The Fourth Amendment’s Applicability to Residents of Homeless Shelters

Steven R Morrison
THE FOURTH AMENDMENT’S APPLICABILITY TO
RESIDENTS OF HOMELESS SHELTERS

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I. INTRODUCTION

In 2005, there were over 700,000 homeless people in the United States.1 Fifty-six percent of these people were living in shelters.2 Forty-one percent were members of families with children.3 Anywhere from 25 to 39% of homeless people were under 18 years old.4 Between 23 and 40% of homeless adults are veterans.5 While homelessness has numerous causes, domestic violence is the immediate cause of homelessness for many women, and it was the second most frequently stated cause of homelessness for

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2 CUNNINGHAM & HENRY, supra note 1, at 11.
3 Id. at 12.
families.\textsuperscript{6} Although the Fourth Amendment protects all Americans, those who are homeless are more vulnerable to violations of the Fourth Amendment. A person's privacy is one of the most important elements of individual integrity\textsuperscript{7} and the Fourth Amendment serves this privacy interest, most acutely in the home.\textsuperscript{8} Since shelters are the only homes that many homeless individuals know, it is necessary to discuss how their Fourth Amendment rights are protected.

No one knows whether or to what extent the Fourth Amendment applies in homeless shelters.\textsuperscript{9} Although there is a small but not insubstantial body of case law dealing with the homeless and the Fourth Amendment, only a handful of opinions have dealt with the Fourth Amendment's applicability in homeless shelters.\textsuperscript{10} They have provided some guidance, but lack the type of reasoning and precedential value that are indicative of law-settling opinions. This may be why no law review article, to my knowledge, has addressed the topic.\textsuperscript{11} With this article, I examine whether and to what extent the Fourth Amendment applies (or might apply) in homeless shelters, and in so doing, address a gap in Fourth Amendment jurisprudence. I also suggest an approach to Fourth Amendment application in shelters based on Terry v. Ohio's\textsuperscript{12} focus on threat of violence as a justification for a limited search.

\textsuperscript{7} Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
\textsuperscript{9} Perhaps most supportive of this statement is that Wayne LaFave’s authoritative treatise, Search and Seizure, at no point discusses homeless shelters. WAYNE LAFAVE, SEARCH AND SEIZURE (1996).
\textsuperscript{10} Other cases deal with the homeless in non-shelter settings. See, e.g., D’Aguanno v. Gallagher, 50 F.3d 877, 878 (11th Cir. 1995) (involving homeless people who lived in shelters they built in a “homeless campsite” on undeveloped, private property); United States v. Ruckman, 806 F.2d 1471, 1472 (10th Cir. 1986) (involving officers who searched a natural cave on land owned by the United States, which Ruckman had used as his home); Love v. City of Chicago, No. 96-C-0396, 1998 WL 60804, at *3–*4 (D. Ill. Feb. 5, 1998) (involving homeless street dwellers who alleged that city officials regularly seized their belongings or destroyed their belongings); Commonwealth v. Cameron, 561 A.2d 783, 784 (Pa. Super. Ct. 1989) (involving a police search of an “abandoned rowhouse” where defendant resided).
\textsuperscript{12} Terry v. Ohio, 392 U.S. 1 (1968).
This article is not concerned with why the Fourth Amendment’s application in homeless shelters has historically been ignored. It is only concerned with the history of the Fourth Amendment, homeless shelters, and the homeless to the extent that these subjects help determine the Fourth Amendment’s applicability in shelters today. This article will provide a roadmap for understanding when and how the Amendment may apply in shelters. It will suggest the body of extant Fourth Amendment law that could apply in a number of shelter settings, it will raise many questions, and it will answer a few of them.

The Fourth Amendment protects people, not places, so it is not homeless shelters to which the Fourth Amendment applies, but the people found therein. A shelter’s staff as well as shelter residents carry a certain level and type of Fourth Amendment protection with them wherever they go. Whether they are at home, in a car, on a public sidewalk, or on a Greyhound bus determines what Fourth Amendment protections they have. Currently, when staff or residents are in a homeless shelter, the level and type of Fourth Amendment protection to which they are entitled is undefined. Also, staff and shelter residents, it is safe to say, have different levels of protection within a homeless shelter. This article is only concerned with the protections, or lack thereof, that residents are afforded within shelters.

In addition to the tenuousness inherent in addressing an unexplored area of law, homeless shelters themselves present a number of issues that make the question of when Fourth Amendment rights apply quite complex. Homeless shelters vary widely in terms of their physical structure, clientele served, staff, rules and regulations, pervasiveness of on-site searches, and the level of privacy afforded to residents. The various combinations of these factors make each shelter unique. For this article I visited a number of shelters, and each differed from the others in substantial ways.

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16 Katz, 389 U.S. at 351.
18 This is so because each has a different role in the shelter. The staff is more like a hotelier, landlord, or business owner, and residents are more like guests, tenants, or business invitees. What role one plays determines one’s Fourth Amendment rights. See Ybarra v. Illinois, 444 U.S. 85 (1979) (holding that a valid warrant to search a tavern and its proprietor did not give police authority to search each individual in the tavern); Stoner v. California, 376 U.S. 483 (1964) (holding that a hotel employee could not effectively consent to the search of a hotel room held by a guest where police had no basis to believe that the guest had authorized the hotel employee to do so); Chapman v. United States, 365 U.S. 610 (1961) (holding that a landlord could not consent to police entry into the house a tenant occupied).
19 See infra Part VI (discussing the author’s visits to seven different homeless shelters).
20 See infra Part VI (discussing the author’s visits to seven different homeless shelters).
residents of shelters were very different. Residents may be children or adults, individuals or families, chronic shelter dwellers, or those staying just for one night.\footnote{See infra Part VI (discussing the author’s visits to seven different homeless shelters).} They may be homeless because of domestic violence, a downturn in the economy, drug or alcohol abuse, or a debilitating injury.\footnote{See infra Part VI (discussing the author’s visits to seven different homeless shelters).} It is impossible to make general statements about the homeless and the shelters they use.

In Part II of this article, I provide a short history of the Fourth Amendment to show why the Amendment’s applicability in shelters may have been ignored until now and why there may be an inclination today not to provide Fourth Amendment protections to the homeless in shelters.\footnote{See infra notes 44-90 and accompanying text.} I conclude this history with a discussion of \textit{Katz} v. \textit{United States} and a description of the contemporary Fourth Amendment analysis that decision introduced.\footnote{See infra notes 77-89 and accompanying text.}

In Part III, I discuss a number of conceptual approaches to understanding courts’ analyses of the Fourth Amendment’s reasonableness requirement.\footnote{See infra notes 91-136 and accompanying text.} These approaches include, for example, basing a reasonableness determination on balancing individual and governmental interests, on governmental acquiescence,\footnote{See infra notes 130-132 and accompanying text (discussing State v. Dias, 609 P.2d 637 (Haw. 1980)).} by looking to the application of the Fourth Amendment during the Framers’ time,\footnote{See infra note 129 and accompanying text (discussing Oliver v. United States, 466 U.S. 170, 178 (1984)).} or by asking whether the person asserting his or her right had a property interest in the location of the search or seizure.\footnote{See infra notes 133-134 and accompanying text.} I look to articles by Orin S. Kerr and Thomas K. Clancy for these approaches,\footnote{See infra notes 130-136 and accompanying text.} but I also mention case law.\footnote{See infra notes 130-136 and accompanying text.} I note that although the \textit{Katz} reasonableness requirement is simple, how the courts perform the analysis is far from consistent.\footnote{See infra notes 91-92 and accompanying text.}

In Part IV, I survey the current case law that deals with the Fourth Amendment and homeless persons.\footnote{See infra notes 137-444 and accompanying text.} Two of these opinions, \textit{Community for Creative Non-Violence v. Unknown Agents of the United States Marshals Service} and \textit{Thomas v. Cohen}, are particularly important because each takes an opposing and somewhat extreme view of Fourth Amendment applicability
to residents of homeless shelters. I contrast these cases for two reasons: first, to introduce the reader to important sources, and, second, to show that the topic is unsettled and open to opposing viewpoints. For each case concerning homeless persons, I discuss the conceptual approach the court used to analyze Fourth Amendment applicability.

In Part V, I discuss a number of what I call “precedential approaches” to understand how we might approach the issue of the Fourth Amendment in shelters. Precedential approaches are the relationships between groups of people, and between groups of people and their environment, that courts have explored at length and largely settled. Examples of these relationships include: landlord/tenant, husband/wife, and parent/child. Examples of environments include: businesses, tents, occasional residences, and hotels. Each of these precedential approaches may assist us in understanding how the Fourth Amendment applies to the homeless. Perhaps, for example, the homeless who stay in shelters are like guests at a hotel or tenants in an apartment.

In Part VI, I discuss a number of shelters I toured and the conversations I had with shelter staff and, in one shelter, a few of the residents. I first give a factual description of a shelter, then raise the questions about the Fourth Amendment that shelter presents, and finally, I draw on the cases dealing with the homeless, the conceptual approaches, and the precedential approaches to answer these questions. At best, we will come away with a number of these questions answered. At worst, we will have a list of detailed issues pertaining to the Fourth Amendment’s applicability to the homeless residents of shelters, as well as a legal roadmap with which to explore these questions more in the future.

In Part VII, I discuss an approach to Fourth Amendment applicability in shelters, based on Terry v. Ohio, that promises to settle the

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33 See infra notes 137-214 and accompanying text (discussing Cmty. for Creative Non-Violence v. Unknown Agents of the U.S. Marshals Serv. (CCNV II), 797 F. Supp. 7 (D.D.C. 1992) and Thomas v. Cohen (Thomas II), 453 F.3d 657 (6th Cir. 2006)).
34 See infra notes 445-626 and accompanying text.
35 See infra notes 559-583 and accompanying text.
36 See infra notes 495-505 and accompanying text (discussing Georgia v. Randolph, 547 U.S. 103, 106 (2006)).
39 See United States v. Gooch, 6 F.3d 673, 676-77 (9th Cir. 1993).
42 See infra Part VI.
law in a way that satisfies individuals’ privacy and safety interests as well as the governmental interest in preventing and detecting crime. \(^{43}\)

II. THE FOURTH AMENDMENT: FROM COLONIES TO KATZ

One way to determine whether the Fourth Amendment applies in a given situation is to look to the history of the Amendment, the framing of the Constitution, or both. \(^{44}\) By this measure, the Fourth Amendment would not apply to residents of homeless shelters. During the colonial era and in the early American republic, the homeless were treated as criminals and forced into poorhouses, workhouses, and almshouses that were in fact prisons for the poor. \(^{45}\) While the homeless were treated less as criminals as time passed, they were still denied Fourth Amendment protections because they did not own property. \(^{46}\) It was only in the 1960s that the United States Supreme Court recognized that the Fourth Amendment applies to people and not places. \(^{47}\) Since then, however, the rights of the homeless to Fourth Amendment protections have been ignored, if not denied.

Since England colonized America, the poor have been politically powerless. \(^{48}\) In the colonial and revolutionary eras, persons without property were unable to vote \(^{49}\) or hold office. \(^{50}\) Colonial governments were statutorily authorized to indenture the poor against their will, \(^{51}\) and the Articles of Confederation expressly excluded the poor from the privileges and immunities of citizenship. \(^{52}\) Those without property were also barred from participating in the drafting and ratification of the United States Constitution. \(^{53}\) As a result, the national government, like the states, excluded the poor from exercising political rights. \(^{54}\) It did so in part by providing protections for property rights and limits to the political powers of the poor. \(^{55}\)

In the new republic, paupers were forced into servitude to the highest bidder. \(^{56}\) The United States Constitution similarly excluded paupers from rights to all privileges and immunities of free citizens. \(^{57}\) The law governing

\(^{43}\) See infra notes 705-738 and accompanying text.


\(^{46}\) See Boyd v. United States, 116 U.S. 616, 637-38 (1886).


\(^{48}\) See Burkhart, supra note 11, at 279.

\(^{49}\) See Fox, supra note 45, at 438.

\(^{50}\) See Burkhart, supra note 11, at 213.

\(^{51}\) Id. at 222.

\(^{52}\) Id. at 213-14.

\(^{53}\) Id. at 213.

\(^{54}\) Id. at 240; Fox, supra note 45, at 428.

\(^{55}\) Burkhart, supra note 11, at 240.

\(^{56}\) Fox, supra note 45, at 443.

\(^{57}\) Id. at 444.
the poor in the new country consisted mainly of forced labor and involuntary sale of the poor into servitude, including: public branding, incarceration for non-work, and forced apprenticeships for needy children.58 The non-working and itinerant poor were generally treated as criminals and were subject to punishment without the benefits of legal protections.59 Their prisons were the poorhouses,60 which were the homeless shelters of that era.

The poorhouses became jails to separate the deviant poor from the public and not to reform the inmates.61 The administrators of the poorhouses had the right to confine and punish the poor without judicial process,62 and the poor were forced to choose between accepting whatever employment existed and imprisonment.63 One commentator explained that “[d]epriving a pauper of basic liberties would . . . not be a denial of equal citizenship for the Founders because the person had rejected, or at least was incapable of, that type of citizenship.”64

Relief farms and workhouses during post-Civil War Reconstruction were like the poorhouses in that they were sites at which the poor were forced to labor.65 People were routinely imprisoned or sentenced to the workhouse without a trial, a hearing, or the gathering and presentation of evidence.66 The classification of the poor as criminals and outcasts continued into the post-Reconstruction era.67

Around this time, in 1886, the Supreme Court issued its opinion in Boyd v. United States.68 Beginning with Boyd and extending to the 1960s, the Court defined the Fourth Amendment largely in terms of property rights.69 The Boyd Court looked to an earlier case, Entick v. Carrington,70 as “the true and ultimate expression of constitutional law.”71 The Boyd Court quoted the court’s declaration in Entick that “[t]he great end for which men entered into society was to secure their property.”72 The Boyd Court wrote that Entick’s “propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.”73 The Boyd Court quoted Entick that “every invasion of private property . . . is a trespass. No man can

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58 Id. at 457.
59 Id.
60 Id.
61 Id. at 461.
62 Fox, supra note 45, at 462.
63 Id. at 463.
64 Id. at 468.
65 Id. at 532.
66 Id. at 562.
67 Id. at 568.
69 Clancy, supra note 44, at 991.
70 Entick v. Carrington, 19 Howell’s State Trials 1030 (1765).
71 Boyd, 116 U.S. at 626.
72 Id. at 627 (quoting Entick, 19 Howell’s State Trials 1030).
73 Id. at 626-27.
set his foot upon my ground without my license.”74 It is possible, therefore, that Boyd established the proposition that the Fourth Amendment protected property, and even more specifically, private property. Either way, Boyd established that Fourth Amendment limits on searches and seizures depended on property status.75

The Boyd analysis of Fourth Amendment applicability continued in force until 1967, when Warden v. Hayden76 and Katz v. United States77 changed the analysis from a property theory to one of privacy. Because many homeless persons live almost completely in public areas, this change does not alter Fourth Amendment protections for many of them.78 Shelters, on the other hand, provide their residents with varying levels of privacy.79 The new privacy theory of Fourth Amendment protection should, therefore, provide sheltered homeless persons some protection.

Katz noted that the Fourth Amendment protects people, not places.80 Therefore, where a person is and what relationship she has to that place matters less than what she “knowingly exposes to the public.”81 Even if she is in an area that the public has access to, what she seeks to preserve as private may be protected under the Fourth Amendment.82 To determine whether a person’s privacy is protected, Justice Harlan formulated the two-part rule for Fourth Amendment applicability that is in use today: if “a person [has] exhibited an actual (subjective) expectation of privacy,” and if that “expectation [is] one that society is prepared to accept as ‘reasonable,’ (objective) then that which she seeks to keep private is protected by the Fourth Amendment.”83 There are, of course, a number of ways government agents can overcome this protection and obtain access to that which someone seeks to keep private. The person could, for example, consent to a search;84 the police could have probable cause to search and obtain a warrant based on that probable cause;85 there could be exigent circumstances, such as hot pursuit86 or there might be a reasonable belief that evidence will be lost or destroyed.87

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74 Id. at 627 (quoting Entick, 19 Howell’s State Trials 1030).
75 Clancy, supra note 44, at 992.
78 See infra Part VI (discussing the author’s visits at seven different homeless shelters).
79 See infra Part VI (discussing the author’s visits at seven different homeless shelters and the varying levels of privacy available at each one).
80 Katz, 389 U.S. at 351.
81 Id.
82 Id. at 351-52.
83 Id. at 361 (Harlan, J., concurring).
Leaving aside the many ways that government agents can overcome Fourth Amendment applicability, the two-part Katz analysis is only deceptively simple. The Katz analysis is actually quite complex due to its “touchstone,” reasonableness. Reasonableness is an “imprecise and flexible term,” so no one test always applies. If the governmental interest in searching is greater than an individual’s interest in maintaining privacy, is a search reasonable? If the Framers would have allowed the search, is it reasonable? What if the totality of the circumstances indicates that the search is reasonable? These are only three of many conceptual approaches that courts take in analyzing which expectations of privacy are “reasonable” and which expectations are not.

III. CONCEPTUAL APPROACHES TO UNDERSTANDING REASONABLENESS

The many approaches to understanding reasonableness suggest that it is not clear “what makes a person’s expectation of privacy constitutionally ‘reasonable.’” What is clear is that, despite the Katz language, society’s view of what is reasonable has little or no role in a court’s analysis. How, then, do courts determine reasonableness? Although they speak of a single “reasonable expectation of privacy test,” there are several distinct approaches that coexist and two or more approaches are often applied together.

Professor Orin S. Kerr argues that there are four major approaches. The first approach he discusses, the probabilistic model, holds that “a reasonableness expectation of privacy depends on the chance that a sensible person would predict that he would maintain his privacy.” In other words, “a person has a reasonable expectation of privacy when the odds are very high that others will not successfully pry into his affairs.” This approach, therefore, often arises in situations where searches are conducted in group settings. It was reflected and rephrased in Georgia v. Randolph, in which the Supreme Court looked, in part, to “sense,” “custom,” and “social

89 Clancy, supra note 44, at 977.
90 See infra notes 91-136 and accompanying text (discussing the conceptual approaches that courts takes to determine whether an expectation of privacy is reasonable).
91 Kerr, supra note 88, at 504.
92 See Christopher Slobogin & Joseph Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,” 42 DUKE L.J. 727, 774 (1993) (“[T]he Supreme Court’s conclusions about the scope of the Fourth Amendment are often not in tune with commonly held attitudes about police investigative techniques.”).
93 Kerr, supra note 88, at 506-07.
94 Id. at 506.
95 Id. at 508.
96 Id. at 508-09.
97 Id. at 544.
practice,"98 to determine whether a defendant would expect that a third person would allow police in to search the defendant’s home.99 The Court wrote that “[t]he constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations . . . .”100 In Randolph, the Court was referring to a defendant’s expectation that another person would consent to a search of his home, and not the odds that a government agent would successfully pry into his affairs.101 The “social expectations” approach, however, can apply to the latter case, and is another way to understand the probabilistic model.

Another way to understand the probabilistic model is through the concept of assumption of risk. The Randolph Court noted that a defendant’s shared tenancy with another means that he assumes the risk that police will rely on that co-tenant’s consent to search.102 Assumption of risk is intrinsic to the common-authority doctrine and is often used in search and seizure cases.103 If the odds are very high that someone will pry into your affairs, you may be said to have assumed the risk of discovery, and therefore you have no reasonable expectation of privacy.

Kerr’s second approach is the private facts model, which focuses on the information the government obtains during the search.104 If the information is “particularly private, then the acquisition of that information is a search.”105 This approach may be reflected in the Court’s analysis of “the uses to which the individual has put a location,” and “our societal understanding that certain areas deserve the most scrupulous protection from government invasion” to determine whether a search infringed upon individual privacy.106 Certain places are believed to contain varying levels of private information, and those places said to contain the most private information are protected the most.107 For example, homes are the most protected, businesses and cars less so, and activities on public sidewalks not at all. This hierarchy makes sense, because what we do in our home often gives rise to information that we prefer to keep private, whereas in public we generally do not engage in behavior that we would not want the world to see. One commentator supports the adoption of this approach, specifically for the homeless, suggesting “a new standard” for Fourth Amendment applicability.

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99 Id. at 112.
100 Id. at 111.
101 Id. at 122-23.
102 Id. at 132 (citing United States v. Jacobson, 466 U.S. 109, 117 (1984)).
104 Kerr, supra note 88, at 512.
105 Id.
“that focuses on private activities.”

He suggests that courts look to whether a homeless person “was using the area searched for activities ordinarily associated with the privacy of the home . . . . If these factors established that the shelterless person was using the searched area as her primary area of residence, then the second prong of the Katz test would be satisfied.”

Another commentator echoes this sentiment in regards to homeless defendants, by advocating for protection of privacy over property by suggesting protection for people’s “living space[s]” or “living areas.”

Kerr’s third approach is the positive-law model, under which courts “look at whether there is some law that prohibits or restricts the government’s action” other than the Fourth Amendment. When the government breaks such a law in order to obtain information it violates a reasonable expectation of privacy. One way that courts determine whether a person has an expectation of privacy is to determine whether that person is a trespasser. This invokes the positive-law model because if the person is not a trespasser then he or she has certain property rights, including the right of exclusion, which would operate to restrict governmental observation.

As another example, one of the shelters profiled for this article is bound to protect the confidentiality of its residents by a federal regulation. This is a positive law that works to keep government (and non-government) eyes from prying. Whether it, in fact, implicates the Fourth Amendment is not clear, and will be discussed below.

Kerr’s last approach is the policy model, which poses the following question: “[S]hould a particular set of police practices be regulated by the warrant requirement or should those practices remain unregulated by the Fourth Amendment?” The policy model says that if “leaving the conduct unregulated is particularly troublesome to civil liberties, then that conduct violates a reasonable expectation of privacy.” However, over regulation of government investigations in order to protect civil liberties could affect the reasonableness of any expectation of privacy.

The policy model is very common in Supreme Court Fourth Amendment decisions, and is another term for the balancing test, which pits governmental interests against individual interests.

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108 Granston, supra note 11, at 1326.
109 Id.
110 Godsey, supra note 11, at 888-89.
111 Kerr, supra note 88, at 516.
112 Id.
114 Kerr, supra note 88, at 518.
115 See infra Part VI.C (discussing Guidepost Foundation Shelter and 42 C.F.R. § 2.1).
116 Kerr, supra note 88, at 519.
117 Id.
118 Id.
119 Clancy, supra note 44, at 1011.
Scholar Thomas Clancy notes five approaches to understanding reasonableness, one of which is the balancing test, discussed above. One approach he sees is the “warrant requirement” approach, which “construes the Reasonableness Clause [of the Fourth Amendment] as being defined by the Warrant Clause.” This means that a search is not unreasonable if carried out under the safeguards of the Warrant Clause; under this approach, therefore, all searches and seizures are per se unreasonable without a warrant.

Clancy’s second approach is the “individualized suspicion” approach, which emerged with the advent of the automobile and the resulting impracticality of the warrant requirement approach. This model encompasses other criteria, besides a warrant, to determine the reasonableness of the search—probable cause to believe there is contraband in a car is one such criteria.

Despite the fact that Clancy labels the warrant requirement and individualized suspicion as “models” for understanding the reasonableness requirement, they are actually more like explanations of past and current Fourth Amendment law. His next approach, the case-by-case analysis, is a true model. This approach is based on the idea that “there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.” The fact that there are a multitude of approaches and inconsistency among courts in their use suggests that the case-by-case approach is the one reliable approach.

Clancy’s last approach couples an interpretation of the common law with a balancing test. Under this approach, a court would first ask whether the governmental conduct in question was “regarded as an unlawful search or seizure under the common law when the Amendment was framed.” If there is no answer to the first question then the court would perform a balancing test. One commentator noted that the historical approach was out of favor in the 1960s and 70s but, by the turn of the century, it had come back into use, if only sporadically. In 1984, for example, the Supreme Court looked to “the intention of the Framers of the Fourth Amendment” for guidance.

120 Id. at 992-93.
121 Id. at 994.
122 Id. at 995.
123 Id. at 996.
124 Id. at 978.
125 Clancy, supra note 44, at 999 (quoting Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)).
126 Id. at 1014 (quoting Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999)).
127 Id.
There are at least three other approaches that deserve note. In 1980, the Hawaii Supreme Court used government acquiescence to establish the defendants’ Fourth Amendment rights. In Hawaii v. Dias, the court considered the case of the defendants who were “squatters,” and who were “occupants of” a “structure” that was located on state government property. This “Squatters Row,” the court stated, “has been allowed to exist by sufferance of the State for a considerable period of time . . . we think that this long acquiescence by the government has given rise to a reasonable expectation of privacy on the part of the defendants, at least with respect to the interior of the building itself.”

One commentator, writing about homeless persons’ makeshift shelters in public areas, suggests that courts adopt the Dias government-acquiescence approach when determining the reasonableness of a homeless person’s expectation of privacy when the person resides in a public area.

It is also possible to use the pre-Katz analysis based on private property. One commentator writes that in evaluating reasonableness, “[t]he right to exclude others has been and always will be measured by the yardstick of property. This ultimate truth is at the heart of what the Fourth Amendment protects—the right to be let alone.”

As for the homeless, he writes, “[i]t is a sad but true fact that those who cannot shut out the world will be subject to its prying eyes.”

If courts mix and match these approaches to reasonableness as they like and the case-by-case approach has any role to play, then courts are also free to adopt novel models for dealing with specific fact patterns. One commentator offers a four-part test to determine whether a particular homeless individual has a reasonable expectation of privacy. This four-part test looks at:

1. [T]he treatment of the homeless by society in a particular locale;
2. whether the homeless person took “normal precautions” under the circumstances to maintain his privacy;
3. the uses to which the place in question was put, including whether the area searched was used as a “home”; and
4. whether the government conducted the search in a physically non-intrusive manner.

This approach has probably not been adopted by any court, and so is merely aspirational. It does, however, indicate that the Fourth Amendment concept of reasonableness is flexible and open to creative approaches, and that the issue of whether and to what extent the Fourth Amendment applies

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130 Hawaii v. Dias, 609 P.2d 637, 639 (Haw. 1980).
131 Id. at 55.
132 Townsend, supra note 11, at 225, 239.
133 Steinberg, supra note 11, at 1547.
134 Id.
135 Schutz, supra note 11, at 1029.
136 Id.
to homeless persons is unsettled. As a review of the case law will show, 
these persons’ Fourth Amendment rights are nowhere more unsettled than in 
shelters.

IV. THE CASE LAW

A. Support for Fourth Amendment Protection for Homeless Shelter 
Residents: Community for Creative Non-Violence v. Unknown Agents of 
the United States Marshals Service

Few cases deal with Fourth Amendment applicability in homeless 
shelters. The cases that do exist are contradictory, which contributes to the 
unsettled nature of this area of law. The first case in this section is 
remarkable for its extreme support for Fourth Amendment protections for 
homeless residents of a huge metropolitan shelter. There are two United 
States District Court for the District of Columbia opinions for Community for 
Creative Non-Violence v. Unknown Agents of the United States Marshals Service.137 In the first opinion the court denied the Marshals’ motion to 
dismiss (CCNV I),138 and in the second opinion the court held that the search 
violated the shelter residents’ Fourth Amendment rights (CCNV II).139

The facts of the case are as follows. In 1992, Community for 
Creative Non-Violence (“CCNV”) operated a homeless shelter in the District 
of Columbia.140 On January 8, 1992, United States Marshals in D.C. received 
a tip from an informant that Earl Hughes, a fugitive, was staying at the 
CCNV shelter.141 They agreed that they would proceed to the shelter, taking 
with them a printout of all fugitives in the D.C. area in case some of the 
others were also at the shelter.142 According to the court, “from the outset the 
Marshals intended to look not only for Hughes but to conduct a general 
sweep of the shelter looking for any fugitive who might be there.”143

On the morning of January 9, 1992, there were approximately 500 
homeless persons sleeping in two portions of the CCNV shelter.144 At 5:30 
a.m., ten United States Marshals entered the only entrance to the shelter, 
approached the enclosed front desk, and showed a picture of Hughes to the 
front desk clerk.145 The clerk said that he had never seen the person in the

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139 CCNV II, 797 F. Supp. at 8.
140 Id.
141 Id. at 9.
142 Id.
143 Id.
144 Id.
picture. The Marshals then proceeded up the stairs to one of the two portions of the shelter, where the informant had told them Hughes was located. The front desk clerk did not protest, but neither did he give his consent—he felt he had no choice regarding whether to allow the Marshals to enter the shelter.

The Marshals approached the “Two South” section of the shelter, which housed male residents who were employed. At the time of the Marshals’ action, there were over 300 people sleeping in Two South. The Marshals entered Two South without the consent of the person on duty there and despite the fact that the person did not recognize Hughes from the picture he was shown.

After they were told that Hughes was not present, the Marshals demanded to see the records of all the people in Two South; Hughes’s name was not in the records. One Marshal then told a CCNV staff member, “We’re going to look anyway.” The Marshals then had the shelter lights turned on and told a CCNV staff member to inform the residents, using the public address system, that they would have to show identification to the Marshals if they wanted to leave the building. At the same time, other Marshals proceeded into the sleeping area of Two South and entered the private cubicles of residents, woke them up, and compared their faces with Hughes’s photo.

One resident testified that a Marshal told him that if he tried to leave without showing identification he would be arrested. The Marshals checked the identification of between 100 and 200 individuals against the list of outstanding warrants. They stayed at the shelter and did this check for approximately one and a half hours.

As the Marshals were searching Two South, another group of Marshals proceeded to the other section of the shelter, the emergency drop-in area, which provided emergency overnight shelter for homeless persons during the winter months. The Marshals approached the locked steel mesh door of the drop-in section and told a CCNV staff member on duty that they were looking for Hughes. The staff member opened the door to get a better

146 Id. at 10.
147 Id.
148 Id.
149 Id.
150 Id.
151 CCNV II, 797 F. Supp. at 10.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id. at 11.
157 CCNV II, 797 F. Supp. at 11.
158 Id.
159 Id.
160 Id.
look at the picture, and several Marshals pushed past him and entered the interior of the drop-in section without the staff member’s consent.\textsuperscript{161} The Marshals checked the drop-in roster; Hughes’s name did not appear.\textsuperscript{162} The Marshals told the CCNV staff member to turn the lights on because they were going to check anyway.\textsuperscript{163}

The Marshals then began going to various beds and waking the residents to see if they could locate Hughes.\textsuperscript{164} They also told the drop-in staff member that no one would be allowed to leave the drop-in area unless they produced identification.\textsuperscript{165} CCNV directors appeared and expressed to the Marshals and the residents that they did not consent to the Marshals’ actions and that they believed what the Marshals were doing was illegal and unconstitutional.\textsuperscript{166}

The CCNV court used the policy/balancing model to determine whether CCNV’s staff, residents, or both, had standing to pursue their Fourth Amendment claim.\textsuperscript{167} The court focused on the plight of the homeless and the difficult task that CCNV staff have in running the shelter, stating that “[i]f homeless people cease believing that the CCNV shelter can provide them housing free from unreasonable search and seizure, they will not come there and CCNV will be hindered in fulfilling its mission.”\textsuperscript{168} The court then found that “if the Marshals continue to conduct these types of ‘raids,’ innocent homeless people who depend on the shelter as their only source of housing will be forced to return to the streets.”\textsuperscript{169} Having established that CCNV staff and residents had standing to sue, the court turned to consider their Fourth Amendment claim. The court again used the balancing test, explaining that “[c]ourts must balance the law enforcement interest in executing fugitive arrest warrants against the privacy interests of innocent third parties who depend on the CCNV shelter as their only source of housing.”\textsuperscript{170} Based on this test and the fact that both sides agreed that the court correctly articulated the applicable law in \textit{CCNV I}, the court concluded that the Marshals’ “actions must be consistent with [a] particular fugitive’s use of the shelter as his or her home, and their actions may not unreasonably infringe on the rights of innocent third parties who live in the shelter.”\textsuperscript{171}

\begin{flushright}
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} \textit{CCNV II}, 797 F. Supp. at 11.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 11-12.
\textsuperscript{167} Id. at 13.
\textsuperscript{168} Id. at 12.
\textsuperscript{169} \textit{CCNV II}, 797 F. Supp. at 12.
\textsuperscript{170} Id. at 13.
\textsuperscript{171} Id.
\end{flushright}
The court’s analysis in CCNV I was based on the policy/balancing model, as it was in CCNV II.\textsuperscript{172} If CCNV II’s analysis was sparse on appreciating the Marshals’ interest in apprehending fugitives, CCNV I’s analysis also lacked that appreciation and depended solely on the policy of promoting homeless shelters. The balancing test was given short shrift. The court specifically disavowed any of the historical or property models, explaining that it was “faced with the challenge of ‘interpreting the Fourth Amendment in light of contemporary norms and conditions.’”\textsuperscript{173} These conditions were, said the court, the growing number of homeless persons in a country that has previously defined the scope of the Fourth Amendment on traditional notions of “home.”\textsuperscript{174}

Based on this analysis, in CCNV I the court found that the shelter’s residents had both an actual and reasonable expectation of privacy, because “the shelter was, for them, the most private place they could possibly have gone—the place most akin to their ‘home.’”\textsuperscript{175} Given the language throughout CCNV I and II, it is clear that the court viewed the shelter as the residents’ “home” for Fourth Amendment purposes.

The ruling in CCNV I holds some radical implications. For example, it may mean that one homeless resident can refuse to consent to a police entry—at least as to that resident—even if the other residents and even the shelter staff consent to the entry.\textsuperscript{176} The court in CCNV II suggested that this may be the case when it concluded that “the government has not offered sufficient proof to meet its burden of showing this Court that [CCNV] staff people had the actual or apparent authority to give consent for such an action.”\textsuperscript{177} The court further suggested that if the staff could consent to the Marshals’ entry into the common areas, it was the residents’ right to consent or refuse consent for them to enter into the sleeping areas.\textsuperscript{178} The court’s final word on the residents’ right to consent, or not, was explicitly that “viewing the totality of the circumstances, the actions taken by the Marshals at the CCNV shelter were non-consensual” on the part of the residents.\textsuperscript{179}

This ruling could also mean that residents have a right to exclude people from the shelter or, if not, that residents and CCNV staff somehow have different sets of rights in the shelter. The court in CCNV II wrote that “CCNV is the exclusive licensee of the shelter premises, [and] many of the CCNV members . . . live at the shelter, and . . . CCNV has the power to

\textsuperscript{173} Id. at 5 (quoting Payton v. New York, 445 U.S. 573, 591 n.33 (1980)).
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 6.
\textsuperscript{176} See Georgia v. Randolph, 547 U.S. 103 (2006).
\textsuperscript{178} Id. at 15 n.8.
\textsuperscript{179} Id. at 16.
exclude people from the shelter.” If the shelter is home for the residents and staff alike, then either the residents can exclude people just as staff can, or two different homeowners may have different Fourth Amendment rights in their homes. Both conclusions seem untenable; the latter is constitutionally so on the basis of equal protection. 181

**B. Fourth Amendment Rights of Homeless Shelter Residents Not Clearly Established: Thomas v. Cohen**

Plaintiffs Natasha Thomas and two other women had been residents at Augusta House in Louisville, Kentucky. Augusta House was a “transitional shelter” for women attempting to acclimate themselves to mainstream society. The residents of Augusta House were homeless women with financial difficulties who had already participated in the first two stages of a program run by Mission House, which owned Augusta House. Throughout the program, Mission House gave the women greater responsibility to help them transition back into mainstream society. The women living in Augusta House had fewer rules and received less supervision than they had earlier in the program.

Augusta House residents had no curfew or live-in supervision, and prior to move-in they were expected to have employment or income of some kind. The residents lived at Augusta House for as long as it took them to “get on their feet,” sometimes staying up to a couple of years. Augusta House was a house located in a residential neighborhood “in order to provide the residents with the responsibility of maintaining a house before their transition into mainstream society.” As a resident, a woman paid $140 per month and received her own bedroom, and she shared the rest of the house with the other residents. The residents were also given their own keys to the house and the freedom to come and go from the house as they wished. The staff of Mission House was “authorized to enter the bedrooms, move the residents to different bedrooms, and place two residents in a bedroom if they wished to do so.” Residents did not sign a lease with Mission House, but the defendants conceded in *Thomas I* that the residents were "tenants."

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180 Id. at 13 n.6.
181 U.S. CONST. amend XIV, § 1.
182 Thomas v. Cohen (*Thomas I*), 304 F.3d 563, 566 (6th Cir. 2002).
183 Id. at 565.
185 Id.
186 Id.
187 Id.
188 Id.
189 Id.
190 Thomas v. Cohen (*Thomas I*), 304 F.3d 563, 566 (6th Cir. 2002).
191 *Thomas II*, 453 F.3d at 659.
192 Id. at 660.
The defendants in *Thomas I* and *II* were four police officers who answered a call on the morning of December 8, 1998, directing them to go to Augusta House.\textsuperscript{195} The call was placed by the director of Mission House, Laura Zinious,\textsuperscript{196} for police assistance in removing the plaintiffs from the premises.\textsuperscript{197} When the officers arrived, "Zinious told them that the plaintiffs had violated the rules of the shelter by possessing alcohol and illegal drugs on the premises."\textsuperscript{198} Zinious also told the police that the plaintiffs had threatened other Augusta House residents and that they refused to leave.\textsuperscript{199} She informed the officers that eviction was “standard procedure” for the House under the circumstances and requested that they remove the plaintiffs.\textsuperscript{200} Zinious did not show the officers a court order or other documentation that authorized them to the evict the plaintiffs.\textsuperscript{201}

The plaintiffs claimed that at that point the officers came into their rooms and ordered them to leave the premises.\textsuperscript{202} Although none of the plaintiffs’ property was destroyed by the police officers, they did not have time to take all of their belongings with them.\textsuperscript{203} Plaintiffs subsequently filed a lawsuit claiming that their Fourth Amendment right to be free from unreasonable seizures and their Fourteenth Amendment right not to be deprived of possessory interests in property without due process were violated.\textsuperscript{204} In response, the defendants filed a motion for summary judgment, claiming “qualified immunity.”\textsuperscript{205} The defendant’s motion was denied by the district court, and the defendants appealed.\textsuperscript{206} On appeal, a divided court rejected the plaintiffs’ arguments that the evictions violated their Fourth Amendment rights.\textsuperscript{207}

The lead opinion in *Thomas I*, which was ultimately in the minority as to the question of whether the Fourth Amendment was violated, rested its analysis largely on the pre-*Katz* property model, but also looked to the positive-law model as well as the balancing test.\textsuperscript{208} The court cited *United States v. Jacobsen* for the proposition that “a seizure of property occurs when there is some meaningful interference with an individual’s possessory

\textsuperscript{193} Id. at 659-60.
\textsuperscript{194} *Thomas I*, 304 F.3d at 566.
\textsuperscript{195} Id. at 566.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 567.
\textsuperscript{199} Id.
\textsuperscript{200} *Thomas I*, 304 F.3d at 567.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} *Thomas I*, 304 F.3d at 567.
\textsuperscript{207} Id. at 565-66.
\textsuperscript{208} Id. at 568-82.
interests in that property.”

“This expansive definition,” noted the court, “is necessary because a seizure threatens an individual’s distinct interest in retaining possession of his or her property.”

The court also mixed the positive-law model with the property model to analyze the plaintiffs’ Fourth Amendment claim:

[T]he legitimation of expectations of privacy must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society. Because the right to exclude others is one of the main rights attaching to property, tenants in lawful possession of a home or apartment generally have a legitimate expectation of privacy by virtue of having a property interest in a specific piece of real estate.

Also perceptible in this passage is a consideration of that which is “recognized and permitted by society,” which may reflect a genuine desire to have rulings based on social norms, or a need to have a theoretical peg on which to hang the court’s desired ruling. Finally, the court used the policy/balancing test, writing that “[a] determination of reasonableness requires a ‘careful balancing of governmental and private interests.’”

Based on this analysis, the lead opinion concluded that the officers were not entitled to qualified immunity. This opinion, however, did not prevail, as the two other judges on the three-judge panel found that any Fourth Amendment right the plaintiffs might have had was not clearly established. These judges did not, therefore, analyze the Fourth Amendment question as to its applicability. While apparently suggesting much about the Fourth Amendment’s applicability in certain homeless shelters, this opinion in fact says very little. Most importantly, the court did not conclude that these women had no Fourth Amendment rights; instead it held that these rights, if they exist, were not clearly established.

C. Two Extremes of Fourth Amendment Applicability: CCNV and Thomas

Taken together, the CCNV and Thomas cases illustrate the unsettled nature of Fourth Amendment law in homeless shelters and the varied conceptions of reasonableness at play in the reasonableness analysis. They

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209 Id. at 569 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).
210 Id. at 570.
211 Id. at 573-74 (citation omitted).
212 Thomas I, 304 F.3d at 574 (citation omitted).
213 Id. at 581.
214 Id. at 582-83 (Gilman and Wallace, JJ., concurring in part and dissenting in part).
215 Id.
also represent two extremes on a continuum of possible Fourth Amendment applicability in homeless shelters. In *CCNV*, the court examined a large, urban, and institutional-style homeless shelter, with many residents who were probably there only for single nights. It found that this homeless shelter was their home for purposes of the Fourth Amendment, implying a number of powers for the residents concerning, for example, consent to enter and the right to overrule another’s consent. In contrast, the court in *Thomas* examined a home-like structure in a residential neighborhood, in which women paid a fee to live, had their own rooms and little-to-no supervision, and stayed for as long as two years. Although the court in that case did not hold specifically that the women had no Fourth Amendment rights, it would have been easy for the court to find that they did have such rights because many of the trappings of legal tenancy existed. Viewing these cases together, it would have made more intuitive sense to provide little or no Fourth Amendment protection to the *CCNV* residents and provide full protection to the *Thomas* residents, treating them as though Augusta House was their home for Fourth Amendment purposes.

**D. No Fourth Amendment Protection Because There Is No Reasonable Expectation of Privacy: People v. Robinson**

In *People v. Robinson*, the defendant, Robinson, was arrested at a public homeless shelter in Brooklyn, New York, without an arrest warrant. At the shelter where he was arrested, a sign-in blotter and metal detector maintained by the staff controlled entry into the shelter. The shelter also employed at least one security guard. The arresting detective in this case received consent from the shelter supervisor to enter the shelter, and the supervising guard at the shelter took the detective to a room and bed that were assigned to Robinson. The shelter did not have any doors or locks that restricted entry to the rooms where the shelter’s residents were living.

Robinson claimed that the supervisor of the shelter and the guard supervisor did not have authority to allow the detective into the shelter or to consent to the search of his room. The court rejected this argument on two bases. First, the shelter supervisor and guard supervisor, “by virtue of their control over access to the shelter and the shelter’s rooms, and their

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216 See supra notes 140-166 and accompanying text (discussing the facts of the case and describing the homeless shelter).
217 See supra notes 175-179 and accompanying text.
218 See supra notes 182-194 and accompanying text.
219 See supra note 215 and accompanying text.
221 Id.
222 Id.
223 Id.
224 Id.
225 Id.
maintenance of the sign-in blotter and metal detectors, were authorized by the shelter’s inhabitants to consent to the entry into the shelter and the rooms by anyone who had legitimate business there. For this reason, the shelter supervisor’s and guard supervisor’s voluntary consent rendered the detective’s warrantless arrest proper. This approach reflects the pre-\textit{Katz} property model of Fourth Amendment analysis by basing the validity of a person’s consent on her ability to control the property. Visitors on the private shelter property impliedly authorize the shelter staff to consent to entry, arrest, and, perhaps, searches that impact the visitor. Upon entry, the visitor assumes the risk that staff will consent to a search and, in that event, he or she will be without Fourth Amendment protection. Based on the property model, this case may have been wrongly decided, given clear Fourth Amendment precedent protecting houseguests and residents of hotels. These precedents will be discussed more below.

The court also rejected Robinson’s Fourth Amendment argument on the basis of the probabilistic model. It wrote that Robinson “did not have any reasonable expectation of privacy in his room or bed at the shelter, given the semi-public nature of the living area.” While this is a more intellectually honest basis for the court’s judgment than its use of the property model, it still may be an incorrect ruling. Clearly, if there is probable cause to arrest someone, as one assumes there was in this case, that person has few Fourth Amendment protections in public against warrantless arrest. A shelter is, as the court wrote, “semi-public.” It may be possible to equate a homeless shelter, which has some of the trappings of a “home,” with a public area, but it should not be done with a mere conclusory statement, as the court in \textit{Robinson} did.

However faulty the court’s rationale in this case might have been, its rejection of Robinson’s argument, based on the probabilistic model, has much traction. Its use of the property model was also informed by the notion that a homeless person assumes the risk that staff will consent to a search. This assumption of risk, based as it is on the common-authority doctrine, applies to this court’s use of the property model and the general use of the probabilistic model, and may be a major hurdle to overcome for people who attempt to cloak homeless shelter residents with Fourth Amendment protections.

\footnotesize{
\begin{itemize}
\item \textsuperscript{226} \textit{Robinson}, 751 N.Y.S.2d at 544.
\item \textsuperscript{227} \textit{Id}
\item \textsuperscript{228} \textit{See supra} notes 133-136 and accompanying text.
\item \textsuperscript{229} Minnesota v. Olson, 495 U.S. 91 (1990).
\item \textsuperscript{230} Stoner v. California, 376 U.S. 483 (1964).
\item \textsuperscript{231} \textit{Robinson}, 751 N.Y.S.2d at 544.
\item \textsuperscript{232} Cf. \textit{Virginia v. Moore}, 128 S. Ct. 1598, 1608 (2008) (reviewing the history of Fourth Amendment jurisprudence and holding that, where a police officer has probable cause to believe that a person has committed a crime in the police officer’s presence, the officer can arrest and search the person).
\end{itemize}
}
E. People v. Gaffney

The defendant in People v. Gaffney was assigned a room at a homeless shelter. He placed clothes over wire mesh to block visual access to the room and he locked the door with a broomstick handle. Despite these measures, the court found that he had no reasonable expectation of privacy in his room. The court exhibited no further reasoning, so it is impossible to discern the model used. At best, then, this case suggests the dismissive approach courts may have to homeless shelter residents who assert Fourth Amendment rights in shelters. It may also suggest courts’ unwillingness to affirm such rights.

F. Alston v. Donelli

The defendant in Alston v. Donelli was a resident of a homeless shelter in New York. A police officer at the shelter saw Alston and another resident exchange money and later saw Alston take a vial of crack cocaine out of his pocket. The officer immediately called for assistance and then seized Alston. The officers found money and more vials of crack cocaine when they searched Alston’s person. During the search Alston also gave the officers his locker number at the shelter. The officers conducted a search of Alston’s locker, with an employee of the shelter observing, and found more crack cocaine.

The court denied Alston’s motion to suppress the cocaine found in his locker because it found that he did not have a reasonable expectation of privacy in it. Alston appealed, arguing that he had a reasonable expectation of privacy in his locker. His conviction was affirmed. Alston’s other state appeals were denied, so he petitioned the United States district court for a writ of habeas corpus.

In its opinion denying Alston’s petition, the district court noted that at trial there was evidence that “a Shelter Rules and Regulations form and a Notice of Assignment of Locker form . . . stated, inter alia, that Alston’s

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234 Id. at 728.
235 Id. at 727.
237 Id.
238 Id.
239 Id.
240 Id.
241 Id.
242 Id.
243 Id.
244 Id.
245 Id.
locker was subject to search by authorized personnel, and that the shelter authorities retained the master key to all lockers.246 This is the only evidence that the district court cited in support of its decision to deny Alston’s petition, so it must have been central to the court’s reasoning, if not dispositive. The court may have been guided by an iteration of the positive-law model in that it viewed the shelter forms as a pseudo-contract by which Alston gave up his privacy in exchange for housing.247 It also may have been informed by the probabilistic model: when Alston signed the form, he became aware of the likelihood that someone else would pry into his affairs by searching his locker.248 In terms of this model, he assumed the risk of a search.

If the court based its finding on the positive-law model, it may have been correct as far as Alston’s case, but it would be incorrect for the majority of shelter residents. Alston, who had $190 on his person and a large amount of crack cocaine that he could sell for more money, was not destitute and was not relying on the shelter for housing. As such, he was under no duress when he signed the shelter forms. Most shelter residents, however, are in need of emergency housing, and the shelter in this case may be their only hope to escape from a cold night, from dangerous streets, or, for many women, from domestic violence.249 In these situations, most residents sign the shelter forms because they have no other choice. These residents are under duress, and when one signs a contract under duress, the contract is generally voidable.250 If the shelter forms had not been enforceable—that is, if Alston had been a typical shelter resident in need—the district court in this case may have had little evidence that would enable it to deny Alston his asserted Fourth Amendment rights. It could, of course, have comfortably rested its decision on the probabilistic model.

**G. Other Cases**

The above cases are the few available that deal with the applicability of the Fourth Amendment in homeless shelters. The following cases deal with homeless persons in other settings. They do not, therefore, apply directly to this article’s inquiry, but they may offer much guidance in terms of conceptual approaches used to deal with Fourth Amendment homelessness cases. They may also suggest the circumstances under which the Fourth Amendment could apply in homeless shelters.

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246 Id.
247 See supra notes 111-115 (discussing the positive-law model).
248 See supra notes 95-103 and accompanying text (discussing the probabilistic model).
249 See supra note 6 and accompanying text (discussing the frequency of domestic violence as a cause of homelessness of women).
250 RESTATEMENT (SECOND) OF CONTRACTS § 7(b) (1981).
I. MacMorris v. State

On July 27, 1986, in Montgomery, Alabama, police received a report that a dead woman was lying on the front lawn of a house. Officer Fernandez and his partner arrived on the scene and observed that the victim had several bullet wounds. The police investigation led to appellant MacMorris. At the time, MacMorris was staying in a vacant house in Montgomery without the permission of the owners. Based on his investigation, Officer Fernandez obtained a warrant to search the house. As a result of the search, the police obtained evidence that gave them probable cause to arrest MacMorris.

The trial court denied MacMorris’s motion to suppress evidence found in the house on the ground that MacMorris had no legitimate expectation of privacy in the house for Fourth Amendment purposes. The appeals court agreed, basing its opinion strongly on the private property model. In explaining its ruling, the court noted that MacMorris “admitted that he resided at the house without the permission of its owners.” The court further stated: “While property ownership is clearly a factor to be considered in determining whether an individual’s Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of . . . [the] inquiry.” Despite this statement, the court pushed on with the property model, explaining that “[o]ther factors to be weighed include whether the defendant has a possessory interest in the thing seized or the place searched, [and] whether he had the right to exclude others from that place . . . .” Finally, the court noted that MacMorris “was an intruder, a squatter, on the premises. He was not legitimately using the premises and admitted that he had no permission to use them.”

The court also used the probabilistic model. It noted that MacMorris explained “that many people drifted in and out of the house and that some slept there.” In addition, the court explained that factors to be weighed included “whether [MacMorris] has exhibited a subjective expectation that [the house] would remain free from governmental invasion, [and] whether he

252 Id. at 1364-65.
253 Id. at 1365.
254 Id.
255 Id.
256 Id.
257 Id. at 1365.
258 Id.
259 Id.
260 Id. (quoting United States v. Salvucci, 448 U.S. 83, 92 (1980) (alteration in original)).
261 Id.
262 Id. at 1366.
263 MacMorris, 521 So. 2d at 1365.
took normal precautions to maintain his privacy . . . “264 Finally, the court noted that MacMorris “knew other people used the house, knew that he did not have the right to exclude them, and did not try to exclude them.”265

Clearly, the property and probabilistic models bode poorly for anyone trying to establish Fourth Amendment rights for residents of shelters. These models, however, figure heavily in Fourth Amendment cases dealing with homeless persons. In light of *Katz*, it is anachronistic to rely so heavily on the property model. The probabilistic model, however, remains a valid and compelling one, since it directly addresses whether someone has an actual or reasonable expectation of privacy.

2. *Amezquita v. Hernandez-Colon*

This case raised the issue of what constitutional rights the members of a squatter community have when a governmental landowner attempts to evict them.266 In January of 1974, a group of squatters occupied part of a farm owned by the Land Authority of the Commonwealth of Puerto Rico.267 The squatters began to set up a community known as Villa Pangola, and, shortly thereafter, the Land Authority sued in the Superior Court of Puerto Rico to evict the squatters.268 Prior to April 2, 1974, officials from two Commonwealth agencies visited the squatter community on two separate occasions and tried unsuccessfully to persuade the members to leave the property voluntarily.269 However, the squatters did not leave, and so, on April 2, government agents came to Villa Pangola and used two bulldozers to destroy the structures in the community that they determined to be uninhabited.270

As a result of this action, members of Villa Pangola sued, claiming, in part, a violation of their Fourth Amendment right against illegal searches and seizures.271 On appeal, the court found that the members’ Fourth Amendment rights were not violated.272 In so deciding, it stressed the property model while also considering the probabilistic model. The court stated:

Nothing in the record suggests that the squatters’ entry upon the land was sanctioned in any way by the Commonwealth. The plaintiffs knew they had no colorable claim to occupy the land; in fact, they had been asked twice by Commonwealth officials to depart voluntarily. That fact

264 Id. at 1365-66.
265 Id. at 1366.
266 Amezquita v. Hernandez-Colon, 518 F.2d 8, 9 (1st Cir. 1975).
267 Id.
268 Id.
269 Id.
270 Id.
271 Id. at 9-10.
272 Amezquita, 518 F.2d at 10.
alone makes ludicrous any claim that they had a reasonable expectation of privacy.273

The court determined the squatters’ Fourth Amendment rights based on a ruling on an eviction action in the Commonwealth Superior Court.274 The court cited that decision, which held that the squatters “have no right whatsoever to remain on [the Commonwealth’s] property . . . or to have houses thereon, the possession by [the squatters] over said property being illegal, their conduct failing to show any right at law . . . .”275 The court compared the Fourth Amendment status of the squatters to that of a car thief and a trespasser “who places his property where it has no right to be.”276 The court also implicated the probabilistic model and the common-authority doctrine by noting another circuit’s ruling that “a trespasser must be deemed to assume the risk that the owner of the property will consent to its search.”277

At this point it is interesting to note the difference between MacMorris and Amezquita. Both opinions were based on the property and probabilistic models. Amezquita, however, referred only fleetingly to the probabilistic model and was quite certain in its ruling on the property model (calling the squatters’ claim “ludicrous”).278 This approach is historically understandable, with Amezquita coming as it did a mere eight years after the Supreme Court declared in Katz that the Fourth Amendment protects people, not places.279 It is also understandable that, 12 years after Amezquita, the MacMorris court would rely on a model other than the property model. Although both models bode poorly for Fourth Amendment applicability, a number of more recent cases suggest that courts are increasingly sympathetic to developing the Fourth Amendment rights of homeless persons.280

3. State v. Dias

The Hawaii Supreme Court decided State v. Dias in 1980, five years after Amezquita, and dealt with squatters who had set up structures on government property, as did the court in Amezquita.281 The differences in these cases are striking, and suggest an evolution away from the property model toward more creative approaches for dealing with homeless defendants.

In Dias, the police received information received from an informant that gambling was taking place in a shack on Sand Island, which is owned by

273 Id. at 11.
274 Id.
275 Id.
276 Id.
277 Id. at 12 n.7.
278 Amezquita, 518 F.2d at 11.
279 See supra notes 77-83 and accompanying text (discussing the Katz decision).
281 Id. at 638.
the State of Hawaii, in an area known as “Squatter’s Row.”\footnote{Id. at 639.} An officer proceeded to the area.\footnote{Id.} After leaving his car, the officer walked to a structure built on stilts and attached to the side of an old bus.\footnote{Id.} As he approached, he heard words that he associated with a game of craps, and when he stood at arm’s length from the door, he was able to see a gaming table through a two to three-inch gap between the two doors.\footnote{Id.} He immediately entered and arrested the defendants.\footnote{Dias, 609 P.2d at 639.} The defendants moved to suppress the officer’s testimony in its entirety, and the trial court granted the motion.\footnote{Id.} The Hawaii Supreme Court affirmed the order of suppression in part and reversed in part.\footnote{Id.}

The court first noted that, while \textit{Amezquita} held that squatters on government property were not protected by the Fourth Amendment, the squatters in \textit{Dias} were in a different position.\footnote{Id. at 639-40.} Unlike the squatters in \textit{Amezquita}, those in \textit{Dias} had not been asked to remove themselves from government property.\footnote{Id. at 640.} This observation led the court to articulate the government acquiescence test:

\begin{quotation}

[W]e have taken judicial notice of the fact that “Squatters’ Row” on Sand Island has been allowed to exist by sufferance of the State for a considerable period of time. . . . we think that this long acquiescence by the government has given rise to a reasonable expectation of privacy on the part of the defendants, at least with respect to the interior of the building itself. This, we think is consistent not only with reason but also with our traditional notions of fair play and justice.\footnote{Id.}

\end{quotation}

The \textit{Dias} court was not constrained to reach this conclusion. It could easily have relied on \textit{Amezquita} to find that the squatters had no Fourth Amendment protection, but it went out of its way to create a new rule in favor of the squatters. The reason why the court did so might be found in the \textit{Katz} evolution away from property and toward privacy.\footnote{See supra notes 77-83 and accompanying text (discussing the \textit{Katz} decision).} Where \textit{Amezquita} relied on the property model, the \textit{Dias} court looked to privacy, noting that “[a] man’s dwelling, generally, is a place where he expects privacy, and . . . he will be deemed to have exhibited an actual expectation of privacy therein.”\footnote{Dias, 609 P.2d at 639.} According to the \textit{Dias} court, a person may satisfy the first half of
the Katz expectation of privacy test simply by subjectively expecting privacy. To satisfy the reasonableness requirement, the Dias court crafted a rule specifically for the squatters. Subsequent cases have not been as novel as Dias, but they have often been just as sympathetic to homeless persons.

4. United States v. Ruckman

This case represents the tension between the pre-Katz property analysis and evolving standards of reasonableness suggested by Dias. The defendant, Ruckman, resided in a cave located northeast of St. George, Utah, on land owned by the United States and controlled by the Bureau of Land Management. Ruckman had lived in and around the cave for about eight months. He had placed wood and other articles on the cave’s opening to form a kind of living quarters, and installed a wooden door. The fact that Ruckman was living in the cave became known to local authorities.

When Ruckman failed to appear in state court to answer a misdemeanor charge, an arrest warrant was issued. Authorities went to the cave to arrest Ruckman, but he was nowhere to be found. They searched Ruckman’s cave and found a number of firearms. At that point, Ruckman appeared on the scene and was arrested. In response to questioning on the scene, he admitted that there was another shotgun in the cave, which the authorities recovered.

Ruckman was taken to jail, and eight days later Land Management agents and local authorities returned to the cave, cleaned it out, and removed Ruckman’s belongings. In doing so, they found anti-personnel booby traps that formed the basis of Ruckman’s prosecution.

The issue in this case was whether Ruckman had a Fourth Amendment right to be free from a warrantless search of his “home,” in this case, a natural cave. The court assumed that Ruckman had an actual expectation of privacy, so its inquiry turned to whether his expectation was reasonable. It concluded that his expectation was not reasonable and based its analysis entirely on the property model.

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294 Id.
295 United States v. Ruckman, 806 F.2d 1471, 1472 (10th Cir. 1986).
296 Id.
297 Id. at 1474 (McKay, J., dissenting).
298 Id. at 1472 (majority opinion).
299 Id.
300 Id.
301 Ruckman, 806 F.2d at 1472.
302 Id.
303 Id.
304 Id.
305 Id.
306 Id.
307 Ruckman, 806 F.2d at 1472.
308 Id. at 1473.
The court stated that “Ruckman was admittedly a trespasser on federal lands and subject to immediate ejectment.” The court went on to say that, because of his status as a trespasser, Ruckman’s subjective expectation of privacy was not reasonable. The court explained that, “[w]hile it has been often stated, the Fourth Amendment protects people, and not places, . . . any determination of just what protection is to be given requires, in a given case, some reference to place. And the place in this instance was on federal [Land Management] land.” The court went on to quote Amezquita, agreeing with its statement that the proposition that a squatter’s right to privacy is reasonable was “ludicrous.”

The Ruckman dissent took the majority to task for its reliance on obsolete pre-Katz precedent. The dissent argued:

[T]he court takes a giant step backward in fourth amendment analysis when it hinges its determination of whether Mr. Ruckman had a legitimate expectation of privacy in his dwelling on whether or not he was a “trespasser.” In the early days of fourth amendment doctrine, property interests were not only a central tenet of search and seizure analysis, they were determinative. Persons aggrieved by searches and seizures needed to prove a property interest in the place searched or item seized superior to that of the Government’s. . . . [A]s our society evolved, the emphasis of the protection we enjoy from unreasonable governmental searches and seizures also evolved. Nearly twenty years ago [in Warden v. Hayden], the Supreme Court recognized this evolution[,] [finding that] . . . the principal object of the Fourth Amendment is the protection of privacy rather than property.

The dissent noted that Katz “cemented this privacy perspective when it disregarded the ‘trespass doctrine’ enunciated in Olmstead and Goldman.” The court explained that, in Katz, the Court established that what a person wishes to preserve as private might be constitutionally protected even when it is kept in an area that is accessible to the public. Summing up, the dissent argued that “[t]o reach its result, the majority in this case, by reverting to discredited notions and obsolete fourth amendment

309 Id. at 1472.
310 Id. at 1473.
311 Id.
312 Id. at 1474.
314 Ruckman, 806 F.2d at 1476-77 (McKay, J., dissenting).
315 Id. at 1477 (referencing Goldman v. United States, 316 U.S. 129 (1942) and Olmstead v. United States, 277 U.S. 438 (1928)).
316 Id. at 1477.
analysis, flies in the face of this evolutionary precedent and of what the fourth amendment attempts to protect for us all.”\textsuperscript{317}

The dissent also seemed to refer to the private-facts model, explaining that Ruckman “‘took normal precautions to maintain his privacy,’ by building a wall with a door of wooden boards and other materials, thereby sealing off the entrance to the cave. All his personal belongings were located therein. The cave was his sole living quarters in every sense.”\textsuperscript{318}

\textit{Ruckman} emerged during a period of change in the Fourth Amendment analysis, and it represents the period well. The majority’s reliance on the property model and the dissent’s admonition to move beyond that and toward a privacy model indicate the tension that existed at that time. This tension toward homeless persons still exists, and, unfortunately, has not been resolved in favor of privacy over property.

5. \textit{Commonwealth v. Cameron}

Cameron was arrested by Philadelphia police for possession of cocaine with intent to deliver.\textsuperscript{319} Cameron had been occupying an abandoned rowhouse that had no running water and had debris and trash thrown all over the place.\textsuperscript{320} The kitchen area had been entirely sealed off from the rest of the house, so one had to go outside in order to enter it.\textsuperscript{321} The windows no longer had glass in them and had been covered with plywood.\textsuperscript{322} There were no bathroom facilities, no cooking appliances, and no electricity.\textsuperscript{323} Cameron occupied a room in this rowhouse, which contained a couch and a working television set, and a police officer observed an “aluminum type foil platter” with food on it sitting on a table.\textsuperscript{324}

A police officer had previously arrested another person at this house, and when he returned the next day the officer observed activity that he believed to be consonant with a drug sale.\textsuperscript{325} He called for assistance, went into the vestibule, and knocked on the inner door, announcing himself as a police officer.\textsuperscript{326} Cameron was in the room and asked him to wait, and through a hole in the door the officer saw Cameron hiding packets of white powder.\textsuperscript{327} When Cameron opened the door the officer conducted a search of the room and found packets of cocaine.\textsuperscript{328}

\textsuperscript{317} \textit{Id.} at 1478.
\textsuperscript{318} \textit{Id.} (citation omitted).
\textsuperscript{320} \textit{Id.}
\textsuperscript{321} \textit{Id.}
\textsuperscript{322} \textit{Id.}
\textsuperscript{323} \textit{Id.}
\textsuperscript{324} \textit{Id.}
\textsuperscript{325} \textit{Cameron}, 561 A.2d at 784.
\textsuperscript{326} \textit{Id.}
\textsuperscript{327} \textit{Id.}
\textsuperscript{328} \textit{Id.}
Cameron claimed that the police officer should have obtained a search warrant before searching the house and he moved to suppress the evidence. The court granted the motion, concluding that Cameron had a reasonable expectation of privacy in the house, based on the presence of food, a couch, and a television. The Superior Court reversed, finding that Cameron had a subjective, but unreasonable, expectation of privacy in the rowhouse.

The court based its Fourth Amendment analysis on the positive-law model informed by the property model, explaining that what is reasonable for an individual is linked with whether the individual has an expectation of privacy from a source other than the Fourth Amendment. These sources, the court explained, were concepts of real or personal property law or . . . understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

The court further noted that the property interest does not necessarily need to be an ownership interest, but there must be a legal basis for arguing that the individual has a right to control that particular area.

The court went on to analyze Cameron’s rights under Pennsylvania’s corollary to the Fourth Amendment—article I, section 8 of the Pennsylvania Constitution. Surprisingly, it rested its state law analysis not on the property model, but on the case-by-case approach. The court gave a rendition of the facts supporting its denial of article I, section 8 applicability, and then concluded that “a television, a couch, and a platter of food are insufficient attributes of a home, and so failed to call the protection against unreasonable searches and seizures into play. We see no reason to extend the protection . . . to such a situation.” The court noted, however, that its holding only extended to the facts of this particular case.

It makes sense that, given the facts in this case, a court could find that Cameron had no Fourth Amendment protection. In interpreting the Pennsylvania Constitution, the court therefore was reasonable to deny such protection. It is interesting, however, that the court did not apply the same case-by-case model to its analysis of the Fourth Amendment itself. As I have

329 Id.
330 Id. at 784.
331 Cameron, 561 A.2d at 786.
332 Id. at 785.
333 Id. at 786.
334 Id.
335 Id.
336 Id.
337 Cameron, 561 A.2d at 787-88.
338 Id. at 787.
suggested above, by 1989, when Cameron was decided, the property model was still prominently used, but was being questioned. Cameron falls squarely within this context. The court, seeking to apply the law, applied the federal law of the time, the property model, to the federal question. As to the state question, the court may have felt more free to depart from the model that Katz said was no longer workable. But with the exception of the probabilistic model, there was no other established approach. There being no settled law, the court fell back to the case-by-case analysis. In this way, the court remained consistent with what it reasonably viewed as federal precedent, but also followed the new precedent laid down in Katz. If it is true that judge-made law percolates slowly up from state and lower federal courts, then Cameron may have represented an early percolation away from the pre-Katz property model and toward a new, undefined model.

6. State v. Mooney

After it was published, State v. Mooney received a great deal of scholarly attention. This makes sense given its subject matter, but based on its analysis of the Fourth Amendment, the level of attention it received is undue.

In 1987, the police sought Mooney for murder after one of the other people involved in the murder implicated him. The police secured an arrest warrant for Mooney and arrested him on August 5, 1987. While he was in custody, a detective met with Mooney’s girlfriend. She took the detective to the place where Mooney had been living at the time of the murder. Mooney had been sleeping on a bridge abutment under an interstate highway that was owned by the state department of transportation.

At the bridge abutment the detective saw a blanket, a rolled-up sleeping bag, a cardboard box, a suitcase, a duffel bag, and trash. Mooney had placed his belongings on the metal and cement beams of the highway support structure, except for the duffel bag, blanket, and trash, which were on the ground. These items were either rolled or closed, and they were

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341 Mooney, 588 A.2d at 150.
342 Id.
343 Id.
344 Id.
345 Id.
346 Id.
347 Mooney, 588 A.2d at 150.
stored, rather than strewn about the space.\(^{348}\) While on the scene, the
detective opened the duffel bag and found a paper bag containing
incriminating evidence.\(^{349}\) He called a police department evidence officer to
the scene and the two officers photographed and tagged all of the items and
then brought them to the police department where they were opened and
searched.\(^{350}\) The cardboard box and duffel bags both contained more
incriminating evidence.\(^{351}\)

Mooney had been living alone under the bridge for one month.\(^{352}\)
Upon leaving every day he secured his belongings to prevent them from
being stolen.\(^{353}\) Mooney returned to the bridge every night to sleep.\(^{354}\) During
this time, Mooney was aware that he was staying on state property and that
other people could enter the area.\(^{355}\) In fact, on one occasion he encountered
a highway worker clearing brush in the area.\(^{356}\)

On appeal to the Connecticut Supreme Court, Mooney argued that
the police violated his Fourth Amendment rights when they “invaded his
home” at the bridge abutment.\(^{357}\) Because the evidence at issue came from
Mooney’s closed containers, the court refrained from deciding whether
Mooney had a reasonable expectation of privacy in the bridge abutment
area.\(^{358}\) It did, however, decide that Mooney had a reasonable expectation of
privacy in his duffel bag and cardboard box.\(^{359}\) To reach its conclusion, the
court made reference to a number of models of reasonableness analysis and
ultimately decided the question based on mainstream Fourth Amendment
precedent dealing with closed containers and abandonment.\(^{360}\)

The court first implicated the property model, stating that “the place
searched is highly relevant to the fourth amendment analysis.”\(^{361}\) It explained
that

\[\text{[l]egitimate expectations of privacy derive from concepts of}
\text{real or personal property law or [from] understandings that}
\text{are recognized and permitted by society. One of the main}
\text{rights attaching to property is the right to exclude others . . .}
\text{and one who owns or lawfully possesses or controls property}\]

\(^{348}\) Id. at 150 n.7.
\(^{349}\) Id. at 150.
\(^{350}\) Id. at 150-51.
\(^{351}\) Id. at 151.
\(^{352}\) Id.
\(^{353}\) Id. at 151.
\(^{354}\) Id. at 150.
\(^{355}\) Id. at 150.
\(^{356}\) Id.
\(^{357}\) Mooney, 588 A.2d at 150.
\(^{358}\) Id. at 152.
\(^{359}\) Id. at 152.
\(^{360}\) Id. at 153.
\(^{361}\) Id. at 152.
will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.\textsuperscript{362} The court, however, recognized that while the property model could be a guide, it could not be dispositive.\textsuperscript{363} It explained that “factors such as whether the defendant was a trespasser and whether the place involved was public ‘are, of course, relevant as helpful guides, but should not be undertaken mechanistically. They are not ends in themselves . . . .”\textsuperscript{364}

Society’s “code of values and its notions of custom and civility”\textsuperscript{365} were also to be considered, as well as a balancing of individual versus governmental interests.\textsuperscript{366} The court also seemed to consider the case-by-case approach and the probabilistic models of analysis, explaining that courts use several factors to determine whether or not a person has a reasonable expectation of privacy, one of which is whether the person left one’s property in an area readily accessible to members of the public.\textsuperscript{367}

Ultimately, the court seems to have favored the case-by-case approach, issuing an opinion with little precedential value. It wrote that “[w]hat this claim does involve . . . is whether the fourth amendment applies to the unique factual circumstances of this case.”\textsuperscript{368} Whatever model it actually used, the court applied the well-established Fourth Amendment precedent dealing with closed containers\textsuperscript{369} and abandonment of closed containers.\textsuperscript{370} The court ultimately refrained from deciding whether Mooney had a reasonable expectation of privacy in the bridge abutment area,\textsuperscript{371} but found that he did have a reasonable expectation of privacy in his closed containers, which was violated by the police search.\textsuperscript{372}

There are three reasons why \textit{Mooney} does not provide much guidance to this article. First, the court refrained from ruling on whether Mooney’s living quarters were a Fourth Amendment home. Second, the court’s analysis of Mooney’s Fourth Amendment rights over his closed containers rested on well-established precedent. Third, the court made clear that its ruling addressed the narrow facts of the case before it, and thus limited its application in other factual contexts. \textit{Mooney}, however, does suggest that courts in its time were moving away from reliance on the property model and toward other, more creative models. This case was important because it applied traditional case law on closed containers and abandonment, but did so while departing from traditional concepts of

\begin{itemize}
\item \textsuperscript{362} \textit{Id.} at 153 (quoting \textit{Rakas v. Illinois}, 439 U.S. 128, 144 n.12 (1978)).
\item \textsuperscript{363} \textit{Id.}
\item \textsuperscript{364} \textit{Id.} at 153-54.
\item \textsuperscript{365} \textit{Mooney}, 588 A.2d at 153.
\item \textsuperscript{366} \textit{Id.}
\item \textsuperscript{367} \textit{Id.} at 153.
\item \textsuperscript{368} \textit{Id.} at 155.
\item \textsuperscript{369} \textit{Id.} at 154.
\item \textsuperscript{370} \textit{Id.} at 155.
\item \textsuperscript{371} \textit{Mooney}, 588 A.2d at 155.
\item \textsuperscript{372} \textit{Id.}
\end{itemize}
reasonableness. It would have been easy for the court to rely on the property model to defeat Mooney’s Fourth Amendment claim. That it did not do so suggests the court’s recognition that Katz’s admonition on privacy and places had become the law and, more importantly for this article, that homeless people have rights that require novel approaches. Although the property model was still widely used, Mooney suggested that in the post-Katz evolution of the Fourth Amendment, homeless persons would have a chance to successfully assert their rights.

7. D’Aguano v. Gallagher

In D’Aguano v. Gallagher, the plaintiffs were four homeless people who had been living on undeveloped, privately owned land in Orange County, Florida. Neither the property owner nor the manager were aware that the plaintiffs were living on the land and both stated that they did not give the plaintiffs permission to be there. Although the manager stated that he had posted “no trespassing” signs in the past, all of the plaintiffs denied ever seeing them.

The defendants in this case were a sheriff and several deputy sheriffs. They visited the campsite at least once a month, asked for identification from the plaintiffs, and repeatedly told at least three of the plaintiffs to leave the property. Ultimately, the defendants entered the campsite and removed the plaintiffs’ shelters and their personal property. When the owner of the land learned of the sheriff’s actions, she said that she was grateful that the defendants worked to help keep people who she viewed as “trespassers” off of her land.

Plaintiffs sued the defendants, alleging, among other things, a violation of their right against unreasonable searches and seizures. The district court granted defendants’ motion for summary judgment, concluding that they were entitled to qualified immunity on the plaintiffs’ Fourth Amendment claim. On appeal, the Eleventh Circuit Court asked whether the defendants’ conduct violated a clearly established right of which a reasonable person would have been aware. The court found that the plaintiffs had not clearly established that their expectation of privacy was reasonable. While they advanced case law that established a general right

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373 D’Aguano v. Gallagher, 50 F.3d 877, 878 (11th Cir. 1995).
374 Id.
375 Id.
376 Id. at 878.
377 Id. at 878-79.
378 Id. at 879.
379 D’Aguano, 50 F.3d at 878.
380 Id. at 879.
381 Id.
382 Id.
383 Id. at 880.
to privacy, they did not cite any authority “which recognizes a person’s right to privacy when he lives or stores his belongings on private property without the landowner’s permission.”384

Because of its posture, this case does not say much about this court’s treatment of homeless persons’ Fourth Amendment rights. It does, however, raise some interesting questions, which will be discussed further below. Residents of homeless shelters are on private property at the invitation of the landowner. At the invitation of the shelter, they often store their belongings in lockers, offices, or other areas, and may leave these belongings in these areas during the day when they leave the shelter. In the case of homeless shelters, therefore, residents are more likely to have Fourth Amendment protections than the plaintiffs did in *D’Aguano*. This makes sense because shelter residents have a greater right to be in the shelter than the *D’Aguano* plaintiffs had to be on the land. Homeless shelters are also more likely to have more of the trappings of “home” than did the *D’Aguano* plaintiffs’ “homeless campsite”—bathroom and shower facilities, heat or air conditioning, beds, a kitchen and provisions of food, and common areas with books, radio, television, and other amenities. To what extent do shelter residents have Fourth Amendment rights? Are their belongings protected? What about their sleeping areas? Are these items and areas protected at only specific times under specific circumstances? What effect does a locker have on protecting residents’ belongings? What if a resident’s bed has drawers underneath it or comes with a dresser? Are these receptacles protected? These questions, and more, are raised because homeless persons are invited into shelters, given a temporary home, and are allowed to bring their belongings and closed containers into the shelter, but they are unlikely to be successful given *D’Aguano*-type fact patterns. These will be the questions explored below.

8. People v. Thomas

In *People v. Thomas*, two Los Angeles Police Department officers responded to the report of a burglary at a clothing manufacturer.385 The officers searched the premises and found clear plastic bags of denim clothing stacked near a window.386 Earlier that morning the same officers had observed a group of men at a nearby corner examining some denim clothing.387 The officers made the connection between the burglary and their observation of the men on the corner. Accordingly, they proceeded to the same corner, where they found several homeless people in blankets, boxes, or makeshift shelters.388 The officers approached one box, banged on it, said

384 *Id.*
386 *Id.*
387 *Id.* at 611-12.
388 *Id.* at 612.
“police,” waited a few seconds, then lifted a corner of the box and observed a clear plastic bag of denim clothing and the defendant, Thomas, asleep next to a woman. Thomas explained that the clothing was in his possession because a friend had “ripped it off.” After the bags of denim cloth were identified as bags from the burglary of the clothing manufacturer, Thomas was arrested and charged with receiving stolen property.

Thomas moved to suppress the evidence found in the box. He testified that he had lived in a 4-by-12 foot structure made of wooden pallets and heavy cardboard for 17 months. The structure protruded onto the sidewalk and did not have electricity, other utilities, or locks. Thomas admitted that he did not have a permit to be living in the structure at the location, and he also admitted that he had not paid rent or taxes on the property. The trial court found that his sidewalk residence constituted a violation of the Los Angeles Municipal Code. The trial court denied Thomas’s motion to suppress, finding that Thomas had an unreasonable expectation of privacy.

The appeals court affirmed, basing its analysis solely on the positive-law model. It held that “[w]here, as here, an individual ‘resides’ in a temporary shelter on public property without a permit or permission and in violation of a law which expressly prohibits what he is doing, he does not have an objectively reasonable expectation of privacy.”

This case demonstrates Orin Kerr’s observation that courts will use various models of reasonableness depending on the factual circumstances with which they are presented, and that it is appropriate that they do so. Perhaps for the sake of judicial efficiency, this court used the positive-law model to dispense quickly with Thomas’s Fourth Amendment argument, and reached a reasonable result. The positive-law model probably would not be applicable in a homeless shelter, since a homeless person’s presence there does not, on its own, violate any positive law. In analyzing the Fourth Amendment’s applicability in shelters, therefore, we can be quite certain that the positive-law model will not be used.

389 Id.
390 Id.
391 Thomas, 45 Cal. Rptr. 2d at 612.
392 Id.
393 Id.
394 Id.
395 Id.
396 Id.
397 Thomas, 45 Cal. Rptr. 2d at 612.
398 Id. at 613.
399 See supra notes 94-119 and accompanying text.
400 See supra notes 111-115 and accompanying text.
9. Pottinger v. City of Miami

In *Pottinger v. City of Miami*, the plaintiffs were members of a class of approximately 6,000 homeless persons living in Miami.\(^{401}\) The plaintiffs alleged that the city had routinely seized their property, destroyed it, and failed to follow city inventory procedures when it seized property belonging to homeless persons.\(^{402}\) Pursuant to 42 U.S.C. § 1983,\(^{403}\) the plaintiffs claimed that the arrests of homeless persons and the seizures of their property amounted to unreasonable searches and seizures in violation of the Fourth Amendment.\(^{404}\)

The plaintiffs included homeless adults and children who lived in public areas in Miami.\(^{405}\) The homeless persons’ property in question included bedrolls, blankets, clothing, toiletries, food, identification, and the items used to hold and transport the property.\(^{406}\) The court noted that police officers and city workers assigned to the areas where homeless persons congregate should recognize the types of property that belong to homeless persons.\(^{407}\) The court explained that homeless persons often arrange their belongings in a way that suggests ownership, making it distinguishable from abandoned property.\(^{408}\)

Between 1987 and 1990, the City of Miami arrested thousands of homeless persons for misdemeanors.\(^{409}\) The majority of the arrests did not involve disorderly conduct, drug activity, or harm to others.\(^{410}\) Instead, most of the arrests involved obstructing a sidewalk, loitering, or being present in a park after hours.\(^{411}\) During one incident in 1988, a group of about 15 homeless persons was arrested, taken to jail, and detained for an hour while being checked for outstanding warrants.\(^{412}\) When they returned to where they were arrested, their belongings were gone.\(^{413}\) As a result of this type of police conduct, the plaintiffs alleged that the city engaged in a pattern and practice of seizing and destroying their personal property or forcing them to abandon it at arrest sites in violation of the Fourth Amendment.\(^{414}\)

The court found that the plaintiffs’ property rights were protected by the Fourth Amendment.\(^{415}\) On appeal, the Eleventh Circuit seemed to

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\(^{402}\) *Id.* at 1554.


\(^{404}\) *Pottinger*, 810 F. Supp. at 1554-55.

\(^{405}\) *Id.* at 1557.

\(^{406}\) *Id.* at 1559.

\(^{407}\) *Id.*

\(^{408}\) *Id.* at 1559.

\(^{409}\) *Id.*

\(^{410}\) *Pottinger*, 810 F. Supp. at 1559-60.

\(^{411}\) *Id.*

\(^{412}\) *Id.* at 1560.

\(^{413}\) *Id.*

\(^{414}\) *Id.* at 1570.

\(^{415}\) *Id.*
agree.\textsuperscript{416} The district court had little difficulty finding that the plaintiffs exhibited a subjective expectation of privacy in their belongings.\textsuperscript{417} The court noted that several factors are useful in determining whether an expectation of privacy is reasonable.\textsuperscript{418} It explained that “[t]he two most relevant factors are whether the person occupying the property is a trespasser . . . and whether the property is left in a manner readily accessible and exposed to the public.”\textsuperscript{419} The court then looked to \textit{Mooney} and noted that, while the property model was a helpful guide, it was not to be undertaken mechanistically.\textsuperscript{420}

Although the court suggested that it was relying on the property and probabilistic models, it then took a novel turn in its analysis. After considering the property model (and apparently ignoring the probabilistic model) the court looked to the “circumstances of this case” to find that “society is prepared to recognize plaintiffs’ expectation” as reasonable.\textsuperscript{421} It then explained: “Having determined that plaintiffs have a legitimate expectation of privacy in their personal property, the next consideration is whether the government’s interest in searching or seizing the property of homeless individuals outweighs the individuals’ expectation of privacy in their property.”\textsuperscript{422}

This analysis is interesting for three reasons, two of which directly impact this article. First, the court was largely uninterested in the property model beyond what appeared to be perfunctory mention of it. Second, the court ignored the one model—the probabilistic model—that could have worked against plaintiffs’ Fourth Amendment rights. These two observations suggest that by the early 1990s, there had developed in some courts a level of sympathy toward homeless persons vis-à-vis their Fourth Amendment rights. Third, this court felt it necessary to consider a number of reasonableness models in proto-procession. Even when it had decided that the plaintiffs’ expectation of privacy was reasonable, it still engaged the balancing model. This may suggest a further disengagement from the once-monolithic pre-\textit{Katz} property model. This observation, therefore, also suggests that courts were becoming more open to Fourth Amendment claims of homeless persons.

\textsuperscript{416} Pottinger v. City of Miami, 40 F.3d 1155 (11th Cir. 1994). The Eleventh Circuit Court of Appeals remanded the case because the facts of the case had materially changed since the district court’s decision. \textit{Id.} at 1157.

\textsuperscript{417} \textit{Pottinger}, 810 F. Supp. at 1571.

\textsuperscript{418} \textit{Id.}

\textsuperscript{419} \textit{Id.}

\textsuperscript{420} \textit{Id.} at 1572.

\textsuperscript{421} \textit{Id.}

\textsuperscript{422} \textit{Id.}
10. Love v. City of Chicago

The plaintiffs in this case were a number of homeless persons living in Chicago’s Lower Wacker Drive area. They filed suit in January 1996, alleging that for several years the City had had a policy of seizing or destroying homeless persons’ property when the City cleaned the area. They claimed that such behavior violated their Fourth Amendment rights.

After the plaintiffs filed their lawsuit, the City suspended the cleanings in question and later adopted temporary procedures so that the cleanings could resume. Key parts of the temporary procedures included: at least 12 hours in advance of cleanings, the City was required to post signs publicizing the cleaning; the Department of Human Services had to attempt to give oral notice of the cleanings; during the 12-hour period before the cleaning, homeless residents of the area could move their possessions to safe areas where their belongings would not normally be removed; when workers arrived to clean, homeless persons who had not moved their belongings were to be given 20 minutes to move them to a place already cleaned.

For 18 months, the City complied with the temporary procedures. Then, in late November 1997, the City issued a construction permit to a building on Lower Wacker Drive, which required the homeless to relocate. During the relocation and cleanup, some residents placed items in a safe area to keep them away from the areas cleaned by the City. Since these items obstructed pedestrian and vehicular traffic, the officers supporting the cleanup decided to discard these items. Many of the personal belongings discarded were intermingled with items that the City had every right to discard, such as items that were obstructing the public way. These items were also possibly stored in a way such that vermin, other pests, and human waste were among the items. After this cleaning, the City consistently followed the temporary procedures. With the exception of that cleaning, the plaintiffs lost almost no property during the cleanings.

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424 Id. at *1.
425 Id.
426 Id.
427 Id.
428 Id. at *2.
430 Id. at *4.
431 Id. at *5.
432 Id. at *6.
433 Id.
434 Id.
436 Id.
437 Id.
The court first denied plaintiffs’ request for a preliminary injunction, finding that it was the City’s policy, custom, and practice to abide by the temporary procedures, and to leave untouched any materials stored in the safe areas unless they presented an imminent threat to public health or safety. The court then inquired whether the temporary procedures resulted in an unreasonable seizure of plaintiffs’ property and meaningfully interfered with their reasonable expectation of privacy in those belongings. The court applied a balancing test, stating that “[a] seizure is unreasonable if the government’s legitimate interest in the seizure is outweighed by the individual’s interest in the property seized.” The court found that the City’s procedures were “minimally intrusive, and effective in preserving the belongings of the homeless,” and therefore did not indicate a Fourth Amendment violation.

The facts in this case and the court’s decision to deny plaintiffs’ Fourth Amendment rights could have led it to rely upon, or at least mention, the property model. That it did not may indicate that the balancing test was more applicable; it could also indicate the court’s acknowledgement that the property model was no longer good law, especially when dealing with homeless persons. Since courts have not been hesitant to use a variety of models, as the profiled cases above and Orin Kerr’s observations suggest, the latter possibility may be more likely. If this is the case, then Love represents the evolution of Fourth Amendment law away from property and toward an analysis that better analyzes homeless persons’ Fourth Amendment rights. In Love, the balancing test achieved that because the court acknowledged that the City and the homeless persons had legitimate interests. If the City’s policy had taken the homeless persons’ interests into account, the court would probably have found in favor of the plaintiffs. The lesson here may be that, going into the twenty-first century, courts will begin to treat homeless individuals as persons, rather than homeless persons, for Fourth Amendment purposes. If this is the case, then a mechanistic application of the property model will no longer suffice, and an assumption that homeless persons may have Fourth Amendment rights to their belongings and “homes” will be the starting point. The law in this area is still unsettled, however, and courts can develop this area by applying settled Fourth Amendment paradigms.
V. THIRD-PARTY CONSENT

The fundamental issue pertaining to homeless shelter residents’ Fourth Amendment protections in shelters is whether and to what extent shelter staff can consent to a search of various physical areas of the shelter. As an initial matter, no one should reasonably suggest that shelter staff and residents do not have Fourth Amendment rights in shelters. It should be clear that police officers cannot simply enter and search shelters when they please and without restriction. If shelters are not homes for Fourth Amendment purposes, they are at least quasi-businesses, whose inhabitants are protected therein by the Fourth Amendment. Therefore, the question is not whether shelters are sites of Fourth Amendment protection, but the inquiry is: what are the contours of that protection within shelter walls?

Like a business, government agents ought not to be prohibited under the Fourth Amendment from passing through the entrance of a shelter into a common waiting area or foyer. The public at large is invited into this area, so people found there should have no reasonable expectation of privacy under the Fourth Amendment. Staff and residents alike in these areas should expect Fourth Amendment protection only to the extent that someone on a public sidewalk would expect it.

Passing into this common area or foyer, the government agent will soon come upon a shelter staff member, who normally should have the power, like any business owner or agent of the owner, to prevent the government agent from proceeding further into areas that may be private or “common” only among shelter staff and residents. This staff member is what I will call the “gatekeeper,” because this staff member controls who enters and who does not enter. If the Fourth Amendment protects residents of homeless shelters, the government agent will have to somehow get past this gatekeeper. The question of the Fourth Amendment’s applicability to residents in shelters is what I call the “gatekeeper question”: whether and to what extent shelter staff can consent to a search of various physical areas of the shelter as against the resident.

The question is one of consent because if a government agent presents the gatekeeper with a warrant, or if exigent circumstances or any other exception to the warrant requirement exist, then there is no question that the agent can enter the shelter despite the gatekeeper’s protestations because, under such circumstances, the government agent can search even the most traditional of Fourth Amendment homes.445 When the agent must rely on consent, the gatekeeper question is raised.

While the gatekeeper question is the most interesting question concerning shelter residents’ Fourth Amendment protections, there is another question. In order to perform a search on resident B, the government agent

may theoretically obtain consent from resident A, who shares a room in a shelter with resident B. The question of resident B’s Fourth Amendment protections is, I think, easily answered by reference to third-party consent cases that deal with common authority under Matlock, and other cases, and clarify that the scope of common authority excludes areas that are under the exclusive control of the target of the search. Application of Matlock and these other cases depends, of course, on the government agent gaining access at all to the residents’ room, which will lie beyond the gatekeeper and which therefore refers us back to the gatekeeper question.

Another question concerns the extent to which a resident may consent to the search of a shelter as against a staff member. Because this article deals with the Fourth Amendment rights of residents, this question is beyond the scope of this article. I will, however, mention that this question can probably be answered by looking, once again, to Matlock’s common authority and the scope of that common authority to exclude areas under the exclusive control of the target of the search. If the resident consented to a search as against a staff member, the government agent would likely hope to search the staff member’s office, sleeping quarters (if the staff member resided at the shelter), or other non-common area. These areas would likely be under the exclusive control of the staff member, and the government agent would probably be aware of this. The consenting resident would lack common authority to consent to this search, and the consent would therefore be ineffective.

We are left with the gatekeeper question. In the next section, I describe a number of shelters, raise the Fourth Amendment questions that they present, and apply current Fourth Amendment law to predict answers to these questions. For the remainder of this section, I discuss the Fourth Amendment law that should be applicable. This discussion will be in depth but preliminary; a fuller application of this law to the specific shelters will be pursued in the next section.

A. Simple Third-Party Consent

Third-party consent jurisprudence began in 1914 with Weeks v. United States. Weeks was arrested and taken into custody by police officers at his house after someone in the house, most likely a boarder, admitted them. During the warrantless search, the police found

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446 See infra notes 450-508 and accompanying text.
447 United States v. Isom, 558 F.2d 858, 861 (2d Cir. 1978); United States v. Block, 590 F.2d 535, 540 (4th Cir. 1978).
448 See infra Part VI.
449 See infra Part VI.
451 Id. at 386.
incriminating evidence.\(^452\) The Court held that the evidence was taken from Weeks's house in violation of his constitutional rights.\(^453\) Then, in 1961, the Court decided *Chapman v. United States*, in which police officers received consent to search defendant Chapman's dwelling house from his landlord.\(^454\) The Court found that this search was unlawful.\(^455\)

Third-party consent in the United States Supreme Court took further shape in *Stoner v. California*, which concerned a defendant whose rented hotel room was searched by police with the consent of the hotel's night clerk.\(^456\) Holding that the search was unlawful,\(^457\) the Court reasoned that the police did not have any basis to believe that the defendant gave the night clerk permission to allow the police to search his room.\(^458\) This holding reflected the holding of the Hawaii Supreme Court in 1962 that a wife may normally consent to a search of the home she holds “in joint control” with her husband, where the search is against her husband.\(^459\) In that case, the court held that the defendant’s wife did not have the “implied authority” to consent to a police search of her husband’s cuff link case.\(^460\)

The notion of authority to consent to a search appeared again in 1969 in *People v. Fry*.\(^461\) In that case, police gained entry into a defendant’s house twice while he was in police custody.\(^462\) The defendant’s wife’s allowed the police to enter the house the first time, and the court found that their entry was legal because it was reasonable for the police to believe she had authority to admit the police.\(^463\) While they were inside the house, the police asked the defendant’s wife to sign a form consenting to a police search of the house.\(^464\) She refused, stating that her husband had told her not to let anybody search or enter the house.\(^465\) Later the same day, officers again came to the house to impound certain items, and the defendant’s wife permitted the officers to enter the house and seize and impound the items.\(^466\) The police officers’ request to enter and impound items was made with the knowledge that the husband told the wife not to allow anyone to enter or search the house.\(^467\) Since the officers knew that the wife had no authority to consent to

\(^{452}\) *Id.*

\(^{453}\) *Id.* at 398.


\(^{455}\) *Id.* at 618.


\(^{457}\) *Id.* at 490.

\(^{458}\) *Id.* at 489.


\(^{460}\) *Id.* at 372.


\(^{462}\) *Id.* at 722-23.

\(^{463}\) *Id.* at 723.

\(^{464}\) *Id.* at 722.

\(^{465}\) *Id.*

\(^{466}\) *Id.* at 723.

\(^{467}\) *Fry*, 76 Cal. Rptr. at 723.
their entry, search, and seizure, the court found that the entry was unlawful.\footnote{Id. at 723-24. It will be noted later that \textit{Georgia v. Randolph} will overturn this finding, holding instead that for a person to effectively object to a police search conducted with the consent of a third party, that person must be present at the scene to object. 547 U.S. 103 (2006).}

In \textit{Frazier v. Cupp} the Court further discussed the related notions of joint control and authority.\footnote{Frazier v. Cupp, 394 U.S. 731 (1969).} In \textit{Frazier}, the Court considered a police search of a duffel bag, used jointly by petitioner and a man named Rawls, when Rawls consented to the search of the bag.\footnote{Id. at 740.} The Court wrote that “[s]ince Rawls was a joint user of the bag, he clearly had authority to consent to its search.”\footnote{Id.} Frazier argued that Rawls had permission to use one part of the bag, but did not have permission to use the other parts of the bag.\footnote{Id.} To this contention, the Court stated the oft-repeated passage:

\begin{quote}
We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls’ consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside.\footnote{Id.}
\end{quote}

By 1970, then, it had become settled law that the “right of one party to consent to a search which affects the interest of another derives from the consenting party’s equal right of possession or control of the same premises or property as the other.”\footnote{Cabey v. Mazurkiewicz, 431 F.2d 839, 842 (3d Cir. 1970); see also Commonwealth v. Martin, 264 N.E.2d 366, 369 (Mass. 1970) ("One having equal authority over premises may authorize a search of them.").} Where it was difficult to determine whether or not a third party had authority to consent because of the facts of the case, as in \textit{Frazier}, courts have found that the defendant assumed the risk that the third party would consent to a search.\footnote{See, e.g., Frazier v. Cupp, 394 U.S. 731, 740 (1969).} This state of affairs would be clarified in future cases in which a third party holding actual common authority could effectively consent,\footnote{See, e.g., United States v. Matlock, 415 U.S. 164, 170 (1974).} as could a third party holding apparent common authority.\footnote{Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990).}

In \textit{United States v. Matlock}, the Court considered a case in which police received consent from a woman named Mrs. Graff to search a bedroom in a house.\footnote{Matlock, 415 U.S. at 164.} The bedroom was occupied jointly by Mrs. Graff and the petitioner, Matlock.\footnote{Id. at 166.} Mrs. Graff and Matlock had been sleeping together in the bedroom regularly, and they shared the use of a dresser in the
room. The Court established the “common authority” rule, 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.”

The Court went on to note:

The authority which justifies the third-party consent . . . rests . . . 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-habitants 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.

Since *Matlock*, courts have liberally applied the twin notions of joint access and assumption of risk to determine that third parties have common authority to consent to searches.

While *Matlock* said nothing about the right of a person who is present to object to consent given by a third party, this question had been raised in some courts. The Florida Supreme Court, for example, stated that “a joint occupant should have authority to consent to a search of jointly held premises if the other party is unavailable, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another.” In so holding, the Florida Supreme Court predicted the outcome in *Georgia v. Randolph* 29 years later. Other courts at the time were not so prescient. In one of its cases, the Sixth Circuit noted in dicta that an appellant’s initial refusal to consent in no way lessened the risk that his co-occupant would consent.

If it were unclear or undefined before, the Second Circuit gave a name to the notion, discussed in *State v. Evans*, that a third party cannot consent to the search of another person’s private belongings. In *United States v. Isom*, the court considered the consent of a homeowner to search a locked metal box belonging to Isom, who resided with the homeowner “from time to time.” The court explained that “the consent of the host should ordinarily be insufficient to justify a warrantless search when it is obvious that the searched item is the exclusive property of the guest.” This notion of “exclusive” authority was seconded by the Fourth Circuit when it wrote that third-person consent “cannot validate a warrantless search when the circumstances provide no basis for a reasonable belief that shared or

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480 *Id.* at 168.
481 *Id.* at 170.
482 *Id.* at 171 n.7.
483 Silva v. State, 344 So. 2d 559, 562 (Fla. 1977).
487 United States v. Isom, 588 F.2d 858, 860-61 (2d Cir. 1978).
488 *Id.* at 861.
exclusive authority to permit inspection exists in the third person from any source. The court stated:

While authority to consent to search of a general area must obviously extend to most objects in plain view within the area, it cannot be thought automatically to extend to the interiors of every discrete enclosed space capable of search within the area . . . each such enclosed space stands on its own bottom for this purpose.

Based on the above cases, it is clear that a proper analysis of common authority for a third party to consent considers every enclosed space individually. The third party may have common authority to consent to a search of a house’s foyer and living room, but not to a bedroom used only by the subject person of the search. If the third party and the subject person share a bedroom, the third party may have common authority to consent to its search, but may not have authority to consent to the search of a closet that only the subject person uses. If both people share that closet, the third party may not have common authority to consent to the search of a shoebox over which the subject person exercises exclusive authority. Each enclosed space, be it a room or a container, must be analyzed on its own, and a third party can consent to its search only if the third party has common authority over it.

In 1990, in Illinois v. Rodriguez, the United States Supreme Court added the doctrine of apparent authority to Matlock’s actual common-authority doctrine. In Rodriguez, the Court held:

[Determination of consent to enter must “be judged against an objective standard: would the facts available to the officer at the moment . . . ‘warrant a man of reasonable caution in the belief’” that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

Rodriguez added nothing to change the underlying structure of third-party consent law: one who has (or, now, appears to have) common authority, meaning joint access or control, over an area or container may effectively consent to its search as against another person who also has joint

490 Id. at 541.
491 A number of cases illustrate this point. See, e.g., United States v. Aghedo, 159 F.3d 308, 311 (7th Cir. 1998) (holding that even if the third party had authority to consent to the search of a bedroom, she did not have authority to consent to search under the mattress in the bedroom); United States v. Welch, 4 F.3d 761, 764-65 (9th Cir. 1993) (holding that a male third party could not effectively consent to a search of a purse in the truck of a car he had rented with his girlfriend); United States v. Kelley, 953 F.2d 562, 566 (9th Cir. 1992) (holding that a third party had authority to consent to a search of petitioner’s bedroom and closet).
493 Id. at 188-89 (citation omitted).
This is still the law, to the extent it applies. In 2006, however, the Supreme Court issued its decision in Georgia v. Randolph, which limited Matlock and Rodriguez by establishing that “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.” The meaning of this case is still under debate, but it is clear that the subject person of a search, if present and actively objecting to a search consented to by a third party, normally remains protected.

In Randolph, an officer asked petitioner Scott Randolph for permission to search Randolph’s house. When Scott refused permission the officer turned to Scott’s wife, Janet Randolph, and asked her for consent to search, which she gave. Prior to this incident, Scott and Janet had been living together in the house, although they had recently separated and Janet was currently living elsewhere. The Court acknowledged that none of its co-occupant consent-to-search cases had “presented the . . . fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained.”

In assessing Randolph’s claim, the Court stated that “[t]he constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations.” In its opinion, the Court repeatedly referred to custom, social practice, and “customary social usage” to determine the reasonableness of a search. The Court explained that “there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.” Because there is “no societal understanding of superior and inferior” authority among disagreeing tenants, one tenant’s objection to a police search must protect him against consent given by a co-tenant. In the

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494 Id.


496 Id. at 111.

497 Id. at 107.

498 Id. at 109.

499 Id. at 111.

500 Id. at 112, 114, 121.

501 Id.

502 Randolph, 547 U.S. at 114.

503 Id. The Court did not, however, claim that superior or inferior relationships are never present. Such relationships may exist where “the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades.” Id.
end, the Court narrowly held that “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.”

What significance *Randolph* will have for this area of law is not yet settled. In one case, a court strictly interpreted *Randolph*’s holding, holding that *Randolph* did not apply because the defendant “and his wife were not standing together at the doorway, one consenting to the search while the other refused.” Another court suggested that a defendant need only be generally present and objecting, stating that “there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant’s permission [to consent] when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant’s contrary indication when he expresses it.” Yet another court read *Randolph* liberally, finding that a search was illegal where the defendant was physically present in his home and objecting, but was later removed by the police, at which point the police obtained consent to search from the defendant’s co-tenant.

*Randolph* adds a layer to the question of the Fourth Amendment’s applicability to residents of homeless shelters. Prior to *Randolph*, a shelter staff member’s consent to search would probably be effective for all areas of the shelter except those areas under the exclusive control of the shelter resident. These areas would certainly consist of the resident’s personal belongings of which the resident retains possession. These areas could also possibly include a dresser assigned to the resident alone, or a locker assigned to the resident. There would be little question, however, that the staff member could consent to the search of common areas, bathroom or shower areas, and dorm-style sleeping rooms. There would also be little doubt that a resident’s objection to such searches would be ineffective to protect him or her. Under *Randolph*, it is possible that in some cases, a resident of a homeless shelter could effectively object to a staff member’s consent to search even common areas of a shelter. As a result of the Court’s claim in *Randolph* that “there is no societal understanding of superior and inferior” relationships, *Randolph* could undercut arguments that shelter staff occupy a superior relationship in a shelter and so have more control to consent to searches. On the other hand, the recognized hierarchy separating shelter staff and residents could mean that residents have less power to object to a staff member’s consent to search. At the very least, third-party consent law both

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505 *Id.* at 121.
506 United States v. DiModica, 468 F.3d 495, 500 (7th Cir. 2006).
507 United States v. Groves, 470 F.3d 311, 321 (7th Cir. 2006).
509 See supra notes 450-494 and accompanying text (discussing the law before *Randolph* was decided).
510 *Randolph*, 547 U.S. at 114.
prior and subsequent to *Randolph* raise interesting questions in the shelter setting. These questions will be explored further in the next section.

At this point, it is evident that the power to consent or object to police searches of homeless shelters depends upon how courts view shelter residents. Are they “residents,” thus suggesting that the shelter is their home for Fourth Amendment purposes? Are they business invitees, taking advantage of the services of an organization? Are their relationships with shelter staff similar to those between tenants and landlords, children and parents, guests and hosts, bailors and bailees, or employees and employers? Residents of homeless shelters and shelter staff do not clearly occupy any of these relationships. Thus, basic third-party consent law as well as the law concerning these relationships can only suggest Fourth Amendment applicability to shelter residents in shelters. Since this law is unsettled and Fourth Amendment law is fact-driven, a resolution of this issue will depend largely on courts’ assumptions concerning homeless persons. The first part of this article argues that shelters are often residents’ homes for Fourth Amendment purposes.511 Negative stereotypes of homeless persons may prevent courts from recognizing these shelters’ status as Fourth Amendment homes. There should, therefore, be a jurisprudential framework to guide courts’ analyses, and the law concerning the relationships listed above provides that framework.

**B. Parental-Consent Cases**

Cases in which a parent consents to the search of a place occupied by a son or daughter may be particularly helpful in determining whether, and to what extent, shelter residents are protected against consent provided by shelter staff. The reason these cases may be helpful is not because residents are similar vis-à-vis staff to children vis-à-vis their parents—such a comparison would be paternalistic and, worse, inconsistent with the actual situation of many homeless persons who are mature adults who through no fault of their own are homeless. Rather, these cases may be helpful because they deal with a person (the parent) who controls the home in which another person (the child) resides, and this other person often lives in the home intermittently and without paying rent. This being the case, the parent often has access to the child’s bedroom to clean and perform other functions consistent with running a household. These realities—intermittent residence, no provision of rent, property supervisor’s control of the property, and nature of his or her access to the occasional resident’s living quarters—are often the realities for residents of homeless shelters.512

511 See supra notes 2-8 and accompanying text.
512 See infra Part VI (providing specific information about seven different homeless shelters).
In an early parental-consent case, *State v. Kinderman*, the Minnesota Supreme Court considered whether a father could consent to a police search of his 22-year-old son’s room.513 The police searched the son’s room and found incriminating evidence in the closet underneath some clothes.514 In finding the father’s consent effective, the court stated:

> [I]f a man’s house is still his castle in which his rights are superior to the state, those rights should also be superior to the rights of children who live in his house. We cannot agree that a child, whether he be dependent or emancipated . . . has the same constitutional rights of privacy in the family home which he might have in a rented hotel room. . . . [T]he protection afforded to the child must be viewed in light of the father’s right to waive it.515

The Washington Supreme Court cited *Kinderman* favorably when it considered whether a mother could consent to the search of her 24-year-old son’s bedroom.516 The court noted that the son was visiting his mother, paid no rent, and the mother “maintained exclusive possession and control of the house, including the bedroom” that her son was occupying.517

The apparent view of these state courts—that parents have the right to consent to a search of any part of their homes, and children residing therein have no privacy rights of their own—was echoed in many cases.518 In a number of these cases, the child was an occasional resident and paid little or no rent.519

In a 1978 case, *United States v. Block*, the Fourth Circuit issued a parental-consent decision that considered a mother’s consent to search the room of her 23-year-old son.520 Officers found incriminating evidence in plain view and also forced open a foot locker in the room, which revealed

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513 State v. Kinderman, 136 N.W.2d 577 (Minn. 1965).
514 Id. at 579.
515 Id. at 580.
517 Id. at 961.
518 See, e.g., United States v. Wright, 564 F.2d 785, 790 (8th Cir. 1977) (holding that despite the mother’s denial, after the search, that she had access to her son’s dresser, her consent to search the dresser was effective); United State v. DiPrima, 472 F.2d 550, 551 (1st Cir. 1973) (holding that the mother’s consent to search her son’s room was effective because she had use of the closet); United States v. Mix, 446 F.2d 615, 618 (5th Cir. 1971) (holding that the mother’s consent to search her son’s closet and chest of drawers was effective); Grant v. State, 589 S.W.2d 11, 13 (Ark. 1979) (holding that the foster parent’s consent was effective to search foster son’s room, where son paid board and everything in the room belonged to the son); Jones v. State, 283 A.2d 184, 187-88 (Md. Ct. Spec. App. 1971) (holding that the mother had “sole control, power and superior right to exclude others, including [her son], from her home, and also from the bedroom that [her son] used.” Thus, she could consent to a search of the bedroom.); Mears v. State, 190 N.W.2d 184, 188 (Wis. 1971) (holding that the mother had the right to consent to a search of the premises of her home).
519 DiPrima, 472 F.2d at 551; Mix, 446 F.2d at 618; Jones, 283 A.2d at 185; Mears, 190 N.W.2d at 186.
520 United States v. Block, 590 F.2d 535, 537 (4th Cir. 1978).
more evidence.521 The trunk had been in the son’s possession for approximately ten years, was kept in his room, was locked when he was away, and his mother had no way to open it.522 Basing its analysis on Matlock-ian common authority,523 the court found that the mother had authority to consent to the search of the son’s room, but that she had no authority to consent to a search of the footlocker.524 Block joined parental-consent cases and traditional third-party consent cases by adopting the formulation that, even where a parent is the consentor, “each such enclosed space stands on its own bottom” for purposes of authority to consent.525 Parental-consent cases subsequent to Block followed its reliance on common and exclusive authority,526 and have held that even children are protected against third-party consent to search areas under the children’s exclusive control.527

While the question of whether a child has a right to privacy in areas under his or her exclusive control or if the parent has complete authority to consent to a search of the child’s living area may still be technically an unsettled question of law because different jurisdictions have taken different sides, courts seem to have settled on Matlock-ian common authority as a touchstone.528 Where there is common authority, there is implied uncommon, or exclusive, authority.529 To determine whether a parent has common authority, courts have looked to the “particular circumstances in each case.”530 These circumstances include the parent’s possessory interest in the house; the parent’s level of control over the house; the child’s payment of rent; the child’s exclusive right to possession of the room; the child’s regular use of the room;531 whether the child shares the room with others;532 whether the child is a minor; whether the child’s door is closed or locked; whether the parents respect the child’s privacy and do not enter the room uninvited; and whether other family members use the child’s room.533

The parental-consent cases are helpful in analyzing shelter residents’ Fourth Amendment protections because they reveal two things. First, they show that even where the relationship between the defendant and third-party consenter is fundamentally one of superiority and inferiority, the person in

521 Id. at 537.
522 Id. at 538.
523 See supra notes 478-482 and accompanying text.
524 Block, 590 F.2d at 541.
525 Id.
527 Swenningson, 297 N.W.2d at 408.
528 State v. Jones, 475 A.2d 1087, 1094 (Conn. 1984); State v. Blair, 638 S.W.2d 739, 750 (Mo. 1982).
530 See State v. Schotl, 182 N.W.2d 878, 879 (Minn. 1971).
531 Id. at 879-80.
532 Blair, 638 S.W.2d at 750.
533 Jones, 475 A.2d at 1094.
the inferior role retains a right of privacy in areas over which that person exercises exclusive authority.\textsuperscript{534} In nearly every shelter, this will include residents’ bags and other closed containers, even if they deposit these items some place away from their person, such as in a locker or other storage receptacle.\textsuperscript{535} This may also include private rooms that residents may be assigned, drawers that are assigned to individual residents, and other areas of similar privacy.

The parental-consent cases are also helpful because they provide factors that determine whether a person has exclusive authority.\textsuperscript{536} These factors, applicable to the child-parent paradigm, are also applicable in shelters. Whether a resident pays any rent, the number of residents residing in a room, the age of residents, the condition of doors, and the representations that staff members make concerning residents’ privacy are all variables that may influence the Fourth Amendment protections provided to shelter residents.

Shelter residents are, of course, not children to shelter staff. They are adults who, in their lives, have been married and are parents themselves, have been employed, and who are homeless most likely for reasons entirely unrelated to their maturity level. While parental-consent cases can help delineate their Fourth Amendment protections in shelters, one cannot make a direct comparison between children and shelter residents. One can, however, make a comparison between residents and guests in other persons’ houses. Host-consent cases may, therefore, help our analysis.

\textbf{C. Host-Consent Cases}

Of all the relationships between defendants and third-party consenters, the relationship between guest and host seems to be most similar to that between shelter residents and staff. Host-consent cases should, therefore, guide this article’s analysis.

In 1958, the D.C. Circuit court held that a great-aunt could effectively consent to the thorough search of her great-nephew’s bedroom, where the nephew paid no rent and the great-aunt took her nephew and his friend in as guests.\textsuperscript{537} The court based its holding on a case-by-case analysis, finding that “[a] lady householder” who takes in, “without payment of rent, two house guests, her grand-nephew and another young man whom she had never seen,” can consent to a search where she discovers a loaded pistol and unusual personal papers.\textsuperscript{538}

\textsuperscript{534} See supra notes 520-527 and accompanying text.
\textsuperscript{535}  This is so because generally people lose their Fourth Amendment protections only in abandoned containers. See California v. Greenwood, 486 U.S. 35, 49 n.2 (1988) (Brennan, J., dissenting).
\textsuperscript{536} See supra notes 530-533 and accompanying text.
\textsuperscript{537} Woodard v. United States, 254 F.2d 312, 312-13 (D.C. Cir. 1958).
\textsuperscript{538} Id. at 313.
Host-consent law probably became more nuanced in the next decade. In a 1969 case, *United States v. Poole*, a United States district court in Louisiana found that a host’s consent was not effective as to the search of a guest’s overnight bag found in a hall closet.539 The court stated that “the consent of the [hosts] to the search of their premises did not and could not be extended to authorize the forcible entry and search of appellant’s property.”540 It went on to hold that “if a room is set aside for a non-consenting party, and he does have a right to exclude others, a third party’s consent to a search of this room would upset a reasonable expectation of privacy. The argument also applies to a searchable (enclosed) effect on the premises of another.”541 If consent is given by a third-party host, police will still be excluded from searching places or things that “a reasonable mind” would consider could be within the control of the guest.542

*Poole*’s use of the exclusive-control doctrine is reflected in *Commonwealth v. O’Neal*, in which a Pennsylvania Superior Court held that a host’s consent to search a room used by a guest was invalid.543 The court explained that the host had “gratuitously relinquished his authority over the bedroom and the closet therein. [Therefore, the guest] had a protected, Fourth Amendment, reasonable expectation of privacy which [the host] could not legally waive by consenting to a warrantless search.”544 Factors contributing to the court’s holding were: the doors to the bedroom and closet were closed; the host’s only connection with the bedroom was that he owned the dresser and bed therein; the guest expected his use of the bedroom and closet to be private; and the host gratuitously relinquished control of the bedroom to the guest.545 A number of cases, however, do not support the use of the exclusive-control doctrine in guest-host relationships.

In a 1971 case, the Ninth Circuit held that a host could effectively consent to the search of a guest’s closed gun case found in the room in which the guest was staying.546 The court based its decision on the fact that the guest was “non-paying,” and so was not a tenant547 or similar to a hotel guest.548 A subsequent Eighth Circuit opinion held that a host could consent to a police search of a guest’s jacket.549 The court explained that the host could consent because she “had the primary right to the occupation of the premises” and also had the right to make the jacket available to the police.550

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540 Id. at 1189 n.6.
541 Id. at 1189.
542 Id. at 1190.
544 Id.
545 Id.
546 United States v. Novick, 450 F.2d 1111, 1113 (9th Cir. 1971).
547 Id. at 1112.
548 Id. at 1113.
549 United States v. Buckles, 495 F.2d 1377, 1381 (8th Cir. 1974).
550 Id.
Another Eighth Circuit opinion held that a caretaker could consent to the search of a pouch in a house legally occupied by the defendant, despite the fact that the government agents knew the pouch belonged to the defendant.\textsuperscript{551} The court apparently held that since the owner of the house could consent to a search of the pouch, his agent, the caretaker, could also consent.\textsuperscript{552}

In 1990, the United States Supreme Court addressed the issue of the Fourth Amendment’s applicability in guest-host relationships.\textsuperscript{553} In \textit{Minnesota v. Olson}, the Court found that “Olson’s status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.”\textsuperscript{554} The Court went on to explain that “[t]o hold that an overnight guest has a legitimate expectation of privacy in his host’s home merely recognizes the everyday expectations of privacy that we all share.”\textsuperscript{555} A host’s home is, to the guest, “a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.”\textsuperscript{556} The fact that the Court in \textit{Olson} did not consider a host’s consent to search, but merely a police raid on the host’s home against the guest staying therein, confuses the issue. After \textit{Olson}, we still must ask: what effect does a host’s consent have on a search of the guest? On one hand, the guest has a reasonable expectation of privacy that can be invaded by a third party with actual or apparent common authority. On the other hand, the \textit{Olson} Court suggested that the guest could be disturbed in his privacy by anyone his host allows inside. What does \textit{Georgia v. Randolph} mean for host consent? Can a guest effectively override a host’s consent to a search? Can a guest override that consent only as to areas under the guest’s exclusive control?

The \textit{Olson} decision has apparently been used to place host-consent cases within the context of traditional third-party consent jurisprudence, which relies on actual and apparent common authority and exclusive authority.\textsuperscript{557} It has also been considered along with \textit{Georgia v. Randolph} to allow guests to object to searches consented to by their hosts.\textsuperscript{558}

Host-consent cases have therefore merged with traditional third-party consent law. To the extent that host-consent cases apply to homeless

\begin{itemize}
  \item \textsuperscript{551} United States v. Baswell, 792 F.2d 755, 757-58 (8th Cir. 1986).
  \item \textsuperscript{552} \textit{Id.} at 759.
  \item \textsuperscript{553} \textit{Minnesota v. Olson}, 495 U.S. 91 (1990).
  \item \textsuperscript{554} \textit{Id.} at 96-97.
  \item \textsuperscript{555} \textit{Id.} at 98.
  \item \textsuperscript{556} \textit{Id.} at 99.
  \item \textsuperscript{558} \textit{See Murphy}, 516 F.3d at 1123.
\end{itemize}
shelters, this line of cases means exactly what traditional third-party consent cases mean. They do not help us determine whether and to what extent shelter residents are protected by the Fourth Amendment. Landlord-consent cases are of little value in that regard, but they must be considered because a number of homeless shelters resemble rental living situations.

D. Landlord-Consent Cases

Landlord-consent cases may suggest the Fourth Amendment rights of shelter residents for two reasons. First, shelter staff are quasi-landlords to shelter residents, if only because they provide housing to residents. Second, some shelters resemble apartments in that residents pay rent, have keys to their private rooms, and have been informed that staff will respect their privacy.

In *United States v. Chapman* the Supreme Court established that landlords may not, under normal circumstances, effectively consent to searches of their tenants’ private living areas. This prohibition has its limits, however. In *United States v. Botsch*, the Second Circuit found that a landlord could consent to a search in a situation where the landlord retained a key and the tenant gave the landlord permission to unlock the residence to permit delivered packages to be stored inside and to sign required receipts. The court reasoned that because the tenant authorized the landlord to accept deliveries flowing from a fraudulent scheme, the landlord and tenant “did not occupy a mere landlord-tenant relationship; [the landlord], having been made an unwitting accomplice by [the tenant], had a vital interest in cooperating with the Inspectors so that he could remove any taint of suspicion cast upon him.” Because the landlord’s activities, though innocent, “were inextricably intertwined with [the tenant’s] alleged scheme and cast suspicion upon him,” the court concluded that the landlord’s consent made the search of the tenant’s residence reasonable.

Landlords may also consent to the search of any area that is not leased to a particular tenant and available for all tenants to use. In *United States v. Gargiso*, the Second Circuit held that a landlord could consent to a search of a basement that was available for the tenant’s use but was under the landlord’s control.

In a Louisiana case, *State v. Wilkerson*, the Louisiana Supreme Court applied *Matlock*’s common-authority doctrine to a landlord’s consent. In

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559 See infra Part VI.
560 See infra Part VI.
563 Id. at 547.
564 Id. at 548.
565 See United States v. Gargiso, 456 F.2d 584 (2d Cir. 1972).
566 Id. at 587.
Wilkerson, a landlord had his tenant-employee move his belongings, including some luggage, from a leased apartment to a vacant and unleased apartment.\textsuperscript{568} Basing its decision on the common-authority doctrine, the court held that the landlord “arguably possessed a degree of authority over the unleased apartment.”\textsuperscript{569} He did not, however, have authority to consent to a police search of the tenant-employee’s luggage.\textsuperscript{570}

The Sixth Circuit also applied the common-authority doctrine to a landlord-consent case.\textsuperscript{571} In United States v. Hall, the court considered a search of a tenant’s room on the landlord’s farm.\textsuperscript{572} The tenant helped the landlord on the farm and in exchange the landlord gave him a room in which to live.\textsuperscript{573} The landlord owned all the furniture in the tenant’s room, and the door was kept unlocked.\textsuperscript{574} Moreover, the landlord had to go through the tenant’s room to get to a storage room, and the landlord had access to both the tenant’s room and the storage room at all times.\textsuperscript{575} The court found that the landlord had common authority over the tenant’s room based on the above facts and because the landlord owned the house and the landlord and tenant never agreed that the landlord would not enter the room.\textsuperscript{576}

Compare Hall with Dotson v. Somers, a Connecticut case with similar facts.\textsuperscript{577} In Dotson, the court considered the search of a tenant’s room with the landlord’s consent, where the landlord owned the house in which the room was located.\textsuperscript{578} The tenant had his own room that could be locked from the inside and he had control over the contents of the room.\textsuperscript{579} Although the tenant and landlord had had a sexual relationship and the landlord took care of the tenant’s laundry, the court found that the landlord could not effectively consent to the search because the tenant exercised control over “everything” in his room.\textsuperscript{580} Because he controlled everything in the room, the landlord did not have Matlock’s common authority to consent.\textsuperscript{581}

Landlord-consent cases are not unlike the other types of consent cases mentioned above.\textsuperscript{582} They depend largely on actual (and apparent) common authority to search a particular area or object, but also include an allowance for a landlord to consent effectively when the landlord must do so in order to remove any suspicion of criminal activity on his or her part. This

\begin{footnotes}
\item[568] Id. at 321.
\item[569] Id. at 322.
\item[570] Id.
\item[571] United States v. Hall, 979 F.2d 77 (6th Cir. 1992).
\item[572] Id. at 77-78.
\item[573] Id. at 78.
\item[574] Id.
\item[575] Id. at 79.
\item[576] Id. at 79.
\item[577] Dotson v. Somers, 402 A.2d 790 (Conn. 1978).
\item[578] Id. at 792-93.
\item[579] Id. at 793.
\item[580] Id. at 795.
\item[581] Id.
\item[582] See supra notes 450-558 and accompanying text.
\end{footnotes}
allowance points to the words of the Fourth Amendment, which prohibit only “unreasonable” searches. If a tenant has involved a landlord in illegal activity, it is reasonable to assume that that landlord will do whatever possible to remove suspicion.

In the context of homeless shelters, this allowance should normally not apply, because there is rarely, if ever, illegal activity carried on by a shelter resident that draws shelter staff into suspicion. As for common authority, we do not need landlord cases to suggest that shelter staff can consent to search only areas and objects over which they have actual or apparent authority. The question, as always, is the extent to which staff consent can approach shelter residents and invade upon their privacy. This is a fact-specific analysis that will be explored in the next section.

E. Employer-Consent Cases

At first glance, shelter staff and residents do not resemble employers and employees. This area of law, however, may shed light on an aspect of the gatekeeper issue. Areas of consent law discussed thus far have not examined cases in which someone occupying an overtly superior role consented to a search as against someone occupying an overtly inferior role. Indeed, traditional third-party consent law has focused almost exclusively on a third party’s right to consent as against another person where that third party’s authority is at least equal to that of the other person. What is the impact on the validity of the search where the third party is clearly in a superior position, as in employer-consent cases and, arguably, homeless shelters?

An older case from the D.C. Circuit, United States v. Blok, looked at a situation in which the police searched a woman’s desk at the government office where she worked, with the consent of her official superior. The court held:

[The woman’s] exclusive right to use the desk assigned to her made the search of it unreasonable. . . . Her official superiors might reasonably have searched the desk for official property needed for official use. . . . [But] [h]er superiors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. Their consent did not make such a search by the police reasonable.

In the shelter context, this case could suggest that, if an assigned desk is no different than an assigned bed, shelter staff cannot effectively

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583 See infra Part VI (discussing seven specific homeless shelters).
584 See supra notes 450-511 and accompanying text (discussing basic third-party consent law).
586 Id. at 1021.
consent to a search of a resident’s bed—underneath it, between mattresses, within the bedding, etc.—for incriminating evidence. Because, furthermore, a bed is more like a home than a desk at an office, the shelter resident’s Fourth Amendment protection should be greater than the defendant’s protection in Blok.

A Fourth Circuit case, United States v. Carter, calls Blok’s holding into question.\textsuperscript{587} In Carter, the court examined whether an employer could consent to the search of a van that the defendant used for work, but that the employer owned.\textsuperscript{588} Based on the common-authority doctrine, the court found that the employer could effectively consent to a search of the van.\textsuperscript{589} The court explained that the employer “could tell [the employee] what he could do, or what he could not do, with the company’s vehicle. Even though he was allowed to take the truck home at night, [the employee] was not authorized to use the truck for any purpose unconnected with the business.”\textsuperscript{590} During the search, the police seized a gun from a coat liner belonging to the defendant that was found in the van.\textsuperscript{591} The court found the search to be constitutional, stating that the removal of the gun “did not violate the Fourth Amendment, for we believe it was reasonable to recognize that [the employer] had the right to permit inspection and that [the employee] had assumed the risk that [the employer] might do so.”\textsuperscript{592}

Thus, Carter contradicts Blok because it suggests that shelter staff can consent to a search of residents’ sleeping areas. Staff regularly tell residents what the residents can and cannot do, and the shelters and their beds are impliedly authorized for use only in sleeping, and not, for example, in hiding contraband or storing other items of the residents.\textsuperscript{593} Carter also suggests that even residents’ closed containers are not immune from effective consent to search.

A Seventh Circuit case, United States v. Bilanzich, seems to support Carter.\textsuperscript{594} In Bilanzich, the court held that “the owner of a business who exercises oversight authority over a management employee has the authority to consent to a search of the business’ premises, including all employee offices, for records relating to the business.”\textsuperscript{595} The court, however, limited the power of consent to a search for business-related records.\textsuperscript{596} In this case, the employer gave consent that extended to all books and documents that

\textsuperscript{587} United States v. Carter, 569 F.2d 801 (4th Cir. 1977).
\textsuperscript{588} Id. at 802-03.
\textsuperscript{589} Id. at 804.
\textsuperscript{590} Id.
\textsuperscript{591} Id.
\textsuperscript{592} Id. at 805.
\textsuperscript{593} See infra Part VI (discussing seven specific homeless shelters and their procedures).
\textsuperscript{594} United States v. Bilanzich, 771 F.2d 292 (7th Cir. 1985).
\textsuperscript{595} Id. at 297.
\textsuperscript{596} Id.
belonged to the business.\textsuperscript{597} Therefore, it is likely that the court would not have approved if consent were given to search for things that the business did not own. This likelihood is bolstered by the court’s rejection of the employee’s claim that she had “exclusive control” over the office that was searched.\textsuperscript{598} Based as this case was on the common-authority doctrine,\textsuperscript{599} employees in the Seventh Circuit are probably protected in terms of items they have at work that are not related to the business or owned by the business. Therefore, under \textit{Bilanzich}, shelter residents’ closed containers should be protected because these closed containers always contain personal, not shelter-related, items. It is an open question whether residents’ objects that are stored out of sight in shelter facilities, but are not in an exclusively controlled closed container, would be protected.

Lockers that are provided to employees may receive protection under the Fourth Amendment in certain circumstances. In \textit{Dawson v. State}, a Texas appeals court held:

\begin{quote}
[W]here an employee . . . has been issued a private locker by her employer on which she has placed a lock, it is reasonable to expect that her belongings will be stored without being subject to search, unless she has been placed on notice of the possibility of such a search.\textsuperscript{600}
\end{quote}

The court also noted that, when courts have upheld warrantless searches of employees’ lockers, there was some sort of notice given to the employee that his or her locker could be searched.\textsuperscript{601}

\textit{Dawson} may be quite instructive. It suggests that people, such as employers, who have superior control over a particular area have the right to increase or decrease their inferiors’ expectation of privacy under the Fourth Amendment. In \textit{Dawson}, for example, the employee’s expectation of privacy was increased because the employer gave her a private locker and allowed her to put a lock on it, and did not notify her that the locker was subject to searches.\textsuperscript{602} The employer presumably could have decreased the employee’s expectation of privacy by prohibiting the application of locks to lockers and informing employees that the employer retained the right to search the lockers.

Homeless shelters frequently have lockers for the temporary storage of residents’ belongings.\textsuperscript{603} If they do not, there are usually other less secure storage areas. These lockers and areas vary in terms of level of security, who has access and when, and the procedures in which one can check in

\begin{itemize}
\item \textsuperscript{597} \textit{Id.} at 295.
\item \textsuperscript{598} \textit{Id.} at 296.
\item \textsuperscript{599} \textit{Id.}
\item \textsuperscript{600} \textit{Dawson v. State}, 868 S.W.2d 363, 370 (Tex. 1993).
\item \textsuperscript{601} \textit{Id.}
\item \textsuperscript{602} \textit{Id.}
\item \textsuperscript{603} \textit{See infra} Part VI (discussing seven homeless shelters).
\end{itemize}
belongings.604 Some shelters will have residents sign a form stating that the staff can search belongings.605 Other shelters will occasionally have police drug dogs do a sweep of the shelter, if only to imply to the residents that the staff can and does consent to police searches.606 Still other shelters do nothing. It would seem that the variation in facts as presented here would change the level of Fourth Amendment protection that residents receive. Most courts would probably consider such facts and end the analysis there. It is possible, however, to differentiate shelter situations from workplace situations on another basis. In true Lochnerian fashion, the courts discussed above might assume that employers have the right and ability to increase or decrease their employees’ Fourth Amendment protections as they see fit. Foregoing a fundamental constitutional right may be approved of as a mere condition of work. As with all contracts, however, an agreement signed under duress may render the contract voidable.607 When faced with the choice of either sleeping outside in the cold, heat, or rain, or foregoing one’s constitutional rights against unreasonable searches and seizures and thereby obtaining a warm bed and dinner, it is possible that any agreement a homeless person signs acknowledging the staff’s right to search personal belongings would be rendered null as to the constitutional question. This article does not question that the staff can search a resident’s bag; the constitutional question arises, however, when the staff consents to a governmental search of the bag. Given that any agreement regarding searches may have been signed under duress, there is a question whether such an agreement can effectively lower the shelter resident’s expectation of privacy under the Fourth Amendment.

F. Bailee-Consent Cases

Bailee-consent cases are helpful to our understanding of Fourth Amendment applicability to shelter residents in one particular respect: whether and to what extent shelter staff can consent to a search of a resident’s belongings when that resident has given these belongings over to the shelter staff for safekeeping. Shelter regulations and provisions dealing with such bailments, as well as the prevalence of short-term storage lockers in shelters,608 make this aspect of Fourth Amendment shelter life particularly important.

In a 1955 host-consent case, Holzhey v. United States, the Fifth Circuit held that hosts could not effectively consent to the search of items stored in their garage and known probably to be those of the guest.609

604 See infra Part VI (discussing seven homeless shelters).
605 See infra Part VI (discussing seven homeless shelters).
606 See infra Part VI (discussing seven homeless shelters).
607 RESTATEMENT (SECOND) OF CONTRACTS § 7(b) (1981).
608 See infra Part VI (discussing seven homeless shelters).
609 Holzhey v. United States, 223 F.2d 823, 825-26 (5th Cir. 1955).
court explained: “[e]ven assuming . . . that the cabinet was not identified unequivocally as being the property of [the guest], certainly the agents were put to some further inquiry as to its ownership if” the host disclaimed ownership of or authority over the cabinet.610 This early case thus established that, where an item in bailment does not belong to the bailee, the bailee’s consent to search it is not effective. Later cases affirmed this rule, finding that for a bailee’s consent to be effective, the bailee would have to have actual or apparent common authority over the item.611 A more recent case, United States v. Most, addresses the conditions that often occur in homeless shelters.612 In Most, the defendant left his bag with a clerk when he went into a grocery store, as store policy required.613 The court found that an officer’s search of the bag was unreasonable, stating:

The defendant’s expectation that the contents of his bag would remain private seems eminently reasonable in this setting. The store required, as a strict policy, that customers must check their bags with the cashier before beginning to shop. . . . When supervision of customers’ bags is part of a store’s daily routine, it seems reasonable to expect that the supervision will be conscientious and professional. And when a person is required to surrender his bags as a condition of entry, he is surely entitled to presume that the store’s employees will not take advantage of the requirement in order to gain access to his possessions.614

Where shelter residents are required to relinquish possession of their bags upon entry into the shelter—as often happens—these cases suggest that they retain Fourth Amendment rights in them, and staff cannot consent to their search. There are, however, cases that state the opposite rule.

In 1970, the Sixth Circuit held that an operator of a dry cleaners could consent to the search of a customer’s suit that had been left for cleaning.615 The court wrote:

Here appellant delivered the suit to the cleaners open to public view. He knew that the suit could be handled and examined by many persons in the course of the cleaning process, but he in no way tried to conceal the suit or anything contained thereon, nor did he try to restrict the number of persons who handled it. We are therefore unable

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610 Id. at 826.
613 Id. at 192.
614 Id. at 199.
to find any significant invasion of anything which appellant sought to ‘preserve as private.’

Later, the Seventh Circuit found that a warehouse manager’s consent to search a common storage area was effective as against the defendant, who had stored boxes in the area. The court found that the manager had access and control to the common area. When FBI agents searched the common area, they saw from the labels on the exterior of the defendant’s boxes that were stored there that the boxes contained incriminating evidence. The Third Circuit held that an accountant could consent to the search of a client’s tax records because the accountant had authority to deal with the tax agent in connection with the client’s civil audit. The Ninth Circuit held that a bailee could consent to the search of a bailor’s bag where the bailee had common authority over the bag and the bailor was present and did not object.

The difference between these two apparently divergent threads of bailee-consent cases can be reconciled by examining the searched items in question. In the cases holding a bailee’s consent to be ineffective, the items were a cabinet, bag, or suitcase—all closed containers. In the cases holding the bailee’s consent to be effective, the items were a suit, a warehouse common area, documents over which the bailee had common authority, and a bag over which the bailee had common authority. This reconciliation reveals that bailee-consent cases are consistent with traditional third-party consent cases. Thus, a bailee may consent to a search of an item in bailment where the bailee holds actual or apparent common authority, and where the bailor has not retained exclusive control. Items in plain view can, of course, be reasonably searched, but people retain a reasonable expectation of privacy in closed containers, an expectation that cannot be overridden by bailees’ consent.

616 Id. at 1325.
617 United States v. Piet, 498 F.2d 178, 181 (7th Cir. 1974).
618 Id.
619 Id.
621 United States v. Canada, 527 F.2d 1374, 1378-79 (9th Cir. 1975).
622 See Holzhey v. United States, 223 F.2d 823, 825-26 (5th Cir. 1955); United States v. Most, 876 F.2d 191 (D.C. Cir. 1989).

Humphrey illustrated this reconciliation well. In that case, the court examined numerous searches of bags and documents. Id. at 61-64. The court drew the line at whether the bags, wrappers, and packages were sealed or unsealed, and limited the bailee’s ability to consent accordingly. Id. at 63. It stated:

The status of “bailee” . . . does not carry with it the implication that the tender is without limitation. The record is barren of any indication that the [bailee] shared with [the defendant] any “joint” possession or other relationship with the documents whatsoever. She was, as far as [the defendant] was concerned, the personal equivalent of United Parcel Service; that is, a non-government courier. . . . In the case at bar, the
In the context of a homeless shelter, it would be virtually impossible for police to believe that residents’ bags stored by the shelter actually belong to the consenting staff member or that, if the bags are closed, the staff member has actual or apparent common authority over them. A more difficult question is the effect that shelter sign-in forms might have on residents’ Fourth Amendment protections in their bags. Many sign-in forms, which must be signed by residents, announce that staff members have the right to search residents’ bags and lockers.625 Most staff members will take this step only when absolutely necessary, preferring to maintain residents’ privacy as much as possible.626 This somewhat contradictory approach to residents’ privacy presents an interesting question. On one hand, these sign-in forms serve to lower residents’ expectation of privacy overall. On the other hand, staff members’ diligent concern for residents’ privacy, often published to residents, may increase their expectation of privacy. There is no easy answer to this, and it will likely depend on a case-by-case analysis. The next section, which presents facts gleaned from visits to a number of homeless shelters, will pursue this analysis.

VI. SHELTER SITE VISITS

For this article, I visited seven shelters in two cities in northern New England.627 Each one is quite different from any other, including the area of residents’ Fourth Amendment protections. When speaking of these protections, therefore, we cannot speak in generalities, but must engage the specific facts of each shelter. By doing so, we find that residents of some shelters should enjoy Fourth Amendment protections that an apartment tenant would enjoy. We also find that, given current law, residents of other shelters may enjoy only the barest of protections for their personal belongings that they keep with them. These residents deserve Fourth Amendment protections as robust as possible, but they may not have them because historical prejudices and contemporary stereotyping of the homeless prevents courts from establishing these rights.

In discussing these seven shelters, I have changed all identifying names. I have not done so at the insistence of shelter staff; indeed, the staff members with whom I met were very helpful and welcoming, and were eager to discuss their facilities, of which they were justifiably proud. My interest in

[bailee] gained the “consent” to deliver the materials and perhaps the right to inspect what was in plain sight (i.e., not in a sealed or otherwise secured status), but cannot fairly be said to have been given consent to take that key extra step the opening of a sealed communication.

Id.

625 See infra Part VI (discussing the procedures of seven homeless shelters).
626 See infra Part VI (discussing the procedures of seven homeless shelters).
627 The author visited all seven shelters that are discussed in Part VI. All of the observations discussed in this article are the author’s own. Further information about these seven shelters can be found on file with the author.
changing identifying names stems from the shelter staffs’ goal of protecting the privacy of their residents. Whatever rights to search or consent to searches staff may reserve, they appreciate their residents’ basic need that we all have to be protected from unreasonable incursions by the police and other antagonistic forces outside the shelter. They will, therefore, expose their residents to a search, or consent to a search only when absolutely necessary.

A. Birch Trail Shelter

Birch Trail Shelter provides housing for women and their children who are fleeing domestic violence. Because of its mission, the staff keeps the location of the actual shelter secret. Since I was unable to view the shelter itself, I met with two staff members, Christine Coran and Amelie Biondi, at the shelter’s administrative offices.

Coran described the shelter. It is a three-level house in a residential neighborhood. It has six bedrooms, each occupied by one woman and her children. Currently there are four women and one child residing at the shelter. There is also a kitchen, living room, four bathrooms, two children’s play rooms, and sitting rooms on each level, all of which are common areas. There is a backyard, as well as a locked office for staff. Residents can store their valuables in the office.

The residents’ bedrooms have no locks on them, and the shelter has a policy of not allowing residents to go into each others’ rooms. The residents know that the staff will “poke [their] head in” the rooms to ensure safety and check other things, such as the presence of pets, which is not allowed. Biondi explained that the staff “work[s] hard to avoid” searching the residents’ rooms. The staff will not search a room unless there is danger, especially if there is danger to the children. If the staff members suspect something unacceptable is occurring, but do not suspect that there is any danger, I believe that the staff would respect the residents’ privacy. If the staff were to actually enter a resident’s room, the staff would ask the resident first and would never be alone in entering the room. If the staff suspected that a resident had illegal drugs, for example, Biondi stated that the staff would ask the resident about it. If the resident’s behavior posed a danger, the staff would certainly address it. If the staff found evidence of criminality, the staff would confront the resident and ask her to leave. The staff has never really had any problems with residents.

The shelter has lockboxes that are available for the residents’ use upon request. They are stored in storage areas but used in residents’ own rooms. Residents, as well as staff, have keys to their lockboxes. Staff will not normally go into the lockboxes; they keep keys primarily in case a resident loses hers.

The shelter provides room and board to the residents, as well as general social services, which include assistance in formulating safety plans, accessing services such as vouchers, education for the children, Temporary
Assistance for Needy Families, food stamps, jobs, and transportation. The shelter has a policy of allowing women to stay for a maximum of 30 days, but the policy is flexible. Lengths of stay can be anywhere from one night to three months, depending on how long it takes for a safety plan to be formulated and implemented. There is no cost to stay at the shelter, and the shelter provides everything, including an on-site washer and dryer, linens, and other items.

The shelter is unstaffed at night. Staff members are present during the day, but at night, only the residents are there. The residents are expected to call the other residents if they are planning on returning to the shelter after 10 p.m. This is not a curfew, and the call is required only because the residents’ background as victims of domestic violence may trigger fear if they hear someone enter the shelter late at night. The outer doors of the shelter are locked, and the residents have keys. There are no security guards.

When a woman comes to Birch Trail, the staff does intake. Coran and Biondi did not mention any search of a resident’s belongings during this procedure. The staff tries to make the shelter seem like a “home.” However, some rules that make it less of a traditional home are needed to ensure safety. For example, residents cannot be picked up or dropped off at the shelter, and they cannot receive friends at the shelter. This is so the location of the shelter remains secret. No alcohol or drugs are allowed in the shelter.

If the police were to call and inform a staff member of their suspicions regarding a resident, the staff member would tell the officer that they cannot say whether they have heard from the suspect, but that if they are able to contact that person, they will pass along a message. The staff then talks with the resident, and asks the resident how she wants to handle the police request. If the police want to speak with the resident, the resident can speak with the police at the police department or at Birch Trail’s administrative offices—never at the shelter. The shelter staff does not share the shelter location with the police, which is a well-established practice at Birch Trail.

Birch Trail’s interaction with the police, the public, and me is designed to ensure a maximum amount of privacy for the residents. Of the shelters I visited, this shelter’s residents are most likely to be protected by the Fourth Amendment. A number of interesting questions arise. First, what is the impact of the staff’s maintenance of the shelter as secret on residents’ Fourth Amendment protections? Second, what is the nature of the residents’ Fourth Amendment protection in their bedrooms, in the common areas, and in the staff office? What is the impact on the staff’s right to “poke [their] head in” residents’ bedrooms and their desire not to search residents’ rooms? Third, what protections do residents have in the lockboxes? Fourth, the staff’s policy with regard to police requests seems consistent with maintaining the residents’ reasonable expectations of privacy. Can staff choose to adopt a different policy that lessens residents’ expectation, or is the staff somehow estopped from doing so? Fifth, this shelter is exemplary of
those shelters that pursue a policy of protecting their residents’ privacy. Indeed, such a policy is necessary for this shelter to effectively operate. We ought to encourage the operation of such shelters, but by ensuring a high level of privacy, even against staff consent to search, are we exposing staff to civil liability if, for example, a resident maintains in her room a dangerous condition not discoverable by the staff’s low-level search policy that harms another resident? Much like the cases that found landlord consents to search reasonable to remove any taint of criminality on the landlords’ part, should courts provide that shelter staff can effectively consent to searches where they otherwise might be exposed to liability? The underlying assumption of these questions is, of course, that residents have Fourth Amendment rights to begin with.

To determine whether residents have Fourth Amendment rights, we look first to *Katz v. United States.* *Katz,* as we have seen, declared that the Fourth Amendment protects people, not places, and so a shelter resident may carry her Fourth Amendment rights into the shelter. Despite *Katz*’s declaration, place still matters, because the Fourth Amendment protects that which the person seeks to preserve as private. Residences whose locations are kept secret, closed doors, locks, lockboxes, and people’s expectations regarding quick spot checks of their living areas can all affect where someone places a thing she seeks to preserve as private. These factors will also influence the results of *Katz*’s two-step analysis for Fourth Amendment applicability: whether the resident has an actual expectation of privacy in a particular place or container, and whether that expectation is something society is prepared to accept as reasonable.

We may conclude that the residents of Birch Trail Shelter have an actual expectation of privacy in the entire house because the location of the shelter is held secret, it is a residential building in a residential area, and only the staff and residents have keys to the outer doors. Residents may leave an item in a common area and expect that that item will remain private, except from staff and other residents. We may also conclude that residents expect that items in their own bedrooms will remain private except from staff, and items in lockboxes will remain private from everyone. Whether this set of expectations is reasonable is a more difficult question. Determining the answer to this depends on the application of the various conceptual approaches to reasonableness, discussed in Part III, *supra.*

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628 See *supra* notes 561-582 and accompanying text (discussing landlord-consent cases).
630 *Id. at* 351; see also *supra* notes 80-89 and accompanying text (discussing the *Katz* decision).
631 *Id.*
632 *Id. at* 361 (Harlan, J., concurring); see also *supra* notes 83-89 and accompanying text (discussing *Katz*’s two step analysis).
Given the case law dealing with homeless persons, discussed *supra* in Part IV, the positive law and property models, or a combination of the two, seem to prevail.633 That would mean that the residents of Birch Trail should have Fourth Amendment protections in their shelter if (1) there is some law other than the Fourth Amendment that prohibits or restricts police searches,634 and (2) the residents have a right to exclude others from the property.635 In Birch Trail’s case, police are prohibited by the law of trespass from entering the shelter and are even prohibited by shelter staff from visiting the shelter to speak with residents. Staff will not inform police of the shelter’s location or whether a particular woman is staying at the shelter. Furthermore, residents not only have the right to exclude others from the property, but they are obligated to do so, as well as refrain from divulging the location of the shelter to acquaintances. This arrangement does not actually comprise a “right” as much as it comprises a responsibility. Regardless, the result for Fourth Amendment purposes is the same: exclusion of others so that privacy is maintained. Based on the positive law and property models, therefore, the entirety of the Birch Trail Shelter should be a place of Fourth Amendment protection for its residents.

Under the probabilistic model, the analysis is not so clear, but it does lead us into some substantial questions. This model holds that reasonableness depends on the chance that a sensible person would predict that he or she would maintain her privacy.636 Under this model, common areas of the shelter as well as residents’ bedrooms would not be sites of Fourth Amendment protection. Lockboxes, to the extent that the staff can and does look in them, would also not be protected areas. Taken on its face, this result leads to absurdity because it would mean that the common area of every home in which more than one person lived would be protected by the Fourth Amendment. In the context of homelessness cases, however, the probabilistic model as applied might be this simple. Cases applying the model have held that “the semi-public nature” of the shelter resident’s room637 and a shelter regulation that allows staff to search a resident’s locker638 made it predictable that the shelter resident would not maintain privacy. Other cases have not given literal meaning to the probabilistic model, applying it only where “many people drifted in and out of” the house that was searched639 and where government agents had twice asked homeless squatters living on government land to leave.640

633 See *supra* Part IV.
634 Kerr, *supra* note 88, at 516.
635 Steinberg, *supra* note 3, at 1547.
636 Kerr, *supra* note 88, at 508-09; see also *supra* notes 95-103 (discussing the probabilistic model).
640 Amezquita v. Hernandez-Colon, 518 F.2d 8, 11 (1st Cir. 1975).
The public policy/balancing test might be used to resolve conflicts in Fourth Amendment reasonableness interpretation where, as here, the results from the use of two other models conflict with each other. This is so because the public policy/balancing test seems to be the last resort before the case-by-case approach is used.\footnote{See supra notes 116-119 and accompanying text (discussing the policy/balancing test).} Applying this model to Birch Trail, we should conclude that its residents have full Fourth Amendment protections in the entire shelter. One cannot deny that it is good public policy to provide victims of domestic violence and their children a safe place to go where they will receive assistance in attaining independent, self-sustaining living arrangements. Furthermore, Birch Trail has had few, if any, problems with their residents, and because of their status as domestic violence victims, the residents’ privacy is probably more important to them than it is to the average person. Therefore, the governmental interest in invading the residents’ privacy in shelters such as Birch Trail is strongly and unequivocally outweighed by the residents’ interest in maintaining their privacy.

Given the conceptual approaches to reasonableness, residents of Birch Trail Shelter should enjoy the same Fourth Amendment protections as people in their private homes. This also means that \textit{Georgia v. Randolph} applies, so even if a staff member consents to a police search, the fruits of the search cannot be used against a present and objecting resident.\footnote{\textit{Georgia v. Randolph}, 547 U.S. 103 (2006); see also supra notes 495-510 and accompanying text (discussing the \textit{Randolph} decision).} Just how present and how objecting a resident must be will vary, depending on the courts’ interpretation of \textit{Randolph}.

The Fourth Amendment protections applied to Birch Trail residents, while starting out broad, may be limited after the application of third-party consent cases. For example, \textit{Matlock}’s common-authority doctrine may be sufficient to allow staff members to consent to searches of residents’ rooms and even lockboxes.\footnote{\textit{United States v. Matlock}, 415 U.S. 164, 167 (1974).} A resident’s own closed container, however, would be under her exclusive authority, and so a staff member could not consent to its search. However, the question then arises, whether the staff has given up actual common authority by providing to the resident an area of privacy such as a room and a lockbox (as well as a residence whose address is kept secret). Most host-consent cases would suggest that the staff has given up such authority.\footnote{See supra notes 537-558 and accompanying text (discussing the host-consent cases).} This seems to be the correct result, at least for the lockbox, because to hold otherwise would be to conclude that the container provided to a resident specifically for the security and privacy of personal belongings is a site that is less protected than the resident’s personal unlocked, closed container, lying out in the resident’s room. If the staff has given up actual...
common authority, however, *Rodriguez’s* apparent-authority doctrine could be relied upon by police for a search of a resident’s room and, possibly, the resident’s lockbox.\(^{645}\) An officer might be warranted in believing that shelter staff has authority over the entire premises.

Based on actual common authority and the bailee-consent cases, items that a resident has stored in the locked staff office could be subject to staff’s right to consent to their search, at least to the extent the items to be searched are not in closed containers.\(^{646}\) In reconciling the cases in which the bailee could effectively consent and those in which he could not, it is apparent that a bailee can consent to the search of an item not in a closed container and located in a common area or an area not under complete control. The bailee cannot so consent to the search of a closed container. This makes sense in the context of Birch Trail because a resident that leaves a closed container in the staff office does not abandon the container and so retains Fourth Amendment rights over the container. The staff has, furthermore, not obtained common authority over the items in the container and so should not be able to consent to a search of the container. On the other hand, a resident’s item stored in the staff office, if it is not concealed in a closed container, is fair game and can be seized because the staff can consent to a police entry into the office and any item found therein is in plain view.

The case law on third-party consent goes beyond *Matlock* and *Rodriguez* in ways that may protect Birch Trail residents in their rooms and lockboxes. Some cases concerning the guest-host relationship suggest that residents are protected against searches of their rooms (and, by implication, their lockboxes) consented to by staff.\(^{647}\) Still others, however, suggest the opposite.\(^{648}\) *Minnesota v. Olson\(^{649}\) seems to have merged host-consent cases with traditional third-party consent cases that rely on actual or apparent common authority.

In sum, it seems important that the shelter’s location is kept a secret and, for this and other reasons, residents should have all the Fourth Amendment protections that people has in their own traditional homes. Even though the staff retain the right to “poke [their] head in” residents’ rooms, they work hard to maintain residents’ privacy and do not desire to search rooms. This relationship of the staff to the residents’ rooms is not unlike the relationship between a host and the room in which a guest is staying.

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646  See supra notes 608-624 and accompanying text (discussing the bailee-consent cases).


648  See, e.g., United States v. Buckles, 495 F.2d 1377, 1381 (8th Cir. 1974) (stating that only an owner of property can consent); United States v. Novick, 450 F.2d 1111, 1113 (9th Cir. 1971) (citing Stoner v. California, 376 U.S. 483 (1964)) (explaining that, in order for a third party to consent, the third party must actually jointly occupy the premises).

Therefore, the right of staff to poke their heads in a room should not give rise to a right to consent to a search of the room. The staff, furthermore, is probably not estopped from adopting a new policy that lessens residents’ expectations of privacy. There is no contract between the staff and residents, and the staff members are not government agents whose actions could otherwise lead to estoppel.\(^{650}\) The staff’s policy regarding residents’ privacy would probably affect the residents’ actual and reasonable expectation of privacy. Finally, although this policy ensures a high level of privacy for residents, could it expose the staff to civil liability, or even put their lives in danger?

The answer to this question is: probably not. Randolph provides clear exceptions to its prohibitive holding where there is an issue of domestic violence or other exigent circumstance. Any search to which the staff consents, in order to ensure the safety of shelter member and residents, would probably trump the objection of a resident when that resident is the likely cause of danger.

**B. Columbia Shelter Services**

Columbia Shelter is located on an attractive, wooded residential street on the outskirts of the city. I missed the driveway at first because it appeared to be just another house occupied by an upper-middle class family. It had, in fact, once been a private home. At the shelter, I spoke with shelter director Micheala Bradford and Loretta Blackall, a director of the agency of which the shelter is a part.

I entered the shelter through a sliding glass door that appeared to have the same type of locks as an average private home in this neighborhood. Bradford informed me that there are two doors leading to the outside, both of which have alarms that are activated at night. During the day, residents can come and go, but after curfew residents cannot enter the shelter. Only staff members have keys to these outer doors, as the residents do not need them in order to get in and out of the shelter.

Entering through the glass doors, I came to a spacious kitchen that looked like any home’s well-appointed kitchen. Women and young children were there, having lunch and talking among themselves. The ground floor consists of the kitchen, a two-car garage, a laundry area with a free washer and dryer, a large staff office, a small room where residents can use a phone, computer, and the Internet in privacy, a living room, and a children’s play room. This ground floor appeared, with some small modifications, to be like any private home.

Proceeding up the stairs, the second floor contains a hallway, off of which are four bedrooms for four residents and a total of six children. The

shelter houses women who are pregnant or who have children with them. Each woman gets her own room, with a door that locks from both the inside and outside, and a key to her room. The staff also has keys to the rooms. There are two bathrooms off the hallway that the women share. In each bedroom, a woman gets a fishing tackle box with a padlock on it for her private things. The resident and the staff both have keys to her box. The staff checks each room every day to make sure they are in order, and if staff perceives anything suspicious then they conduct a search.

Each resident pays the shelter a “living expense,” which is equal to half of whatever the resident earns at her job. This covers all expenses, including: utilities, food, phone, Internet, and cable. Public health nurses and teachers also come to the shelter. The shelter staff teaches basic life skills to the residents, and the shelter is designed to move residents from the shelter to private living. The average length of stay is 3.7 months, but the amount of time a woman stays can vary widely.

When a woman arrives at the shelter, she unpacks her things with a staff member, and the staff member does an inventory. This procedure facilitates conversation between the woman and the staff members. It allows the staff to uncover any problems that the woman might have that she does not volunteer to the staff and allows the staff members to provide services to her. Clearly, the procedure is also used to uncover weapons, drugs, and other prohibited items, but this is not the primary purpose. The resident also signs a client rights and responsibilities form as well as a rules and regulations form. The rights and responsibilities form includes the following:

To ensure the privacy of residents, . . . staff must knock before entering a resident’s room. [Columbia Shelter] prohibits the use of surveillance cameras.

. . .

[Every Columbia Shelter employee must not disclose personal information about a resident with any persons without] the specific consent of the resident in the form of a signed release. Disclosures without consent can be made only . . . when laws or regulations require disclosure without a client’s consent, or when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person.

. . .

[Residents’ files] shall be kept in a locked cabinet and may be removed only with permission from [various staff members] and only by staff with a direct professional need to do so.

. . .

[Columbia Shelter] may withhold information judged to be harmful to the resident . . . except: when ordered by a court
to disclose the information, or when required by federal and state laws to disclose the information.

The rules and regulations form also provides that the Columbia Shelter staff has “the right to do random checks for safety and will do searches if warranted.”

The shelter has little interaction with the police because it has not been necessary for them to have contact with the police. Shelter staff have called police on only two occasions, once because a resident was found with a bag of marijuana, and the police have never come to the shelter on their own.

The staff sees the shelter as a “home setting,” meaning it is “part home, part something else.” They believe that in the shelter the residents find a connection with adults who respect them and want them to make their lives better. The staff also believes that the residents themselves view the shelter as their “home.” Chores are assigned, and each night there is a family style dinner. It is a “safe place,” a “homey, comfy place, but [the staff is] still strict with the rules and regulations.” Bradford once helped a resident give birth, and staff members rotate staying at the shelter overnight.

For the residents, the shelter is clearly “home,” even if a temporary one. I spoke with three residents, all whom were young women with young children. One woman said that when she and her kids drive up to the shelter, her kids say, “we’re home!” One woman noted that the shelter feels like a home, even with the staff room checks, because she and the other residents have their own bedroom and their own space. One woman noted the life skills training, the “house meetings,” and the “safe environment.” She said, “at dinner time, we all sit down as a family.”

As a rule, residents’ friends and family are not allowed in the shelter building. They are, however, allowed on the property. This policy reflects the shelter’s intended purpose: to serve as a place intended to facilitate transition to private housing and independent living, not as a social meeting place.

This shelter has the trappings of apartment living: the residents pay to live here, they have keys to their doors, and the forms that they are required to sign indicate a level of privacy that the staff will violate only in specifically enumerated circumstances. The shelter procedures, however, also provide for less privacy than is legally mandated in an apartment: staff conducts daily room checks, they can search rooms if they suspect any wrongdoing, there is a curfew, and the balance between a resident’s private bedroom and the common areas suggests more of an institutional setting and less of an apartment setting. The fundamental Fourth Amendment question for this shelter is, therefore, how to balance the apparently contradictory message about privacy that is being sent by the shelter. Do the residents have Fourth Amendment protections, and if so, in what? Do they extend to the common areas, are they restricted to the residents’ bedrooms, lockboxes, or other closed containers belonging to the residents, or do residents simply have no Fourth Amendment protections? Underlying this question are a
number of subsidiary questions. First, to what extent might the residential setting and appearance of the shelter affect the Fourth Amendment’s applicability to residents? Second, what is the effect of the requirement to pay a living expense? Third, what is the effect of the initial inventory search on the resident’s Fourth Amendment protections? Fourth, what is the effect of the two forms the residents must sign upon entry into the shelter? Fifth, does the fact that the staff, residents, mothers, and children alike, view the shelter as “home” affect the Fourth Amendment analysis? If so, how?

Columbia Shelter Services is similar to Birch Trail Shelter in a number of ways. Their residential settings, clientele served, small number of residents, private rooms for each resident, and other similarities mean that the Fourth Amendment analysis of Birch Trail is a good starting point for an analysis of Columbia Shelter. Based on the positive law/property, probabilistic, and public policy/balancing models, it is likely that Columbia Shelter residents enjoy full Fourth Amendment rights in the whole shelter building, with the limits mentioned in the Birch Trail discussion that correspond to living with other people. The differences between Columbia and Birch Trail that may lessen residents’ expectations of privacy in the shelter’s common areas probably would not actually do so. The fact that Columbia residents cannot enter the building after curfew and do not carry keys to the shelter’s outer doors are not factors that would impact a resident’s expectation that the inside of the structure is more or less a site of privacy. Residents should, therefore, be protected in the common areas just as any homeowner is in her own home’s common areas and just as residents of Birch Trail are protected.

If the residents’ private rooms at Birch Trail are accorded less than full Fourth Amendment protection, then Columbia Shelter’s individual resident rooms should be accorded relatively more protection. Unlike the rooms at Birch Trail, each room at Columbia Shelter has a door that locks from the inside and outside, staff members have keys to all of the rooms, and every resident has a key to her own room. This arrangement means that the resident should have an actual and, probably, reasonable expectation of privacy in her room as against other residents and visitors to the shelter. The only persons who may enter her room are staff members. While staff members do a room check every day, these checks are not meant to, and typically do not, disclose any items that are in closed containers, closed closets, dressers, or that are not caught by the staff’s quick room check. The resident’s room is thus not “semi-public,” and is akin to a guest’s room in her host’s home. It may, in fact, by virtue of the lock on the door, be more private than a guest’s room.

651 See supra notes 95-119 and accompanying text.
652 See People v. Robinson, 751 N.Y.S.2d 543, 544 (N.Y. App. Div. 2002); see also supra notes 537-538 (discussing the host-consent cases).
Residents at Columbia Shelter pay a “living expense.” This is very important to the Fourth Amendment analysis because the result of many third-party consent cases depend, at least in part, on whether the target of the search paid rent or a fee. Although this fact is probably not dispositive, it should be given much weight. Paying such a living expense could result in the resident obtaining a property interest in her room, the shelter, or both, and would therefore be accorded the rights associated with that interest.

It is also important that the rights and responsibilities form that the residents sign includes a provision that “staff must knock before entering a resident’s room.” This will increase the residents’ actual expectation of privacy and may increase their reasonable expectation of privacy as well. This provision is part of an overall plan in the shelter to provide privacy to the residents and thus create an atmosphere that is home-like. This atmosphere, according to both staff and residents, has been successfully created and should increase residents’ reasonable expectation of privacy. The fact that the rules and regulations also provide that the staff has “the right to do random checks for safety and will do searches if warranted” is an exception to the overall shelter policy encouraging privacy, much like Terry v. Ohio is an exception to the overall Fourth Amendment policy encouraging the same. Both Columbia Shelter and Terry v. Ohio recognize people’s right to privacy, and will typically invade that privacy only where there is a possible danger. However, simply because the staff reserves the right to search the residents in such situations does not mean that the effect of its overall policy on residents’ expectation of privacy should be discounted.

At least one court has given weight in its Fourth Amendment analysis to a sign-in form that provided that the staff of the shelter had the right to search residents’ belongings. This case and other similar ones probably should not apply to Columbia Shelter because the Columbia Shelter form provides that staff have a right to search and indicates that residents have a right to privacy. The right to search described in the form, furthermore, is a circumscribed right to search when there is an issue of safety. At best, then, a resident would not have a reasonable expectation of

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653 See State v. DiPrima, 472 F.2d 550, 551 (1st Cir. 1973); United States v. Mix, 446 F.2d 615, 618 (5th Cir. 1971); People v. Thomas, 45 Cal. Rptr. 2d 610, 613 (Cal. Ct. App. 1995); State v. Vidor, 452 P.2d 961, 962 (Wash. 1969); Mears v. State, 190 N.W.2d 184, 186 (Wis. 1971).
654 See Thomas v. Cohen (Thomas II), 453 F.3d 657, 665-66 (6th Cir. 2006); Thomas v. Cohen (Thomas I), 304 F.3d 563, 566 (6th Cir. 2002); see also supra notes 182-215 and accompanying text.
656 Terry v. Ohio, 392 U.S. 1 (1968); see also infra Part VII (discussing Terry and its possible application to homeless shelters).
privacy when the staff has a concern about safety. In effect, therefore, the Columbia Shelter form may suggest that staff are permitted to search where there are exigent circumstances that make a search necessary, which is similar to what police officers in typical search situations are allowed to do. The Columbia Shelter form thus may not increase or decrease residents’ expectation of privacy beyond the boundaries of typical Fourth Amendment law.

When a woman comes to Columbia Shelter, the staff conducts an initial inventory of her belongings. This initial search is apparently not done at Birch Trail, but it should not affect the residents’ Fourth Amendment rights while they are residents. It would not make sense to take a snapshot of a situation at one moment in time and apply the facts, as they existed at that moment, to Fourth Amendment analyses in the future. Through time, facts change, and Fourth Amendment analyses also change. When a woman first enters the shelter and a staff member conducts an initial search of her belongings, she has not yet paid any living expense, has not occupied her room or received a key, and has not yet obtained a locked tackle box. In addition, it is assumed that after the inventory, the woman will acquire more belongings. If the shelter performed an inventory every week, for example, the residents may have a lessened expectation of privacy. The initial inventory may lower residents’ expectation of privacy at the moment of the inventory, but once they become paying residents in the shelter, the initial inventory should not affect their Fourth Amendment rights.

C. Guidepost Foundation Shelter

Guidepost Foundation operates a building that houses a homeless shelter in its basement and a detox clinic on the second floor and part of the ground floor. I entered the ground floor from the main door after being buzzed in by a secretary. I spoke with Guidepost staff members Leila Johnson and Mithra Loman, and they gave me a tour of the basement and ground floor. The second floor, which consists of the detox clinic, was off-limits because federal law mandates that the shelter maintain their detox clients’ confidentiality.

On the ground floor is a secretary’s desk, a conference room, staff offices, a restroom for staff, a restroom for detox clients, a common area for detox clients with seating, a television, and reading material, and a porch out of a back door, where detox clients can smoke. The basement houses the homeless shelter itself. It is a night shelter, meaning that residents can stay only for the night, and must leave and return the next day if they wish to stay another night. The shelter opens at 4:00 p.m. and closes at 7:00 a.m. Before 4:00 p.m., people line up outside a locked side door in an alley next to the shelter. They press a doorbell, and staff lets them into the shelter, usually two at a time. They are led down a small flight of stairs into a sign-in area. At the sign-in area they are asked to empty their pockets so that the staff can search
them for knives and drugs. They are also asked to store their bags and, while the resident is still present, the staff quickly searches the bags for knives and alcohol. The bags are left in cubbyholes or on the ground in the sign-in area.

After checking in, residents shower and eat dinner. Next to the sign-in area is a large open area, which is used to serve dinner. After dinner, the tables and chairs are put away, vinyl mats are put down, and this area is transformed into a sleeping area. The area is also used for 12-step meetings. To the left of the sign-in area is the laundry, which the staff operates. Also to the left is a small area with a kitchenette and Mithra’s office. Past this area is another large room, where more vinyl mats are laid for sleeping and five hospital beds for residents with disabilities who have trouble getting up from the ground. In addition, at least one of the residents is on dialysis. Lights are generally out by 7:00 p.m., or things are at least kept very quiet. The basement also has a couple of closets in which a small amount of donated clothing is stored.

The shelter is a “wet” shelter, which means that it serves people who are homeless and intoxicated. Those who are not intoxicated are directed to other shelters and are assisted in getting there. Guidepost “doesn’t turn anyone away.” A resident must be intoxicated to be here, but he must also be able to “walk and talk” in order to provide information and to ensure that he does not fall or is at risk of overdose. The shelter can sleep 41 people. It generally has 38 males and 3 females, the latter sleeping in a separate area upstairs. When a resident signs in, he must fill out a number of forms, most of which deal with the resident’s health and background. None of the forms constitute an agreement stating that the resident consents to a search of any sort.

The shelter provides nursing and counseling services, as well as a number of other formal and informal services. No fee or rent is required, there are no lockers for the storage of residents’ belongings, and there are no security guards. Leila stated unequivocally that the shelter is “definitely not a home.” It is “a place to lay [one’s] head for the night.”

The shelter’s relationship with the city police is very good. There have never been any problems to speak of, and the police know the shelter’s limits. The shelter and the police have structured meetings together, mostly to educate new police recruits and new shelter staff. These meetings cover a number of topics, including police limits and how to improve communication between police and shelter staff.

When a resident requires emergency on-site medical care, a medical services agency comes to the shelter, accompanied by a police officer. The agency typically goes directly to the resident in need, and the officers usually stay only with the agency and do not shine their flashlights around or engage in any search or observation outside that which is necessary to help the agency.

Part of these police limits arise from the fact that the detox clients and residents in the shelter are protected by a federal regulation, 42 C.F.R.,
Part 2. The regulation states, and Johnson confirmed, that the shelter cannot disclose information regarding any resident or whether that resident is present at the shelter without the resident’s consent. This means that if the police show up, want to be allowed entry, and the staff wants to let them in, one or more residents can refuse the police entry. This would only apply, I believe, to areas where the residents are located, and would not apply to staff offices and other similar areas.

In spite of the regulation, Johnson and Loman informed me that if an officer came to the shelter and demanded entry, the staff would ultimately let the officer in, but they would express their opposition based on the regulation. They believe that doing so would absolve them of any liability. In addition, the staff would never “kick a client out” even if an officer came to the staff and said the client was dangerous. In that situation, the staff will neither confirm nor deny the presence of a client to an officer. However, it is a different matter if the officer has a warrant, according to the staff. Loman stated that, because of the federal regulation, the staff would require a “federal warrant” to enter. State warrants, she said, would not suffice.

Occasionally, residents’ probation officers come to the shelter looking for their parolees. If the parole officers do not have a “consent to disclose” form, signed by the parolee, the staff will neither confirm nor deny the client’s presence at the shelter. The staff will invite the parole officer to wait outside the shelter for the parolee to appear but will not allow the officer into the shelter. If the parole officer has a form that shows that the resident consented to the staff’s disclosure, the staff will then talk with the resident and ask the resident if he or she wants the parole officer to come in, or if the resident wants to go out to meet the parole officer. Sometimes, the resident asks the staff to tell the parole officer that he or she does not want to see the parole officer at that time. In that case, the staff will inform the parole officer of the resident’s presence, but will not allow a meeting to occur in the shelter. If the resident claims that the consent to disclose form is not real—which rarely happens—the staff has other forms with which to compare the resident’s signature, which will likely cause the resident to admit signing the consent form.

The most interesting question arising from this shelter is the impact of the regulation on the Fourth Amendment analysis. First, does the regulation provide Fourth Amendment protections to residents, or is it a distinct type of privacy right? This may make a difference, at least in terms of challenging any violation of privacy rights in court. Second, beyond the legal application of the regulation, does the staff’s activity in response to what they perceive as their requirements under the regulation affect the Fourth Amendment analysis? That is, because the staff thinks that and acts as though the regulation prohibits disclosure and allows residents to refuse

659 Id.
police entry, are residents’ expectations of privacy affected such that they actually do have those rights under the Fourth Amendment? Similarly, what is the effect of the staff’s policy of allowing police to enter the shelter under staff protest? If this policy is engaged often, then realistically, if not legally, residents’ expectations of privacy would be lessened. Third, what would be the legal effect of a warrant issued by a state court? Does the federal regulation preempt its validity or not? Fourth, given the reduced Fourth Amendment protections that parolees have, can a parole officer legally be prohibited from entering a shelter? An officer’s specific parolee probably cannot legally be prohibited from entering, but due to the presence of other residents and the operation of the regulation, this may be a very important question. Fifth, since the shelter lacks privacy among residents, is night to night, and has little to protect residents’ bags from searches, is the operation of the regulation and the staff’s policy regarding interaction with the police enough to tip the Fourth Amendment balance in favor of residents’ protections?

The regulation that covers Guidepost protects patients/clients who have applied for or participated in any service from a federally assisted alcohol or drug program. Under the regulation, if Guidepost receives a request for a disclosure that is not permitted by the regulation, staff members must refuse to make the disclosure, and must be sure to do so in a way that does not reveal that the individual has ever been diagnosed, treated, or received services related to an alcohol or drug problem. Johnson and Loman claim that allowing a warrantless entry by police officers would violate their residents’ rights under the regulation. Besides setting a standard for disclosure external to the Fourth Amendment, the regulation in this case also affects the Fourth Amendment analysis because statutes that apply to a specific situation affect the reasonableness of any search in that situation. Where a regulation provides a standard of privacy that is higher than the Fourth Amendment’s provision of privacy and the staff that is responsible for abiding by that regulation follows it, it is reasonable to believe that the shelter residents will be aware of it, come to rely on it, and thus their expectation of privacy, in accord with that regulation’s mandates, will be

661 42 C.F.R. § 2.1.
662 Id.
deemed reasonable. Because the staff will allow a warrantless police entry into the shelter only under protest, given the regulation, it should be assumed that police know that they may not have the right to enter. Therefore, police would not fall under the good-faith exception when they reasonably rely on a statute and act within the scope of the statute. The regulation does, therefore, actually increase residents’ reasonable expectation of privacy under the Fourth Amendment, and therefore can be the basis for any Fourth Amendment-grounded argument.

Loman also noted that staff would allow a warranted police entry only if it were a federal warrant, because of the existence of the federal regulation. It is possible, however, that a state warrant would suffice. In United States v. Gibbons, the Tenth Circuit considered an “Arizona warrant . . . issued by an Arizona judge, on an Arizona form, on application of an Arizona narcotics agent [and] returnable to the issuing state judge,” but was used to search for evidence of a federal crime. The court held that “[i]n such circumstances the warrant and affidavits need only conform to federal constitutional requirements in order for the resulting evidence to be admissible in a federal prosecution.” In United States v. Weiland, the Ninth Circuit seemed to indicate that in the course of an investigation of the federal felonies of forfeiture and weapons possession, both state and federal warrants would suffice, as long as the searches under a state warrant would proceed as they would under a federal warrant. In Keweenaw Bay Indian Community v. Rising, the Sixth Circuit held that “the use of a state warrant by state police rather than a federal warrant does not, on its own, violate any rights bestowed on the [defendant] by the Constitution or any federal law.” Therefore, it seems that a state warrant would suffice for police to gain lawful entry into Guidepost, if that warrant satisfied federal requirements.

The question of a parole officer’s right of entry into the shelter is an interesting issue. Most, if not all, sets of parole conditions include a provision requiring that parolees submit their “place of residence” or “home” to unannounced visits and searches at any time with or without a warrant. Assuming that Guidepost is a parolee-resident’s Fourth Amendment “home,” then the resident’s parole officer should be able to gain admittance to the shelter, at least to the extent that it does not violate the privacy of any other resident, under the regulation. As it stands, the Guidepost staff do not let parole officers in the building at all. Moreover, the staff considers the regulation to preempt the parole officer’s right to enter and search. This is demonstrated by the shelter’s policy that, when the resident has not

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664 See Krull, 480 U.S. at 360 n.17.
665 United States v. Gibbons, 607 F.2d 1320, 1325 (10th Cir. 1979).
666 Id.
667 United States v. Weiland, 420 F.3d 1062, 1066, 1071 (9th Cir. 2005).
668 Keweenaw Bay Indian Cmty. v. Rising, 477 F.3d 881, 894 n.6 (6th Cir. 2007).
consented to disclose his or her presence, the staff will not inform the officer whether or not the parolee is present. It is possible that Guidepost is a safe haven for parolees from their parole officers, protected as they may be by the federal regulation. It is also possible that, if the regulation is not intended to preempt state or federal law concerning parole officers’ right to entry and search, the staff is impeding the lawful enforcement of law.

Guidepost presents complex questions about federalism, preemption, and the Fourth Amendment, that make definite answers in the context of this article impossible. It does seem likely, however, that the facts that underlie these questions—the federal regulation, the warrant requirement, the activity of residents’ parole officers, and the staff’s response to all three—increase the residents’ actual and reasonable expectation of privacy such that they ought to be protected against police entries and searches. Even where the staff might consent to these actions, there should be nothing to prevent the residents from asserting their own rights to privacy under the regulation. A *Randolph*-type right to successfully object to the staff’s consent to search should therefore apply to the residents.670 If they do not have *Randolph* rights that are based directly on the Fourth Amendment (because they may not have Fourth Amendment rights in the absence of the federal regulation), they should have rights that are the same or virtually the same through operation of the regulation. Either way, the end result should be the same: the residents should successfully be able to assert their right to privacy and prevent police entry and search.

**D. Baxter Recovery Community**

Baxter Recovery Community is owned by a private, non-profit hospital. Baxter Recovery Community is separate from the hospital, however, and within it are five distinct shelter arrangements, which are discussed below. Baxter is located in two buildings, separated by approximately 40 feet of sidewalk. They are one-story buildings, and from the outside look like some elder care facilities—institutional places with some trappings of traditional residential structures. Entering building one, it was clear that this was not a residence. It looked, in fact, like a not-well-cared-for hospital floor. An unpleasant odor struck me, there were laundry bags piled next to a wall, and it was not as clean as it perhaps might have been. That said, it was not repulsive, and one could easily get used to it, at least for a time.

Upon entering the building, I came upon a large front desk. There were two hallways proceeding past the desk on either side, with a number of doors leading off of these hallways. These doors led to dorm rooms for residents, offices, a cafeteria, a day room, laundry machines, a medicine room (residents turn in their medications and can come to the medicine room

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670 *See supra* notes 495-505 (discussing the *Randolph* decision).
to administer them themselves), a smoking room, and a bathroom with a shower. There are no locks on the inner doors, the main outer door is always unlocked and side outer doors are locked.

I spoke with Breck Kent, Baxter’s administrator. He gave me a tour of two of Baxter’s buildings. Building one, described above, is called Baxter’s “Shelter,” and houses the least private and most “shelter-like” of Baxter’s five levels of shelter. Shelter has 44 beds, and is full every night. There is no fee required and it accepts men and women ages 18 and older. The beds are located in various dorm rooms, with the largest room containing 17 beds, and usually is occupied by people who are intoxicated. There are three smaller rooms, with three to four beds each. Baxter tries to group people: those who are intoxicated are grouped together, and those who are sober are grouped together. The women have a separate dorm room, containing six beds.

Lockers are not provided for the residents, but, instead, residents keep their bags near their bed at night and on top of their bed during the day. Residents are allowed to have no more than one medium-sized bag. If a resident has valuables, the staff will keep them safe at the resident’s request. When people come to Baxter to obtain housing they are required to fill out forms about health, rules, and regulations. Baxter is a mix between a night-by-night shelter and a long-term shelter. It has characteristics of a night-by-night shelter because the residents generally have to leave during the day and are only permitted to stay in the shelter during the day under certain circumstances, for example if they are sick. Baxter also has characteristics of a longer-term shelter because every morning residents can request to use their same bed again and the staff will keep their bed for them.

The terms of stay in Baxter vary. Some residents, according to Kent, “use [the shelter] for years.” Others come to work at the state fair and stay at the shelter while they are working. These people are not unlike seasonal, migrant workers. Some residents have social security income and “choose to stay” at Baxter. When someone comes in with some sort of income the staff tries to put him or her on a timeline toward private housing. The staff will also help him or her obtain needed services, such as housing vouchers and food stamps.

Ancillary to Baxter’s Shelter is “Life Safety.” Life Safety exists at the same level of privacy as the Shelter and is in existence because the Shelter is always filled to capacity. When someone comes in for a bed and the Shelter is filled, he or she will be put into Life Safety, which means that the resident is given a blanket, some food, and is allowed to sleep on the floor in the cafeteria. Fire code prevents Baxter from having more beds, but floor sleepers do not violate code. The night before my visit to Baxter, the Shelter housed 44 people and Life Safety housed 6 people.

The second level of privacy is the “Extended Shelter,” which is a residential shelter for residents who abuse substances, with ten beds
available. Residents can stay in the Extended Shelter for 45 days, and it is located in building one.

The third level of privacy is the “Bridge” program. This program is housed in building two. Entering building two, I came into a long hallway. To my left was a common room with four or five residents talking and watching television. Off the hallway were a number of single rooms. At the end of the hallway, through two doors, was another common area, a kitchen, a dining area, and two more hallways leading to more single rooms. The Bridge program consists mainly of people who are coming from the Extended Shelter. They stay for 181 days, but there can be longer stays based on individual evaluations. The average stay is six months, but some can stay for two or more years. At this level, the staff engages in case management so residents can build relationships among themselves; they plan meals together, buy the food, and possibly move out of the Bridge program into private housing together.

The fourth level of privacy is “Home Base.” This level is for people who are in the area looking for a job or have a job, and who have some financial resources but are just “getting their financial ducks in a row”—for example, waiting on housing vouchers to come through. Home Base is located in building two, and each resident pays $60 a week for a private room. The rooms have locks on the doors and both the resident and the staff have keys to the rooms. There is a shared living room, free laundry, bathroom, and residents can purchase food tickets.

The fifth level of privacy is “Gardenpath Apartments,” which is located a substantial distance away from the main Baxter campus. Sixteen people are housed in Gardenpath, two people to each two-bedroom apartment. This is, obviously, more independent living than in Home Base. The residents also pay more to live in Gardenpath. Residents have keys, as does the housing coordinator, who, according to Kent, is “the landlord essentially.”

In Bridge, Home Base, and Gardenpath, residents have, according to Kent, the “same rights as anyone renting in the city.” If Baxter wants to evict someone in these three programs, it follows the state law governing the eviction of a tenant. Residents sign a monthly lease and, in the event of eviction, Baxter cannot remove residents’ belongings for 30 days. Kent believes that this policy is in accordance with the state law regulating eviction.

Baxter has a good relationship with local police. Baxter shelter staff and the police have regular meetings approximately every three months and the Baxter Recovery Community is a topic included in these meetings. If Baxter staff is having a problem with a resident, staff will call the police, and if the police have someone they need to house, they will call Baxter. Staff generally call the police only if there is a safety issue—not if someone is simply under the influence of an illegal drug. The staff calls the police three to four times per week, normally because an intoxicated resident begins
yelling or fighting, but Baxter “rarely” has more severe problems. Baxter’s policy is to call the police when there is a safety issue, tell the police what the situation is, and let them do their job. Baxter will not specifically ask the police to search a resident. Staff may search residents if they suspect the resident has a weapon or otherwise poses a danger but it seems that such interventions occur only in two of Baxter’s levels of shelter: Shelter and Life Safety.

Baxter Recovery Community is interesting because of the wide range of shelter arrangements that it operates. Gardenpath Apartments, on the one hand, seem to be like any private apartment for Fourth Amendment purposes, while the Shelter and Life Safety seem to be locations of the lowest level of protections for residents. These still, however, give rise to Fourth Amendment questions. As for Gardenpath Apartments, what impact might \textit{Thomas v. Cohen} have on its residents’ Fourth Amendment protections? As for the Shelter and Life Safety, residents should retain privacy rights in their own closed containers, but do their protections go beyond that? The Extended Shelter, Bridge, and Home Base occupy a gray area. Their physical appearance is very institutional, like a hospital or university dormitory, and they are clearly not apartment settings. The payment residents make to stay in those shelters would not be considered rent under \textit{Thomas v. Cohen}. On the other hand, residents sign monthly leases, have keys to their rooms, and most importantly, Baxter staff believe and operate under the assumption that regular landlord-tenant law applies to evictions of these tenants. Does the staff’s posture raise the residents’ expectation of privacy to the expectation given to private apartment lessees? How might the answer to this question determine Baxter staff’s right to call the police as against a resident of Extended Shelter, Bridge, or Home Base?

\textit{Thomas v. Cohen} would probably have no impact on the Fourth Amendment rights of residents of Gardenpath Apartments because they actually are individual apartments, while the residence in \textit{Thomas} was more akin to an independent group home. Another difference between \textit{Thomas} and Gardenpath is that two people occupy each apartment in Gardenpath, while, in \textit{Thomas}, Augusta House housed all residents in one building. Gardenpath residents have what the shelter administration calls a “landlord,” and, if a resident is to be evicted, the shelter follows the law of eviction. In contrast, residents of Augusta House could be moved from room to room and be placed with another resident in a bedroom by the Augusta House

\begin{footnotes}
671 See \textit{supra} notes 182-215 and accompanying text (discussing \textit{Thomas I} and \textit{Thomas II}).
672 See \textit{supra} notes 182-215 and accompanying text (discussing \textit{Thomas I} and \textit{Thomas II}).
673 See \textit{supra} notes 182-215 and accompanying text (discussing \textit{Thomas I} and \textit{Thomas II}).
674 See \textit{supra} notes 182-215 and accompanying text (discussing \textit{Thomas I} and \textit{Thomas II}).
\end{footnotes}
The most fundamental difference between the two shelters is that residents of Gardenpath Apartments have the right to exclude others from their residences. This fact means that under the property model of Fourth Amendment reasonableness—the model that existed prior to *Katz* and still weighs heavily in courts’ analyses today—Gardenpath Apartment residents have the same rights that regular apartment renters have because they are regular apartment renters.

Residents of Shelter or Life Safety exist on the other extreme of Fourth Amendment applicability in shelters. Shelter and Life Safety are in an institutional setting, with dorm rooms, unlocked exterior and interior doors, and a lack of lockers, dressers, or any other spaces that might provide some measure of privacy for a resident or his or her belongings. A resident of Shelter or Life Safety will continue to have Fourth Amendment protections over personal closed containers as well as items under the resident’s exclusive control, but will probably not have a reasonable expectation of privacy beyond those containers. Due to the fact that police respond to staff calls three or four times per week, residents should reasonably expect that intrusions into their privacy by staff members, other residents, and, most importantly, police, will extend only to their own closed containers and, perhaps, the belongings that they ask staff to keep safe for them. Although *CCNV v. Marshals* would suggest that even residents of Shelter and Life Safety have Fourth Amendment protections in the shelters, it is difficult to see how this case, in light of most other cases that provide lesser protections, could succeed in showing that these residents have full Fourth Amendment rights to the dorm rooms and common areas of Shelter and Life Safety. Therefore, they most likely are protected only in their own closed containers.

The most interesting sections of Baxter Recovery Community are Bridge and Home Base. They are located in building two, which bears a striking resemblance to a college dormitory. As in a dormitory, each resident has a private room off of a hallway. The resident can lock the door, and there is a common room and kitchen. The resident pays a fee to live there and can buy food tickets, much like college students can put money on their ID cards to purchase food. There are institutional rules to follow that go beyond typical rules found in a lease for an apartment. The difference is that the shelter administrator claims that residents have the same rights as anyone renting a regular apartment. Residents sign a monthly lease and can be evicted only under the state law governing eviction.

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675 *See supra* notes 182-215 and accompanying text (discussing *Thomas I* and *Thomas II*).

676 *See supra* notes 137-181 (discussing *CCNV I* and *CCNV II*).

Bridge and Home Base suggest, more than any shelter situation, the ambiguity inherent in a Fourth Amendment analysis of homeless shelters. These shelter arrangements are not quite shelters—their residents are not quite “homeless,” which means that they reside in living arrangements that are in some way like homes. They even sign leases and pay rent. On the other hand, these living arrangements are designed to operate as stepping stones to permanent housing. They are located in an institutional setting and are not what most of society would consider to be “home.” If Bridge and Home Base are like homes, then even the common areas should be protected from a search. If so, then could a resident successfully object to a staff member’s consent to a police officer to search the common room? While residents of Bridge and Home Base need to be protected from untoward police intrusions into their privacy, to allow resident objections may have a bad public policy outcome.

Bridge and Home Base are not easily susceptible to a property analysis of the reasonableness of a search because their residents occupy a gray area in terms of their property interests. There is also no positive law, other than the Fourth Amendment, that would keep police out, except for a notion of trespass against the shelter as owners of the property. This notion is a weak one because the shelter staff regularly invites the police onto the property, and the police probably come onto the property only at the invitation of the staff. The probabilistic model has its own problem with application to a group setting, as discussed above regarding the Birch Trail shelter. The public policy/balancing test remains as a possible option. 678 What level of protection ought residents of Bridge and Home Base receive in order to satisfy their interest in privacy while still addressing governmental interests? Terry v. Ohio provides guidance on the answer to this question and suggests that perhaps searches ought to be allowed only when there is reasonable suspicion of danger. 679 The Baxter staff already follows this guideline, as is demonstrated by their practice of calling the police only when there is a safety issue. This approach might be selling the residents short because they might actually have full Fourth Amendment rights as tenants to the shelter’s status as self-proclaimed landlord. If, however, a lesser Fourth Amendment protection is to be applied to Bridge and Home Base, a Terry v. Ohio approach might be a good one. 680 I discuss this possibility more in Part VII.

E. Bernard House

Bernard House is an urban shelter that serves minors between 10 and 18 years of age who have nowhere else to go because of violence, poverty, or

678 See supra notes 116-119 and accompanying text.
679 See infra Part VII (discussing the application of Terry to homeless shelters).
680 See infra Part VII (discussing the application of Terry to homeless shelters).
their status as lesbian, gay, bisexual, or transgendered, among other reasons. The entrance to the shelter is locked and has a buzzer. When I arrived at 10:30 a.m., I pressed the buzzer and a staff member came to the door and opened it. I entered the shelter at the ground level, which consists of a common area with a pool table, staff offices, and a kitchen. On the second floor there is another common area, a room where staff sleeps overnight, two dorm rooms for the residents, and bathrooms off of each dorm room.

There are a total of 16 beds in the two dorm rooms. There are eight beds for boys in one dorm room, and eight beds for girls in the other dorm room. To stay at this shelter residents do not have to pay rent or a fee. Each resident has a bed, a desk with drawers, and shares two dresser drawers with another resident. Each resident also has a locker that is much like a large locker at a high school. Residents can put their belongings in the locker and can request that a lock be put on the locker. The staff retains the key to the locker, but only because of the possibility that the resident could lose the key if the resident held it. If the locker is left unattended for three days, the staff is authorized to dispose of its contents.

According to the shelter’s license, residents can stay for a maximum of 30 days. In reality, the shelter does not count days and so could allow residents to stay for a longer period of time. However, most residents stay for under one month. Forty-two percent of residents stay 0 to 9 days, 15% stay 10 to 19 days, and 6% stay 20 to 29 days.

When a juvenile comes to Bernard House, an assessment is done. According to Bernard House Program Director Lance Cardwell, the juvenile “turn[s his] pockets out” and opens his bags. This is a “self-search” for, among other things, weapons, alcohol, and drugs. The juveniles have to turn in lighters and knives—“all homeless people carry them,” said Cardwell. The juveniles get their knives back at the end of their stay if they are in their possession legally. The staff asks about the juvenile’s past arrests and will also ask for proof of identification. The staff will call the juvenile’s parents if they feel it is necessary and if it is safe to do so. If there is an issue of abuse, the staff is obligated to call the Department of Health and Human Services. The staff also asks questions such as: whether the juvenile uses drugs, how life is going, when was the last time the child saw a doctor, does the child need to see a doctor, and so forth. One of two social workers on-site does a more in-depth assessment. The goal is to find housing for the juvenile with relatives or in another safe environment. A doctor also comes on the premises to provide health care to the juveniles.

On the issue of conducting searches of the juveniles and their property, Cardwell said: “[I]f we think someone uses drugs [or is into anything else], we might search.” If the staff were to search, Cardwell would want the resident present. However, searches of residents’ personal areas are rare; Cardwell did one such search in all of 2007.

If police come to the door of the shelter and say that they are looking for a resident and would like to come in to look for the resident, the staff
generally does not let them in. As a result, police in the past have gotten upset. The staff will, however, bring the resident down to speak to the officer, and, in this case, staff would remain present and watch the interview.

If the police are “in pursuit of a crime” and a resident has just come running in the door with the police following, the staff will allow the police to enter the shelter. Recently, residents have been known to steal from cars in the nearby downtown area and run back to the shelter. In such cases, staff will let the police in so that they can pursue the resident.

“The tricky part,” said Cardwell, is when police come to the door upset and are looking for a resident. As a general rule, staff will not let them in, however, it depends on the officer and the circumstances. Cardwell has a good relationship with at least one police officer and so if that officer came to the door, Cardwell would be more likely to assist him. In short, the staff at Bernard House deals with interactions with police on a case-by-case basis and seems to be concerned about protecting their residents from the police.

Staff do not report all crime that is perpetrated by residents to the police. Cardwell said that the staff “will know if the kid has done something.” For example, a resident might show up with new clothes. In this situation, the staff will ask for a receipt, and then if no receipt is produced, the staff will take the clothes back to the store from where they were stolen and tell the store that they “found these clothes.” The staff typically will not call the police for these type of crimes. If, however, a resident commits a “crime against humanity,” as Cardwell calls violent crimes or crimes that put others in danger, the staff may call the police.

Bernard House seems to fall in the middle of the spectrum of Fourth Amendment applicability to shelter residents. Cardwell and the staff clearly attempt to provide a safe and private environment for the residents, which includes safety and privacy against government searches. Cardwell seems to be familiar with the Fourth Amendment, and is certainly more familiar with it than staff at other shelters with whom I spoke. He seems to believe that the Fourth Amendment does apply to Bernard House, but he is unsure as to the extent to which it applies. He takes interaction with police on a case-by-case basis and wants to develop positive ties with the police department. He has succeeded, he said, in being able to “borrow” a police drug dog to perform searches, mostly to frighten the residents into not possessing drugs. While this may lower residents’ expectation of privacy, for the most part they probably have an actual expectation of privacy against outside intrusion, including intrusion by police.

Of all the shelters profiled in this article, Bernard House presents most clearly the gatekeeper issue. Cardwell and the staff work hard to protect the residents against police intrusion, going so far as to prevent the police from entering and refusing to report crime committed by residents. They will also, however, let police in under certain circumstances, and use police drug dogs to frighten the residents into abiding by the law. First, then, if the residents of Bernard House have Fourth Amendment protections in the
shelter (as Cardwell seems to believe they do), then to what extent can staff consent to search override these protections? After Georgia v. Randolph, can residents override the staff’s consent to search, at least as to those who object to the search?\(^{681}\) Second, does it make a difference that the residents of Bernard House are all minors? Should the parental-consent cases govern here any more than they do in other shelters that serve adults?\(^{682}\) Third, to what extent can staff consent to searches, if they can effectively consent at all? Can their consent reach only the common areas, or can it reach into the dorm rooms, the residents’ desk and dresser drawers, lockers used by the residents, or the residents’ own closed containers? Fourth, to what extent does the staff’s use of a police drug dog violate the residents’ Fourth Amendment rights, if it does at all? Whether it violates these rights or not, does this use of drug dogs effectively lower the residents’ expectation of privacy?

The gatekeeper issue here is tied intrinsically to the shelter staff’s position as quasi-parents to the residents. As far as interactions with police and respect for residents’ privacy go, the staff has taken on the role of a concerned and respectful parent who will allow police to have access to his or her children only when absolutely necessary. The staff-parent will protect the children from police searches, but also understands that police have legitimate goals and so will facilitate a child talking with police. If a child commits a minor crime, the staff-parent will rectify the transgression without police involvement. The staff-parent will also respect the privacy of the children in their living areas, performing searches rarely and only when the staff-parent suspects something, like drug possession. For these reasons and the fact that the residents of Bernard House are, in fact, minors, the Fourth Amendment analysis ought to start with the parental-consent cases.

The parental-consent cases, as discussed above, suggest that in cases where a parent has consented to the search of a child’s room, Matlock’s common-authority doctrine and the doctrine of exclusive authority control.\(^{683}\) These doctrines should be followed even more in Bernard House than in a private residence because, at the shelter, staff probably has greater control over resident activities in common areas than parents have over their children in a private home. This also means that a child in a private home is more likely to succeed in invoking Randolph if the child objects to a search consented to by a parent than a shelter resident will be if the resident objects to a search consented to by a shelter staff member. Furthermore, a resident of a shelter is less of a “child” to the staff-parent than a child is to his or her parent or legal guardian. This means that the child-residents have a greater interest in keeping belongings under their exclusive control private from someone who is not their actual parent. In other words, the child-resident is more of a regular person as opposed to a “child” for Fourth Amendment

\(^{681}\) See supra notes 495–505 (discussing the Randolph decision).
\(^{682}\) See supra notes 512–536 (discussing the parental-consent cases).
\(^{683}\) See supra notes 512–536 (discussing the parental-consent cases).
purposes, so the analysis should depend less on the parental-consent cases and more on basic Fourth Amendment analysis, which has wholly approved of the exclusive-control doctrine.

The residents of Bernard Shelter should, therefore, have a reasonable expectation of privacy in their belongings that are held in their own closed containers. Staff should be able to consent to a search of the common areas of the shelter, including dorm rooms—whether the residents can successfully object to such a search based on Randolph is an open question, and could reasonably go either way. The more interesting question is the status of the desks, dressers, and lockers used by the residents.

To analyze the question of residents’ rights in their desks, dressers, and lockers, we must first ask whether they have Fourth Amendment rights in these containers. We then must ask whether the shelter staff has common authority to consent to a search of the containers. To answer the first question, let us assume that the residents have an actual expectation of privacy in these containers. Whether they have a reasonable expectation of privacy depends on what model of analysis is used. The law of trespass would maintain the privacy of these containers as against government searches under the positive-law model. The public policy/balancing test model should also accord protection to residents. The youths who stay at Bernard House are vulnerable and may be untrusting, both because they are minors but also because of their unique life situations as youths running from what would otherwise be their home under the Fourth Amendment. They require some space to call their own and in which they have an assurance of privacy. The governmental interest in this case is to prevent crime and discover evidence thereof. Given that the shelter staff supervises the residents and seems to address issues relating to crime and their residents, the governmental interest in the ability to search residents’ containers should be far outweighed by the residents’ interest in privacy. They should, therefore, have Fourth Amendment rights in their desks, dressers, and lockers. The fact that the staff occasionally uses a drug dog to conduct searches should not impact the analysis, because the Supreme Court has held that a drug dog sniff is not a search for Fourth Amendment purposes. An act that does not entail an intrusion into one’s property should not be used to justify later intrusions.

The real question is whether staff consent can override residents’ rights in these containers. To determine whether a parent has common

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684 See infra notes 111-115 and accompanying text (discussing the positive-law model).
685 See supra notes 116-119 and accompanying text (discussing the public policy/balancing test model).
687 Edmond, 531 U.S. at 52.
authority, courts have looked to the particular circumstances in each case.\textsuperscript{688} The factors that have been considered—the parent’s possessory interest in the house; the parent’s level of control over the house; the child’s payment of rent; the child’s exclusive right to possession of his room; the child’s regular use of the room;\textsuperscript{689} whether the child shares his room with others;\textsuperscript{690} whether the child is a minor; whether the child’s door is closed or locked; whether the parents respect the child’s privacy and do not enter the room uninvited; and whether other family members used the child’s room\textsuperscript{691}—all suggest that staff has common authority over the desks, dressers, and lockers in the shelter. The fact that most residents stay at Bernard House for less than one month means that the staff has greater control over the dorm rooms and desks, dressers, and drawers for turnover, cleaning, repair, and so forth. On the other hand, the hotel cases would discount this fact in a Fourth Amendment analysis.\textsuperscript{692} Furthermore, Cardwell did only one search in all of 2007, which suggests an extremely low level of intrusiveness into the residents’ privacy. As to the desks, dressers, and lockers, therefore, the question of staff’s common authority is open and would probably be based entirely on a case-by-case approach. If the staff does have common authority over these containers, can residents successfully object to a search under \textit{Randolph}? If the residents have Fourth Amendment rights in these containers, it would appear that they can.

\textbf{F. City Area Homeless Shelter}

The City Area Homeless Shelter is located in a two-story building on a busy city street, with a large sign clearly displaying its name. I entered the building via a glass door off the main street that is always kept locked. A staff person just inside the building monitors the entrance and will buzz a visitor in if the visitor does not look like trouble. Upon entering the shelter I came directly into a common area with rows of tables and chairs. Many of the residents were here talking, playing cards, or just sitting around. There is an open kitchen in the back of this room, and it is clear that this is the room where residents congregate and eat. Off to one side a staff person sits at a station, and staff offices are located behind that station.

At the shelter I met with the director, Daniel Stone, who led me through a locked door off of this common area and up a flight of stairs to the second floor of the shelter. On this floor are 11 bedrooms and a few common bathrooms off of a hallway. There are a total of 33 beds on this floor, with two to five beds per room. The doors do not lock from the inside or outside, except for a couple of doors that inadvertently have locks on them.

\textsuperscript{688} State v. Schotl, 182 N.W.2d 878, 879-80 (Minn. 1971).
\textsuperscript{689} Id. at 178-79.
\textsuperscript{690} State v. Blair, 638 S.W.2d 739, 750 (Mo. 1982).
\textsuperscript{691} State v. Jones, 475 A.2d 1087, 1094 (Conn. 1984).
\textsuperscript{692} See supra note 41 and accompanying text.
doors can be locked from the inside but can be opened from the outside with a coin or any key. On this floor is also a common room where residents can meet before lights out.

This shelter admits both men and women, but it does not admit children. Inside the shelter residents are segregated by gender. During the day, residents use the glass door through which I entered. At night, there is another locked door through which they enter that leads directly to the bedrooms. The term of residents’ stays vary, and they are welcome as long as they get along, follow the shelter rules, and make progress to the extent they are able. Residents with ongoing mental health issues have lengthened stays because the staff understands the mental health issues and often gives these residents lenience when they violate the rules because of their mental illnesses. Some individuals are barred from the shelter because of trouble they have caused in the past.

When people come to stay in the shelter, they must sign a “contract,” which is actually a resident’s acknowledgement of shelter policies. The form states, “I understand that the Shelter is not liable for any of my personal belongings, and that they must be stored in an assigned locker.” At night, the residents can keep their belongings with them in their bedrooms. In the morning, they are awakened at 6:00 a.m., and must place all of their belongings in an assigned locker on the second floor. The staff has keys to these lockers but residents do not. Residents must keep anything they will need during the day with them because they are not allowed into the lockers during the day, except in limited circumstances. Residents also cannot leave anything in their bedrooms during the day.

Residents know they are subject to searches of their belongings by shelter staff. Staff will, however, give residents some measure of privacy for things like medications or tampons. Rarely will the staff perform a body search of a resident, and they do so only when an issue such as weapons or a threat of violence presents itself. These searches occur very rarely. Staff can, and do, search lockers if they suspect drugs or weapons inside. Occasionally, when the staff suspects some sort of drug possession, the staff will call the police to come over with a drug dog and do a sniff search. This is partially to find drugs, but mostly to show the residents that the shelter will not tolerate drugs. The shelter has a very good relationship (a “long-term relationship,” said Stone) with the police. This is in part because the city in which the shelter is located is small, and the shelter staff and police know each other. This is also because the shelter occasionally calls on police for assistance and wants to maintain good relations.

When asked what would happen if an officer appeared at the shelter and said, “I want to search Joe’s locker, because he might have something,” Stone said that his response to the officer would depend on the circumstances. He noted that he, as well as three of the four staff members, would “resist” a warrantless entry or search. That said, his response would be very dependent on the specific facts. If an officer he did not know came by at
2:00 a.m. without a warrant or any documentation showing suspicion of a resident, Stone might very well tell him, “F**k off.” If an officer who Stone knows well and respects came by at 3:00 p.m., Stone would probably be very helpful. It is clear that Stone and his staff guard the shelter against untoward police searches, and that they make decisions to allow searches based on a number of factors: whether they know the officer and their past interactions with the officer; whether there’s a search or arrest warrant or other documentation; what time the officer comes by; what evidence the officer has implicating a resident; and the accusation against the resident (murder versus jaywalking, for example). It is also clear that the residents have no say in whether the staff consents to the unwarranted search or not. If a warrant is presented, Stone and the staff will cooperate completely.

Of all the shelters I visited, City Area was the shelter that was most similar to what I consider to be a “traditional shelter”: privately run, regimented, and intrusive to the extent necessary to ensure the safety of staff and residents. This shelter thus best raises the fundamental question of this article: to what extent does the Fourth Amendment provide protection to residents of homeless shelters? The most realistic answer to this question will be found through consideration of the gatekeeper issue. The question thus becomes—to what extent can City Area staff consent to searches as against a shelter resident? Can this consent cover searches of common areas, bedrooms, beds, closed containers, lockers, or closed containers in lockers? Does Georgia v. Randolph give effect to a resident’s objection to staff consent as to him? Compared to the shelters profiled above, City Area Homeless Shelter offers relatively weak Fourth Amendment protections for the residents.

The City Area Homeless Shelter defines the gatekeeper issue: it is a shelter in which the staff exercise total control over when to let police in and when to keep them out, the staff inform the residents and the residents know that they are subject to searches by staff, and the staff exercise maximum control over the residents’ surroundings and belongings, even taking custody of their own closed containers during the day, to the exclusion of the residents themselves. Given these facts, shelter staff-consent situations are most similar to parental-consent cases, and so rest on the doctrines of common and exclusive authority. At the simplest level of analysis, staff should be able to consent to searches of all areas, with the exception of searches of the inside of residents’ own closed containers. Even if these containers are in the possession of staff, the bailee-consent cases suggest that if these containers are closed in a fashion that ensures privacy from the roaming eye, staff consent to search them will be invalid.

This line is clear. What is less clear is the effect that Randolph should have on the residents’ right to object to a search. Based on Randolph,
“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.”\(^{695}\) The Court also called the person a “potentially objecting tenant,” “occupant,”\(^{696}\) and “inhabitant.”\(^{697}\) It is evident that the Court did not intend only legal tenants to have the power to effectively object to another’s consent. Nor did the Court intend for strangers who happen to be at the door to have that power. The Court was, rather, concerning itself with the issue of whether and to what extent “an individual who chooses to live with another assumes a risk” that the other will consent.\(^{698}\) To invoke *Randolph*, the premises must be “shared.”\(^{699}\)

Residents of City Area Homeless Shelter and all other shelters are clearly “occupants” or “inhabitants,” and are invited into the shelter by those who would consent to a search. On the other hand, they do not really “live with” the staff (unless, of course, staff have sleeping quarters as well. Even then, this is not a typical arrangement in which the residents can be said to be living with the staff), nor do they “share” the facilities with staff. Does *Randolph* apply? That is, can residents effectively object to staff consent to police searches? The cases that have interpreted *Randolph* seem to have largely confined themselves to where, when, and how a person objected to the consent, not whether that person was the type of occupant who is covered by *Randolph*.\(^{700}\) Whether *Randolph* applies to shelter residents will, therefore, likely depend on the extent to which the shelter is their Fourth Amendment “home.”

In shelters such as Birch Trail and Columbia, residents may very well be occupants covered by *Randolph*. In City Area Homeless Shelter, that claim would be harder to make. It would depend largely on judicial discretion: if the court in *CCNV v. Marshals* was reviewing the matter, the residents might be *Randolph*-type occupants; if the *Thomas v. Cohen* court was reviewing it, it is probable that the residents would not be covered under *Randolph*, to say nothing of whether the court would accord them any Fourth Amendment rights at all.

The field of Fourth Amendment applicability to residents of shelters such as City Area is open to debate and arguments based on public policy and non-legal areas of study. This article advocates for a robust application


\(^{696}\) *Id.*

\(^{697}\) *Id.* at 122.

\(^{698}\) *Id.* at 108.

\(^{699}\) *Id.*

of Fourth Amendment law because homeless citizens are quite similar in background to those of us lucky enough to have jobs and homes, are not a particularly dangerous group of individuals, and both because of and independent of these facts, deserve the rights enjoyed by any other citizen. That their “homes” are rent-free, communal, short-term, or impermanent, and lack the amenities that traditional homes have, should have no bearing on the extent to which they have Fourth Amendment rights. Furthermore, this is not a call for extrajudicial compassion as much as it is a call to apply Fourth Amendment law consistently as we examine its applicability in homeless shelters.

Because Randolph’s applicability to shelters such as City Area would be made based on public-policy arguments, public policy might just as easily determine that Randolph should not apply, and that shelter staff ought to have maximum authority to manage and secure their shelters for the safety of all. This is reasonable, and suggests that Fourth Amendment applicability in City Area Homeless Shelter and other shelters will be determined on the public policy/balancing test model. Once again, Terry v. Ohio might provide a good middle road that would satisfy residents’ interest in privacy and staffs’ interest in maintaining a safe environment. This approach would also be consistent with Randolph because the Court in that case noted that its decision would not limit officers’ ability to enter a premises “to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.” Combining Terry and Randolph in the shelter setting would mean that a resident’s objection to staff consent to search will be effective unless the officer has reasonable suspicion that violence or the threat of violence has or will soon occur. This would balance the interests well.

G. Cambridge Street Shelter

Cambridge Street Shelter is run by the city in which it is located, and Patrick McDonnell, the staff member with whom I spoke, works for the city’s Department of Health and Human Services.

The shelter is located in a mixed residential/business area with a high school located nearby. The shelter building has three floors, and the layout of each floor is roughly identical to the others. A shelter maintenance worker let me in through a door off of Cambridge Street that is usually kept locked. I found myself in a large open room that the staff calls the “day room.” The room had a shelter reception desk in one corner and a hallway leading to staff offices in the back. To the left and up four steps was a room full of mats, cots, and lockers that is used as a sleeping area. There is a small

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701 See infra Part VII.
702 Randolph, 547 U.S. at 118.
hallway through the sleeping area that leads to the area where residents enter, fill out sign-in forms, and receive towels, toiletries, and other necessities. Past the sign-in desk and to the right is a laundry area with three or four sets of washers and dryers that residents can sign up to use. At night, mats are laid down in the laundry room and residents sleep there. The two floors above this one have a similar layout.

The shelter serves homeless men who are age 18 and above. According to McDonnell, it “tries to be a dry shelter,” but if someone is not too drunk, the shelter might accept him. The shelter provides the usual shower, bed, and food, but also provides access to a number of services that relate to obtaining and keeping private housing, health, employment assistance, and so on. The shelter has a capacity of 154 residents, but likes to keep the nightly number below 100. Currently, the shelter sees an average of 120 residents per night. The higher the numbers, the fewer people the shelter is able to successfully help find private permanent housing. There is no fee or rent, even if the resident has a job, which many residents have. There is also no limit to the length of time a resident can stay in the shelter. About one-third of residents stay at the shelter for a very short length of time. Another one-third of the residents are there for “a moderate amount of time,” and may be simply waiting for a housing voucher to be approved so that they can get their own private housing. The last one-third of the residents are in the shelter virtually permanently. Residents can remain in the shelter for 1,000 nights, and for them, said McDonnell, the shelter “is their home.” According to McDonnell, the shelter is “not a home, [it is] a temporary shelter, [a] temporary place to be. And we’re clear about that.” The long-time residents stay for the night, leave during the day, possibly going to a shelter with a day program, and return the next night.

The shelter is night to night. Residents check in every night at 7:45 p.m. and receive a bed assignment. Residents are not searched unless staff suspects something. This means that no pockets are turned out and no bags are searched. Residents are, however, asked to turn in anything that could be used as a weapon, which may include such things as carpenter tools belonging to a resident who works as a carpenter. At the end of their stay, the residents get their weapons and items back. At check in, the staff performs a check to see if a signing-in resident is a sex offender. If he is, he cannot be housed due to city rules and the proximity of the high school.

Residents can check out lockers on a first come, first serve basis. Lockers are opened by a combination, and both staff and the resident it is a assigned to can open them at all times. Every Thursday, residents have to empty out the lockers for cleaning, but they do not thereby lose their locker privileges.

During the week, a police officer is on duty at the shelter from 6:30 p.m. through 1:00 a.m., and he is there from 3:30 p.m. through 12:30 a.m. on the weekends. The officer usually remains outside in the police cruiser, and he is there more to patrol the outside of the shelter than to patrol the inside.
This officer also covers another shelter in the neighborhood, and McDonnell confirmed my observation that the officer is more like a neighborhood officer than a shelter-specific officer. Some of the officers that are on-duty enter the shelter’s common area to chat. McDonnell says that the officers’ presence “has made a huge [positive] difference,” and the residents say they feel safer. Residents often ask the officer about obtaining restraining orders, where to go if they have been assaulted or witnessed a crime, and other legal questions. The officer is a good resource for the residents, and he is there to protect the residents, not to police them.

When residents sign in, they have to sign an agreement that states: “Shelter staff reserves the right to conduct regular and/or spot inspections of all client [resident] lockers at any time, without prior notice.” There is nothing in the agreement about bag searches or personal searches and the staff appears to take residents’ privacy seriously. McDonnell notes that while the Fourth Amendment has never been discussed among staff, resident privacy and confidentiality has been discussed. This is so because the shelter is all about supporting and respecting the resident, except in cases when there are safety concerns. McDonnell explained: “I think we have to have reason to search their bags.” Other staff members I spoke with said the same thing. One staff member said that they can search residents’ bags “at will” if they “have reason to believe” that there is something illegal or dangerous. McDonnell noted that the shelter submits its sign-in agreement to the city’s legal counsel, who signs off on its legality. The staff, perhaps without knowing it, was using Fourth Amendment language of reasonable suspicion and a Terry v. Ohio-type analysis of allowing limited searches only for things that would affect the safety of the staff and residents. If the staff has information that a resident is very dangerous—if, for example, another shelter calls and says the resident has a gun—Cambridge Street Shelter will not hesitate to call in a police officer to conduct a search.

The staff members with whom I spoke, other than McDonnell, were very clear as to what limits they place upon allowing police access to the shelter. I asked them what they would do if an officer came during the night and asked to see or search a specific client. They responded that, if the officer did not have a warrant, there would be “no way” that the staff would let the officer into the sleeping areas. When asked the same question, McDonnell agreed that the officer would definitely not be allowed to enter. If, on the other hand, an officer came to the door leading to the day room, the officer would be allowed to look around the day room. This is so, said one staff member, because the day room is “a public place.” If the officer saw the resident-suspect there, then the whole shelter is fair game. It seems to me that the staff member was equating the day room with a public sidewalk for Fourth Amendment purposes. If the officer came to the shelter with a warrant, the staff would abide by the warrant, without a doubt.

The interactions with police as discussed above are largely theoretical because the shelter generally has a good relationship with police,
and such problems or confrontations have generally not occurred. Detectives have come by the shelter with a subpoena, in a case where, for example, a resident has witnessed a crime. The staff will allow the detective to look in the common areas for the resident, but staff will not bring the resident out to meet the detectives. Later, the staff might tell the resident that detectives are looking for him or her, and that the resident may want to contact the detectives.

The shelter staff with whom I spoke were not concerned with the Fourth Amendment—they were not quite sure what the Amendment said, much less that they, as government employees, were possibly bound by it. They had never been briefed or trained on it. Rather, the staff took the position of most of the staff at other shelters I visited: they are there to protect and support their residents on the one hand, but to preserve order and ensure safety on the other. As McDonnell said, the staff walks that “fine line.” If the police are necessary to ensure the safety of the residents and staff, the staff will enlist their help. The staff also wants to cooperate with the police, but they will require the police to abide by all constitutional rules of which the staff is aware. The staff follows rules of consent, entry into a “home,” and search warrants.

If government employees did not run this shelter, I would say that the Fourth Amendment applicability to residents is at its nadir here, in comparison to the other shelters profiled above. However, because it is run by government employees, the Fourth Amendment’s applicability may be nonexistent, because there is no reasonable expectation of privacy in a shelter run by those who are limited by the Fourth Amendment. The first question, then, is just that: given that the shelter is run by government employees, does the Fourth Amendment apply, and if so, to what extent? Are residents’ own closed containers still protected? The second question arises from the fact that, however they are limited by the Fourth Amendment, the staff seems to be abiding by a version of the Fourth Amendment enumerated in *Terry v. Ohio*, in which limited searches of suspects are legal where the government agent initiating the search reasonably suspects that he or others may be in physical danger. These searches must be limited to finding the instrumentalities of such a threat, such as a knife or a gun. In operating as the Cambridge Street Shelter staff apparently does, are residents’ Fourth Amendment rights both acknowledged and protected? Third, whether at this shelter the residents have acknowledged Fourth Amendment rights that are respected, is this *Terry*-type approach to Fourth Amendment analysis an appropriate middle ground to take as regards the Fourth Amendment rights of residents in all shelters? At all the shelters I visited, I spoke with staff who deeply care both for the privacy and safety of their residents. This gives rise to confusion as to what extent police may invade the privacy of shelter residents. Perhaps the appropriate policy for homeless shelters is to allow

703 See infra Part VII.
such invasions only where there is a reasonable suspicion of the likelihood of immediate physical harm. What would this policy look like?

We first ask whether the residents have Fourth Amendment rights. In the common areas and sleeping rooms, it is probable that they do not have an actual expectation of privacy because these areas are open to other residents, staff, and even the police officer on duty. Even if the officer never enters the sleeping area, he could view a large portion of the sleeping area from the common area. This applies to the first floor. On upper floors, where the officer generally will not go, the residents may have an actual expectation of privacy. Residents probably would not have an actual expectation of privacy in their lockers because the staff reserves the right to search the lockers at any time without prior notice. However, the doctrine of exclusive control would likely apply to resident’s closed containers inside the lockers, giving residents both an actual and reasonable expectation of privacy in those containers.

If the residents have an actual expectation of privacy in the common areas, sleeping areas, and lockers, it is likely not a reasonable expectation. Based on the positive law/property model, the residents have no property interest in the shelter and, because the officer on duty can enter the shelter, there is no positive law other than the Fourth Amendment that would keep the officer out. The officer probably has no access to the lockers, so the positive-law model may suggest that residents have a reasonable expectation of privacy in the lockers. The probabilistic model also suggests no reasonable expectation of privacy. Residents know that an officer is on duty, that the officer may enter the shelter, and that staff and residents may discuss situations in the shelter that would cause the officer to inquire and proceed throughout areas of the shelter. The public policy/balancing test model does not argue strongly for Fourth Amendment application for two reasons. First, it seems that this model is applied usually when other models, especially the positive law/property model, do not apply. Here, they do apply and militate against Fourth Amendment applicability. Second, given the open layout of the shelter and the fact that a police officer is on duty (which, it may be assumed, is necessary for safety purposes), a balancing of interests may conclude that application of Fourth Amendment rights would unduly infringe upon the governmental interest and would also negatively impact residents’ interest in a safe environment. The residents’ interest in privacy may not exist to begin with because the shelter setup, with its open layout and police presence, is not unlike a public area, where Fourth Amendment protections in exposed things generally do not exist.

If anything, the fact that the staff members are employed by the city may further lessen residents’ Fourth Amendment rights, to the extent they have any. Residents will still retain rights in the interior of their own closed containers, as the doctrine of exclusive control is unambiguous and settled law. Is this the right approach? This article advocates for Fourth Amendment rights for shelter residents, and the staff of Cambridge Street Shelter does as
well. Although they may not speak the language of the Fourth Amendment, the staff acts as though they are bound by it. They will only call a police officer in to search if there is evidence that a resident is very dangerous, which correlates with the exigent circumstances exception to the warrant requirement. They claim that they need a reason to search a resident’s bags, such as evidence of something illegal or dangerous. This correlates with the exigent circumstances exception as well as Terry v. Ohio, at least as far as searching for a dangerous object goes. They also recognize that they are there to protect the residents on one hand, but also to preserve order and ensure safety. This is the “fine line,” as McDonnell puts it, which underlies the public policy/balancing test. If the residents of Cambridge Street Shelter do not have Fourth Amendment rights, they should.

H. Summary

Fourth Amendment applicability to residents of homeless shelters is an unsettled question of law and presents myriad fact patterns that render a succinct answer virtually impossible. Because Fourth Amendment law is so fact-specific and therefore arises out of case-by-case analyses, there is an opportunity to create Fourth Amendment law that addresses homeless shelters. This law should be focused on ensuring residents a maximum level of Fourth Amendment protection while also promoting the governmental interest in preventing and detecting crime. This governmental interest is also the residents’ interest in the safety and security of their homes, the shelters. The public policy/balancing test model should therefore be the primary conceptual model used.704 Terry v. Ohio offers a good legal model because it establishes a Fourth Amendment regime that allows invasion of people’s privacy only when necessary to prevent what is reasonably perceived to be a threat of imminent violence.

VII. APPLYING TERRY V. OHIO

For Fourth Amendment purposes, homeless shelters share some attributes, but not all, with hotel, guest-host, and parent-child situations.705 Although these areas of law may shed some light on the Fourth Amendment’s applicability in shelters, shelter situations are unique. The gatekeeper issue is central in shelter analysis, and shelters call for a novel response that is not completely addressed by hotel, guest-host, parent-child, or traditional third-party consent law. If a shelter, such as Birch Trail or Columbia Shelter Services, is treated as a home for Fourth Amendment purposes, we can apply the Fourth Amendment law dealing with homes and

704 See supra notes 116-119 and accompanying text (discussing the public policy/balancing test model).
705 See supra notes 451-558 and accompanying text.
need not create a new approach. For those shelters that are less like homes, such as Bernard House or Cambridge Street Shelter, a framework of Fourth Amendment applicability informed by settled Fourth Amendment protections would be helpful. Terry v. Ohio provides a workable framework for Fourth Amendment applicability in shelters because it satisfies the residents’ interest in privacy and security as well as the governmental interest in preventing and detecting crime.

First, the Fourth Amendment, as interpreted by Terry, was designed to reflect society’s concern for the right of each individual to be let alone and to prohibit unjustifiable police intrusions which are overbearing, harassing, frightening, or humiliating. It also acknowledges that some police intrusions are reasonable when the gravity of the offense is serious, the need for prompt action is high, and the extent of the intrusion relates to the offense’s seriousness. Therefore, the context in which a person’s Fourth Amendment rights are asserted shapes which searches are considered reasonable and which violate the Fourth Amendment. Terry thus allows us to consider the unique situation of a shelter as a place like a home, but not quite a home. Given that shelters are like homes to some degree, and that homes are generally accorded the highest level of Fourth Amendment protection, Terry suggests that shelters should be sites of at least some level of protection.

For street level stop-and-frisks, Terry requires the officer to have specific and articulable facts that warrant a person of reasonable caution in the belief that an individual who the officer is investigating is armed and presently dangerous to the officer or others. Any resulting search must be “strictly circumscribed by the exigencies which justify its initiation.” That is, the officer has only “a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer.” This framework—limited searches allowable only where there is the threat of violence—is roughly the framework that all of the shelters I visited applied. All of the staff with whom I spoke acted to protect the privacy of their residents up to the point where that privacy could be protected without

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706 See supra Part VI.A-B.
707 See supra Part VI.E & G.
710 Id.
711 See supra Part VI.
712 Terry, 392 U.S. at 9.
714 Terry, 392 U.S. at 21.
715 Id. at 22.
716 Id. at 24.
717 Id. at 26.
718 Id. at 27.
719 See supra Part VI.
risk of harm to any resident or staff member.\textsuperscript{719} Staff members would call in police only when there was a threat of violence.\textsuperscript{720} Terry thus would provide an established legal and constitutional Fourth Amendment framework that already is applied unofficially in most or all of the homeless shelters I visited. Terry’s application would, therefore, allow privacy that is as close as possible to what “society” is prepared to accept as reasonable.

Furthermore, Terry applies to street encounters that, because of their fleeting nature, are situations when it is difficult to go through the sometimes lengthy process to obtain a warrant.\textsuperscript{721} Shelters, especially night-to-night shelters, share this problem.\textsuperscript{722} To ensure that the government can adequately prevent and detect crimes, there must be a framework for allowing limited searches of shelters without a warrant. In response to this, there must be adequate safeguards in place to protect residents of shelters. Both of these interests are satisfied by following Terry and allowing limited searches only where there is reasonable suspicion of danger.

If Terry was applied, officers would be able to search shelters when there are reasonable grounds, based on specific and articulable facts, to believe that someone in the shelter is armed and presently dangerous.\textsuperscript{723} Stated another way, they would be able to search when an officer reasonably suspects someone in the shelter of being about to commit or having just committed a crime of violence.\textsuperscript{724} If the officers have a reasonable belief that a person within the shelter is in need of immediate aid, they could enter and search.\textsuperscript{725} Other exigent circumstances might also justify warrantless searches.\textsuperscript{726} Clearly, when there is an issue of safety or threat of violence, Terry and other Fourth Amendment law would not bar officers from entering and searching a shelter. Searches based on lesser, non-violent offenses, or searches that are much more intrusive than the circumstances call for may violate the Fourth Amendment.\textsuperscript{727}

As mentioned above, if it is determined that an officer can search, the allowable scope of the officer’s search is to be determined by the circumstances that justified the search in the first place.\textsuperscript{728} A search for a gun must be confined to places where a gun may be located, and a search based

\begin{itemize}
\item \textsuperscript{719} See supra Part VI.
\item \textsuperscript{720} See supra Part VI.
\item \textsuperscript{721} Terry, 392 U.S. at 20.
\item \textsuperscript{722} See supra Part VI.
\item \textsuperscript{723} Terry, 392 U.S. at 21, 24; Sibron v. New York, 392 U.S. 40, 64 (1968).
\item \textsuperscript{724} Adams v. Williams, 407 U.S. 143, 153 (1972) (Brennan, J., dissenting).
\item \textsuperscript{725} Mincey v. Arizona, 437 U.S. 385, 392 (1978) (“[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.”).
\item \textsuperscript{726} Georgia v. Randolph, 547 U.S. 103, 117 (2006) (identifying “violence in the home” as another reasonable ground).
\item \textsuperscript{727} Terry, 392 U.S. at 20, 24; United States v. Garcia, 450 F. Supp. 1020, 1023 (D.N.Y. 1978).
\item \textsuperscript{728} See United States v. Sharpe, 470 U.S. 675, 682 (1985); Mincey, 437 U.S. at 393; Terry, 392 U.S. at 19.
\end{itemize}
on reasonable suspicion that someone poses a threat of violence must be limited to methods calculated to discover whether that person does or does not pose a threat and to remove that threat.

Applying these rules to shelters, officers would be able to enter and search shelters when they have reasonable suspicion that someone inside presents an immediate threat of violence. Their searches would be limited to discovering and removing any such threat. This approach recognizes the fact that shelters are both residences where Fourth Amendment protections are normally at their highest and are quasi-communal gathering places where people who congregate have an interest in the government protecting them against the threat of violence presented by others. Just as officers in a public square cannot search a person if they have a reasonable suspicion that the person committed a non-violent crime, residents of a shelter do not have an interest in officers entering their residences to discover another resident’s crime that presents no danger to others.

Some may argue that this framework provides too much power to police to enter and search shelters. The reality, however, may dispel some of their concern. Police do not normally peek through shelter windows or otherwise perform surveillance on shelters. They are not normally able to gather specific and articulable facts giving rise to the requisite reasonable suspicion on their own. Based on my shelter visits, police do not and have no desire to perform such intensive police work vis-à-vis shelters. The vast majority of information regarding criminality in shelters comes from shelter staff who call police and ask them to come to the shelter to investigate, search, or remove a resident who poses a threat. These calls, when they do happen, are virtually always well-founded because shelter staff strive to uphold their residents’ privacy and recognize that police intervention threatens that privacy as well as the ability of the shelters to achieve their mission of providing safe housing to the homeless in the area. Shelter staff know that if a shelter experiences a high level of police intervention, or that intervention is for relatively minor offenses, homeless persons will become less trusting of the shelter and will choose to stay outside in less safe conditions. As a result, the staff generally contacts the police sparingly, and when they do, they use them for truly dangerous situations.

Viewed from a law enforcement point of view, some may be concerned that this approach gives residents of shelters too much privacy, even as against the wishes of the shelter staff, who are responsible for providing a safe, productive environment for all residents. If a resident has a stash of illegal drugs but poses no danger to others, should not the staff be able to manage this problem? The answer is, of course, yes, and the staff can do so. They can kick the resident out of the shelter, and they can call for

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729 See supra Part VI.
730 See supra Part VI.
police assistance to do so where that assistance does not include a search. Staff can generally search residents’ belongings at will because they are not limited by the Fourth Amendment. If the staff suspects that by doing so, the resident will become violent, they can call for police assistance, if that assistance does not include a search beyond searches based on reasonable suspicion that the resident poses a threat. Finally, shelter staff, for the most part, already support and follow the rule that the Terry approach sets forth.\textsuperscript{732} This approach would mostly just enshrine a de facto rule into law, thus providing guidance to the police and the public alike.

It should be noted here that officers generally are able to obtain the requisite reasonable suspicion to perform a search under Terry when shelter staff make the call for police assistance. Information that police obtain from informants can be used to obtain reasonable suspicion if the totality of the circumstances, focusing on the informants’ veracity, reliability, and basis of knowledge, lead to the officer having reasonable suspicion.\textsuperscript{733} Because staff members, as a rule, try to protect their residents’ privacy, often have good relationships with local police, and are on-hand at the shelter to observe the potentially threatening resident, their calls to police should virtually always be sufficient to establish reasonable suspicion.

\textit{Georgia v. Randolph} should also not be cause for concern about the Terry approach to shelters.\textsuperscript{734} \textit{Randolph} does not allow residents to object effectively to staff’s consent to search where there are exigent circumstances or where one resident may be physically abusing another resident.\textsuperscript{735} Reasonable suspicion that a resident poses a risk of immediate danger to others could certainly qualify to render any resident’s objection ineffective. In addition, \textit{Randolph} does not prevent a co-tenant (or, assumedly, a shelter staff member) from acting on his or her own initiative to deliver evidence to the police, which could then be used to obtain a warrant.\textsuperscript{736} If a staff member wishes to perform a search on a resident or the resident’s belongings, the staff member could confiscate any contraband and turn that over to police, who could then perform a search if the evidence indicated a threat of violence or obtain a warrant if the evidence indicated a non-violent crime. Finally, for a resident to successfully object, the resident must be present at the door and objecting.\textsuperscript{737} If the resident is “nearby but not invited to take part in the threshold colloquy, [the resident] loses out.”\textsuperscript{738} This narrow line will probably serve to make most staff consents valid, because the resident who is the target of the search will likely not be present or objecting.

\begin{footnotes}
\item[732] See supra Part VI.
\item[735] Id. at 118.
\item[736] Id. at 116.
\item[737] Id. at 114-15.
\item[738] Id. at 121.
\end{footnotes}
Whatever criticisms of this situation are made, they are appropriately made against Randolph and not against the Terry approach described here. What is important is that Randolph will not provide residents of homeless shelters easy protection if they pose a risk of violence to others.

Randolph should, however, allow residents to effectively object to searches for evidence of non-violent crime. This is the holding in Randolph and would be consistent with the Terry approach in shelters because it would limit searches to those that address violence or the risk of violence. It could be said that Randolph has no applicability under the Terry approach. If the staff consents to a search in response to suspicion of a non-violent crime, police would not, under the Terry approach, be able to search. If the staff consents to a search in response to suspicion of violence or threat of violence, then exigent circumstances are created and police do not need consent to enter and perform a limited search. Randolph would not apply because where consent is not necessary, and a resident’s objection to that consent would become irrelevant.

VII. CONCLUSION

Because Fourth Amendment analyses are fact specific, we are required to wait until a series of opinions emerges—or, perhaps, one major Supreme Court opinion—before we can say what Fourth Amendment protections people have in a particular context. Opinions that address residents of shelters have not yet been written, and so we are left to guess as to their Fourth Amendment protections. Why these opinions have not yet emerged is difficult to know, but the recent creation (within the last century) of the modern homeless shelter combined with homeless persons’ low societal visibility and relatively low level of legal representation—effective or otherwise—may mean that these persons go ignored in the criminal justice system and their constitutional rights are not pursued.

This article pursues those rights, discusses what Fourth Amendment case law may apply, and suggests a framework based on Terry v. Ohio that would work in the shelter setting. The assumption throughout is that residents of homeless shelters have a certain level of privacy in these shelters as “homes,” but that the unique structure of most shelters demands a novel approach. Shelters differ from traditional homes in that they are often short-term residential schemes in which a number of residents live together in varying degrees of proximity to one another. The primary need that government faces in patrolling these shelters is the need for safety.

The Terry approach satisfies the interests of residents and police alike. For shelter residents, it ensures that the police will have easy access to shelters when the residents are at risk of violence from someone in the shelter. It also ensures that the police will be largely excluded from shelters, even where a resident is suspected of being involved in a non-violent crime that does not threaten others. Given police officers’ right to enter a traditional
home if someone is at risk of immediate violence, the Terry approach means
that shelters will be treated most often as traditional homes. For the
government, the Terry approach ensures that the police will be able to
respond to calls at shelters and search suspects found therein under the
reasonable suspicion standard. Where it truly matters, such as in cases of
violent crime and threats of violence, officers will have very easy access to
shelters. This serves the governmental interest in preventing and detecting
crime, and has the added collateral benefit of serving shelter residents’
interest in personal safety.