. 2001) (citations omitted); Accord, United States v. Ross, 456 U.S. 798, 822-23 (1982) (“The Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.”); United States v. Jacobsen, 466 U.S. 109, 114 (1984) (“Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy.”); United States v. Fultz, 146 F.3d 1102, 1105 (9th Cir. 1998) (“A person has an expectation of privacy in his or her private, closed containers.”)


31 United States v. Donnes, 947 F.2d 1430, 1437 (10th Cir. 1991)

32 Welsh v. Wisconsin, 466 U.S 740, 748 (1984) (quoting United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 313 (1972)). See also Kyllo v. United States, 533 U.S. 27, 31 (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); Wilson v. Layne, 526 U.S. 603, 610 (1999) (“The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home.”); Payton v. New York, 445 U.S. 573, 590 (1980) (“The common law maxim ‘every man’s house is his castle’ is part of our Fourth Amendment jurisprudence prohibiting unreasonable searches and seizures.”); Mincey v. Arizona, 437 U.S. 358, 393 (1978) (“The Fourth Amendment reflects the wave of those who wrote the Bill of Rights that the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.”); Silverman v. United States, 365 U.S. 505, 511 (1961) (“At the very core” of the Fourth Amendment “stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.”).

34 Stoner v. California, 376 U.S. 483, 490 (1964) (hotel room) (internal citation omitted). See also United States v. Gordon, 168 F.3d 1222, 1226 (10th Cir.) (“An individual may have a reasonable expectation of privacy in a motel room.”), cert. denied, 527 U.S. 1030 (1999); United States v. Nerber, 222 F.3d 597, 600 n.2 (9th Cir. 2000) (“For Fourth Amendment purposes, a hotel room is treated essentially the same, if not exactly the same, as a home.”).

35 McDonald v. United States, 335 U.S. 451 (1948)


37 Smyth, 398 F. Supp. at 785 (quotation omitted)

38 West Virginia Board of Education v. Barnette, 319 U.S. 624, 637 (1943)

39 Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); Accord, Smyth, 398 F. Supp. at 786 (“The [student’s] dormitory room is his house and home for all practical purposes, and he has the same interest in the privacy of his room as any adult has in the privacy of his home, dwelling, or lodging.”); Beauchamp v. State, 742 So. 2d 431, 432 (Fl. App. Ct. 1999) (holding the student “did have an expectation of privacy in his dormitory suite,” which the court noted was “comparable to a motel room or a room in a boarding house.”)


41 Piazzola, 442 F.2d at 288 (quotation omitted)


43 United States v. Angevine, 281 F.3d 1130, 1134 (10th Cir.) (citation omitted), cert. denied, 537 U.S. 845 (2002); Accord, United States v. Salvucci, 448 U.S. 83, 91 (1980) (noting that, while ownership of an item does not confer “automatic standing,” the Court has long recognized that property ownership is a “factor to be considered in determining whether an individual’s Fourth Amendment rights have been violated.”); Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (“Petitioner’s ownership of the drugs is undoubtedly one fact to be considered” in deciding whether standing existed.); United States v. Heckencamp, 482 F.3d 1142, 1146 (9th Cir. 2007) (“No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of warrantless government intrusion. However, we have given weight to such factors as the defendant’s possessory interest in the property searched or seized, the measures taken by the defendant to insure privacy, whether the materials are in a container labeled as being private, and the presence or absence of a right to exclude others from access.”) (citations and internal citations omitted)
among factors to consider in deciding whether employee had subjective expectation of privacy is “whether the accused had a property or possessory interest in the place invaded,” although court noted this factor is not dispositive); Gatlin v. United States, 833 A. 2d 995, 1005 (D.C. App.2003) (“Moreover, ‘a legitimate expectation of privacy turns on consideration of all the surrounding circumstances, including but not limited to defendant’s possessory interest.’”) (citation omitted); United States v. Taketa, 923 F.2d 665, 672 (9th Cir. 1991) (noting that “privacy analysis does not turn on property rights.”)

United States v. Miravalles, 280 F.3d 1328, 1331 (11th Cir. 2002). See also United States v. Rheault, 5621 F.3d 55, 59 (1st Cir. 2009) (noting “it is beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building.”); United States v. Paradis, 351 F.3d 21, 31 (1st Cir. 2003) (noting defendant had no privacy interest in bag of ammunition left on back porch of apartment building because “he had no expectation of privacy in the common areas of a multi-family building.”); United States v. Nohara, 3 F.3d 1239, 1241-42 (9th Cir. 1993) (apartment hallway); United States v. Concepcion, 942 F.2d 11709, 1171-72 (7th Cir. 1991) (apartment common areas); United States v. Barrios-Moriera, 872 F.2d 12, 14-15 (2d Cir. 1989) (apartment hallway), overruled on other grounds by Horton v. California, 496 U.S. 128 (1990); United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977) (apartment hallway); United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir. 1976).

Miravalles, 280 F.3d at 1332. See United States v. Carriger, 541 F.2d 545, 550 (6th Cir. 1976) (apartment common areas).


Id. at 371

Id. at 374

Id.

Id. at 372

Id. at 373-374 (quoting United States v. Dunn, 4809 U.S. 294, 301 (1987) and Oliver v. United States, 466 U.S. 170, 180 (1984))


United States v. Feffer, 831 F.2d 734, 737 (7th Cir. 1987) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 487)

Coolidge, 403 U.S. at 487

57 United States v. Alexander, 447 F.3d 1290, 1295 (10th Cir. 2006); United States v. Ginglen, 467 F.3d 1071, 1074 (7th Cir. 2006); United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir.), cert. denied, 538 U.S. 1051 (2003); United States v. Young, 153 F.3d 1079, 1080 (9th Cir. 1998); United States v. Jenkins, 46 F.3d 447, 460 (5th Cir. 1995); United States v. Malbrough, 922 F.2d 458, 462 (8th Cir. 1990); and United States v. Jarrett, 338, F.3d 339, 345 (4th Cir. 2003), cert. denied, 540 U.S. 1185 (2004) (combining the two factors into “one highly pertinent consideration”). In United States v. Pervaz, 118 F.3d 1, 6 (1st Cir. 1997), the First Circuit Court of Appeals refused to adopt “any specific standard or test,” identifying instead several factors that may be relevant to this determination: “the extent of the government’s role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests.”

58 Jarrett, 338 F.3d at 345. See also United States v. Poe, 556 F.3d 1113, 1123 (10th Cir.), cert. denied, ___ U.S. ___, 130 S. Ct. 395 (2009)

59 Presley v. City of Charlottesville, 464 F.3d 480, 488 fn 7 (4th Cir. 2006)


61 United States v. Smythe, 84 F.3d 1240, 1243 (10th Cir. 1996)

62 United States v. Shahid, 117 F.3d 322, 325 (7th Cir.), cert. denied, 522 U.S. 902 (1997). See also Jarrett, 338 F.3d at 344 (“[T]o run afoul of the Fourth Amendment … the Government must do more than passively accept or acquiesce in a private party’s search efforts. Rather, there must be some degree of Government participation in the private search.”)

63 State v. Santiago, 217 P. 3d 89, 94 (N.M. 2009)

64 United States v. Koenig, 856 F.2d 843, 850 (7th Cir. 1988)

65 United States v. D’Andrea, 497 F. Supp. 2d 117, 122 (D. Mass. 2007). See also Jarrett, 338 F.3d at 345-346 (in order to find a private search has become governmental, there must be evidence of government “participation in or affirmative encouragement of” the private search, as “passive acceptance” by the government is “not enough.”)

66 United States v. Leffall, 82 F.3d 343, 347 (10th Cir. 1996)

67 United States v. Mekjian, 505 F.2d 1320, 1327 (5th Cir. 1975)

68 Id.

69 Malbrough, 922 F.2d at 462 (noting that, in addition to the two factors commonly used, other “useful criteria” would include whether the private actor performed the search at the request of the government). See also United v. Walther,
652 F.2d 788, 793 (9th Cir. 1981) (noting “the government cannot knowingly acquiesce in and encourage directly or indirectly a private citizen to engage in activity which it is prohibited from pursuing where that citizen has no motivation other than the expectation of reward for his or her efforts”)

70 Steiger, 318 F.3d at 1045

71 Id. at 362

72 Leffall, 82 F.3d at 347

73 Shahid, 117 F.3d at 325-326

74 United States v. Atkinson, 900 F.2d 1427, 1432 (9th Cir.), cert. denied, 498 U.S. 961 (1990). See also Koenig, 856 F.2d at 843 (noting that, “once the court has considered all of the circumstances surrounding the search and is satisfied that a private entity has conducted a search for its own, private reasons and not as an instrument or agent of the government, the specific reason for the search no longer matters”)(internal quotation marks omitted)


76 Malbrough, 922 F.2d at 462

77 Compare United States v. McAllister, 18 F.3d 1412, 1417-1419 (7th Cir. 1994) (in finding confidential informant (CI) to be private actor, court noted that “neither the case law nor common sense supports the proposition that a CI automatically obtains and retains an ongoing status as a law enforcement officer or a governmental agent ....” ) with United States v. Barth, 26 F. Supp. 2d 929, 935-936 (W.D. Tex. 1998) (confidential informant’s actions attributable to government)

78 United States v. Ginglen, 467 F.3d 1071, 1075-1076 (7th Cir. 2006) (collecting cases)

79 Morale, 422 F. Supp. at 996


81 422 F. Supp. 988 (D.N.H. 1976)

82 Id. at 992

83 Id.

84 Id. at 993

85 Id. at 996

87 Id. at 123 (citations omitted)
88 Id.
89 Id. at 124
90 Id. at 124
91 Id. at 124
93 Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citation omitted)
94 Id. at 227
95 Id. at 228
96 Id. at 233
97 Id. at 226; United States v. Asibor, 109 F.3d 1023, 1038 n.14 (5th Cir.), cert. denied, 522 U.S. 902 (1997); United States v. Smith, 260 F.3d 922, 924 (8th Cir. 2001); United States v. Givan, 320 F.3d 452, 459 (3d Cir. 2003); United States v. Ivy, 165 F.3d 397, 402 (6th Cir. 1998); United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996); United States v. Taylor, 196 F.3d 854, 860 (7th Cir. 1999), cert. denied, 529 U.S. 1081 (2000); and United States v. Blake, 888 F.2d 795, 798 (11th Cir. 1989)
98 Schneckloth, 412 U.S. at 227; United States v. Watson, 423 U.S. 411, 424 (1976); Asibor, 109 F.3d at 1038; United States v. Jones, 286 F.3d 1146, 1152 (9th Cir. 2002); Ivy, 165 F.3d at 402; Blake, 888 F.2d at 798
99 Schneckloth, 412 U.S. at 226; Smith, 260 F.3d at 924; Hubbard v. Haley, 317 F.3d 1245, 1253 (11th Cir. 2003); Ivy, 165 F.3d at 402; Lattimore, 87 F.3d at 650; Taylor, 196 F.3d at 860
100 Schneckloth, 412 U.S. at 226; Hubbard, 317 F.3d at 1253
101 United States v. Boone, 245 F.3d 352, 362 (4th Cir.) (“Written consent supports a finding that the consent was voluntary.”), cert. denied, 532 U.S. 1031 (2001); United States v. Navarro, 90 F.3d 1245, 1257 (7th Cir. 1996)
102 Schneckloth, 412 U.S. at 226; Watson, 423 U.S. at 424; Smith, 260 F.3d at 924; Hubbard, 317 F.3d at 1253; Ivy, 165 F.3d at 402
103 United States v. Carrate, 122 F.3d 666, 670 (8th Cir. 1997) (suspect “idly stood by while the troopers searched his car, never indicating that he objected to the search”); United States v. McSween, 53 F.3d 684, 688 (5th Cir.), cert. denied, 516 U.S. 874 (1995); Givan, 320 F.3d at 459; Blake, 888 F.2d at 798.
104 Watson, 423 U.S. at 424 (while noting that custody is a factor to be considered, Court emphasized that “the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search”); Smith, 260...
F.3d at 924; Asibor, 109 F.3d at 1038 n.14; Jones, 286 F.3d at 1152; Taylor, 196 F.3d at 860; Blake 888 F.2d at 798; United States v. Cellitti, 378 F.2d 618, 622-623 (7th Cir. 2004) (“Consent given during an illegal detention is presumptively invalid” … but “may nevertheless be valid provided that it is sufficiently attenuated from the illegal police action to dissipate the taint.”)

105 Asibor, 109 F.3d at 1038 n.14; Blake, 888 F.2d at 798

106 Orhorhaghe v. Immigration and Naturalization Service, 38 F.3d 488, 500 (9th Cir. 1994); Asibor, 109 F.3d at 1038 n.14; Taylor 196 F.3d at 860; Blake, 888 F.2d at 798

107 Watson, 423 U.S. at 424-425; Smith 260 F.3d at 924; Lattimore, 87 F.3d at 650; United States v. Barnett, 989 F.2d 546, 556 (1st Cir. 1993)

108 Smith, 260 F.3d at 924

109 Watson, 423 U.S. at 425; Smith, 260 F.3d at 924; Jones, 286 F.3d at 1152; Taylor, 196 F.3d at 860

110 Watson, 423 U.S. at 424; Smith, 260 F.3d at 924; Hubbard, 317 F.3d at 1253; Ivy, 165 F.3d at 402; Hadley v. Williams, 368 F.3d 747, 749 (7th Cir. 2004)

111 Watson, 423 U.S. at 424 (suspect’s consent found valid in part because “consent was given while on a public street, not in the confines of the police station.”); Smith 260 F.3d at 924; Givan, 320 F.3d at 459; Lattimore, 87 F.3d at 650

112 Jones, 286 F.3d at 1152; United States v. Soriano, 346 F.3d 963, 971 (9th Cir. 2003) (in such situations, application of this factor “hinges on whether a suspect is informed about the possibility of a search warrant in a threatening manner.”), cert. denied, 521 U.S. 1174 (2001)

113 Taylor, 196 F.3d at 860. But see United States v. Jones, 254 F.3d 692, 696 (8th Cir. 2001) (noting “there is certainly no legal rule that asking more than once for permission to search renders a suspect’s consent involuntary, particularly where the suspect’s initial response is ambiguous.”)

114 Schneckloth, 412 U.S. at 227

115 Bumper v. North Carolina, 391 U.S. 543, 550 (1968); Orhorhaghe, 38 F.3d at 500 (“There can be no effective consent to a search or seizure if that consent follows a law enforcement officer’s assertion of an independent right to engage in such conduct.”); United States v. Cedano-Medina, 366 F.3d 682, 684 (8th Cir. 2004) (burden of proving consent is on government, and such burden “is not satisfied by showing a mere submission to a claim of lawful authority.”) (citation omitted)


Id. at 172 n.7

United States v. King, 627 F.3d 641, 648 (7th Cir. 2010) (citing Rodriguez, 497 U.S. at 188)

See, e.g., Rodriguez, 497 U.S. at 185 (“It is apparent that, in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded … of agents of the government … is not that they always be correct, but that they always be reasonable.”); United States v. Amratiel, 622 F.3d 914, 915 (8th Cir. 2010) (“A warrantless search is justified when an officer reasonably relies on a third party’s demonstration of apparent authority, even if that party lacks common authority.”), cert. denied, 2011 U.S. LEXIS 1150 (2011); United States v. Morgan, 435 F.3d 660, 663 (6th Cir. 2006) (“Apparent authority is judged by an objective standard. A search consent to by a third party without actual authority over the premises is nonetheless valid if the officers reasonably conclude from the facts available that the third party had authority to consent to the search.”)


Id. (“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect?’”) (citations omitted)

Id. at 252 (“A suspect may of course delimit as he chooses the scope of the search to which he consents.”); Walter v. United States, 447 U.S. 649, 565 (1980) (plurality opinion) (“When an official search is properly authorized - whether by consent or by issuance of a valid warrant - the scope of the search is limited by the terms of its authorization.”)

See, e.g., Painter v. Robertson, 185 F.3d 557, 567 (6th Cir. 1999) (noting “the consenting party may limit the scope of that search, and hence at any moment may retract his consent.”)

United States v. Hylton, 349 F.3d 781, 786 (4th Cir. 2003); Jones, 254 F.3d at 695 (“Consent can be inferred from words, gestures, and other conduct.”); United States v. Carter, 378 F.3d 584, 587 (6th Cir. 2004); United States v. Wesela, 223 F.3d 656, 661 (7th Cir. 2000) (“The fact that there was no direct verbal exchange between [the parties] in which the [consenting party] explicitly said ‘it’s o.k. with me for you to search the apartment,’ is immaterial, as the events indicate her implicit consent.”), cert. denied, 531 U.S. 1174 (2001); United States v. Buettner-Janusch, 646 F.2d 759, 764 (2d Cir.) (“Moreover, it is well settled that consent may be inferred from an individual’s words, gestures, or conduct.”), cert. denied, 454 U.S. 830 (1981)
126 United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997). See also United States v. Janis, 387 F.3d 682, 686 (8th Cir. 2004) (“An adult co-occupant of a residency may consent to a search.”) (citation omitted)

127 United States v. Richard, 994 F.2d 244, 250 (5th Cir. 1993)

128 Matlock, 415 U.S. at 170


130 Id., 547 U.S. at 120

131 United States v. Warner, 843 F.2d 401, 403 (9th Cir. 1988). See also Chapman v. United States, 365 U.S. 610, 616-617 (1961) (holding that, to uphold consent by a landlord would “reduce the Fourth Amendment to a nullity and leave tenants’ homes secure only in the discretion of landlords.”) (internal parentheses omitted); United States v. Elliott, 50 F.3d 180, 185 (2d Cir. 1995) (“In general, a landlord does not have common authority over an apartment or other dwelling unit leased to a tenant.”) (citation omitted), cert. denied, 516 U.S. 1050 (1996); United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992) (noting that “a landlady is not ordinarily vested with authority to authorize a search of premises leased to a tenant.”); Commonwealth v. McCloskey, 272 A.2d 271, 273 n.3 (Pa. Super. Ct. 1970) (“Many other cases have held that one in the position of a lessor cannot consent to a police search of a tenant’s premises, even though the lessor, himself, has a right to enter the room or apartment.”) (citations omitted) See, e.g., Stoner, 376 U.S. at 489 (“It is important to bear in mind that it was the petitioner’s constitutional right which was at stake here, and not the night clerk’s nor the hotel’s. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.”); United States v. Jeffers, 342 U.S. 48 (1951); Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965), cert. denied, 383 U.S. 968 (1966)

132 Stoner, 376 U.S. at 490

133 See Elliott, 50 F.3d at 186 (“A landlord does, however, have authority to consent to a search by police of dwelling units in his building that are not leased.”); United States v. Law, 528 F.3d 888, 904 (D.C. Cir. 2008) (“While a landlord cannot ordinarily consent to a search of a tenant’s home, she can consent to a search of an unleased apartment.”) (internal citation and citation omitted); United States v. Williams, 523 F.2d 64, 66 (8th Cir. 1975), cert. denied, 423 U.S. 1090 (1976)

134 See Elliott, 50 F.32d at 186 (“Further, if the landlord has joint access or control over certain areas of his apartment building for most purposes, he may validly consent to a search of those areas.”); United States v. Kelly, 551 F.2d 760, 764 (8th Cir.) (even assuming that tenant had reasonable expectation of privacy in common hallways of apartment
building, landlord could validly consent to search of common areas “over which he had ‘joint access or control for most purposes.”), cert. denied, 433 U.S. 912 (1977); United States v. Kellerman, 431 F.2d 319 324 (2d Cir.) (landlord of apartment building could validly consent to a search of common basement area), cert. denied, 400 U.S. 957 (1970)

135 Walker, 143 Cal. Rptr. 3d at 845 (quotation omitted)

136 Id. (quotation and internal quotation marks omitted)

137 Esteban v. Central Missouri State College, 415, F2d. 1077, 1089 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970)


140 Devers v. Southern University, 712 So. 2d 199, 205 (La. Ct. App. 1998); Kappes, 5450 P.2d at 124 (“The university has an obligation to provide a safe and studious environment for those in attendance. It must be solicitous of the health, welfare and safety of its students, many of whom are experiencing life away from home for the first time. It is entirely appropriate that it routinely inspect its dormitory rooms for orderliness and safety, and its authority to do this does not compromise a student’s right to protection of the Fourth Amendment.”)

141 Piazzola, 442 F.2d at 289

142 Id.

143 Id. (footnote omitted); see also Smyth, 398 F. Supp. at 788 (“Furthermore, a blanket authorization in an adhesion contract that the College may search the room for violation of whatever substantive regulations the College chooses to adopt and pursuant to whatever search regulation the College chooses to adopt is not the type of focused, deliberate and immediate consent contemplated by the Constitution.”)

144 United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992); United States v. Warner, 843 F.2d 401, 403 (9th Cir. 1988) (landlord authorized to enter property inhabited by tenant “for the limited purpose of making specified repairs and occasionally mowing the lawn” could not consent, on behalf of tenant, to police search of premises)

145 Walker, 143 Cal. Rptr. 3d at 849

146 Id. at 849-850

147 831 P. 2d 1033 (Utah App. Ct. 1992)

148 Id. at 1037

149 Id. at 1034

150 Kappes, 550 P.2d at 124
151 Healy v. James, 408 U.S. 169, 180 (1972) (quotation omitted)

152 Hunter, 831 P.2d at 1036

153 Id. at 1036

154 Id.

155 Id.


157 Id. at 204

158 Id. at 205

159 Id.

160 Id.

161 Id.

162 Id. at 206


164 Id.

165 Id.

166 Id.

167 Id. at 330

168 Id.; see also United States v. Place, 462 U.S. 696, 701 (1983)

169 Id. at 331

170 Id.

171 Id. at 331-333

172 Id. at 337


175 Id. at 135 (“An example of the applicability of the ‘plain view’ doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.”); United States v. Reinholz, 245 F.3d 765, 777 (8th Cir.) (officers executing a search warrant were lawfully on premises), cert. denied, 534 U.S. 896 (2001); United States v. Hamie, 16 F.3d 80, 82 (1st Cir. 1999)
(officers were lawfully on premises because they “had a valid warrant to search the premises.”); United States v. Munoz, 150 F.3d 401, 411 (5th Cir. 1998) (plain view seizure permissible during execution of arrest warrant), cert. denied, 525 U.S. 1112 (1999); United States v. Calloway, 116 F.3d 1129, 1133 (6th Cir.) (plain view seizure permissible where officers were present because they “were executing a valid search warrant.”), cert. denied, 522 U.S. 925 (1997)

176 Horton, 496 U.S. at 135 (“Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate.”); United States v. Reed, 141 F.3d 644, 649 (6th Cir. 1998); United States v. Jackson, 131 F.3d 1105, 1109 (4th Cir. 1997) (courted not that, when “an officer’s presence in a residence is justified … by any recognized exception to the warrant requirement, including consent, he may seize incriminating evidence that is in plain view.”)

177 Horton, 496 U.S. at 136 (holding that, “not only must the item be in plain view, its incriminating character must also be ‘immediately apparent.’”) (citations omitted)

178 Arizona v. Hicks, 480 U.S. 321, 326 (1987) (“We have not ruled on the question whether probable cause is required in order to invoke the ‘plain view’ doctrine. … We now hold that probable cause is required.”); Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (“If … the police lack probable cause to believe that an object in plain view is contraband without conduct some further search of the object … the plain-view doctrine cannot justify its seizure.”); Texas v. Brown, 460 U.S. 730, 742 (1983) (plain view seizure “presumptively reasonable, assuming there is probable cause to associate the property with criminal activity.”)


180 Horton, 496 U.S. at 137

181 Id. at 137 n.7 (citations omitted)


183 Id. at 985

184 Id.

185 Id.

186 Id.

187 Id.

188 Id.

189 Id. at 987
United States v. Robinson, 414 U.S. 218, 224 (1973)

Chimel v. California, 395 U.S. 752, 762 (1969); Gant, supra at 1716 (“The [search incident to arrest] exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.”); Robinson, 414 U.S. at 234 (“The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.”); United States v. Edwards, 415 U.S. 800, 802-803 (1974) (search incident to arrest exception “has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of a crime when a person is taken into official custody and lawfully detained.”) (citation omitted); Agnello v. United States, 269 U.S. 20, 30 (1925) (“The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.”

Chimel, 395 U.S. at 763

Gant, 129 S. Ct. at 1716

Knowles v. Iowa, 525 U.S. 113, 118-119 (1998) (Court held search incident to arrest exception was a “bright-line” rule that was not extended to situations in which an arrest was not effected)


See, e.g., Holmes v. Kucynda, 321 F.3d 1069, 1082 (11th Cir. 2003) (exception “places a temporal and spatial imitation on searching incident to arrest ….”) (quoting Belton, 453 U.S. at 465)

See, e.g., United States v. Sanchez, 555 F.3d 910, 922 (10th Cir.) (search of arrestee occurred “promptly after his arrest, and can be readily characterized as ‘substantially contemporaneous.’”), cert. denied, ___ U.S. ___, 129 S. Ct. 1657 (2009)

See, e.g., United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (search incident to arrest upheld even though search occurred after defendant had been transported from scene of arrest)

See United States v. Ruigomez, 702 F.2d 61, 66 (5th Cir. 1983) (citing Edwards, 415 U.S. at 804)


Robinson, 4114 U.S. at 235; Chimel, 395 U.S. at 762-763
See, e.g., United States v. Donnes, 947 F.2d 1430, 1437 (10th Cir. 1991) ("Additionally, a search incident to a lawful arrest permits a law enforcement officer to conduct a warrantless search of a container located in the area of the arrestee’s immediate control."). See also United States v. Uriceochea-Casallas, 946 F.2d 162, 166 (1st Cir. 1991) (wallet); United States v. Tavolacci, 895 F.2d 1423, 1428-1429 (D.C. Cir. 1990) (locked suitcase); United States v. Swann, 149 F.3d 271, 273 (4th Cir. 1998) (film canister); United States v. Ivy, 973 F.2d 1184, 1187 (5th Cir. 1992) (briefcase); United States v. Richardson, 121 F.3d 1051, 1056 (7th Cir. 1997) (shaving bag); United States v. Oakley, 153 F.3d 696, 698 (8th Cir. 1998) (backpack)

See, e.g., James v. Louisiana, 382 U.S. 36, 37 (1965) (warrantless search of home after defendant arrested two blocks away found unconstitutional) (citation omitted); United States v. Varner, 481 F.3d 569, 571-572 (8th Cir. 2007) ("Ordinarily, the arrest of a person outside of a residence does not justify a warrantless search of the residence itself.") (citation omitted)

Shipley v. California, 395 U.S. 818, 820 (1965) (citation omitted)

Compare Varner, 481 F.3d at 571-572 ("One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence. … Even absent an affirmative indication that the arrestee might have a weapon available … the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee’s elbow at all times.") (citation omitted); United States v. Wilson, 306 F.3d 231, 241 (5th Cir. 2002) (holding “the potential of a personal safety hazard to the arrestee places a duty on law enforcement officers to obtain appropriate clothing….“); United States v. Gwinn, 219 F.3d 326, 333 (4th Cir.) (officers re-entered trailer to get shirt and boots for arrestee), cert. denied, 531 U.S. 1025 (2000); United States v. Butler, 980 F.2d 619 (10th Cir. 1992) (officers accompanied arrestee back inside trailer to get shoes); and United States v. Di Stefano, 555 F.2d 1094 (2d Cir. 1977) (officer accompanied arrestee, who was wearing only a nightgown and bathrobe, to get dressed), with United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983) (finding entry unlawful absent “a specific request or consent.”), cert. denied, 465 U.S. 1100 (1984); United States v. Kinney, 638 F.2d 941, 945 (6th Cir.) (entry impermissible where “the defendant did not request permission to secure additional clothing and did not consent to an entry of his home.”), cert. denied, 452 U.S. 918 (1981);
208 455 U.S. 1 (1982)

209 Id. at 3-4

210 Id. at 6 (footnote omitted)

211 Id. (citations and internal citations omitted)

212 Id. at 7

213 Id. at **9

214 Id. at **6

215 Michigan v. Tyler, 436 U.S. 499, 509 (1978) ("Our decisions have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant.")

216 See also Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002) ("Exigent circumstances exist where there are 'real immediate and serious consequences' that would certainly occur were a police officer to postpone action to get a warrant.") (citations, quotations, and internal brackets omitted)


218 United States v. Jeffers, 342 U.S. 48, 51 (1951)

219 See United States v. Tobias, 923 F.2d 1506, 1510 (11th Cir.) ("A warrantless search is allowed, however, where both probable cause and exigent circumstances exist."). cert. denied, 502 U.S. 907 (1991); United States v. Lindsey, 877 F.2d 777, 780 (9th Cir. 1989) (for valid claim of exigent circumstances, "the burden is on the government to demonstrate that: (1) the police had probable cause to search [the defendant's] apartment; and (2) exigent circumstances excused the lack of a warrant.")


221 Id. at **3

222 Id.

223 Id. at **9

224 Id. at **6

225 Id. at **6-**7

226 Id. at **7

227 Id.
Id. at **8

Id. at **9 (“By entering Defendant’s dormitory room, campus police infringed upon the reasonable expectation of privacy that Defendant had in that place which … is entitled to the same level of protection against unreasonable search and seizure as a private home.”)

Id. at **10

Id. (“Neither does the exigent or emergency circumstances exception justify the entry, for instance to prevent the concealment or destruction of evidence.”)

Id.

Smyth, 398 F. Supp. at 790 (“While the College has an important interest in enforcing drug laws and regulations, and a duty to do so, it does not have such special characteristics or such a compelling interest as to justify setting aside the usual rights of privacy enjoyed by adults.”)