Public Education and Student Privacy: Application of the Fourth Amendment to Dormitories at Public Colleges and Universities

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

Although few people who have ever resided in a college dormitory would favorably compare those living quarters to the comfort of a private home, a dormitory room is ‘home’ to large numbers of students who attend universities... Because of the very nature of dormitory life, privacy is a commodity hard to come by, however much desired.1

Dormitories across the country are different in many ways: some house hundreds of students, while others house thousands; some are segregated by sex, while others are not; some use suites to house students, while others retain the familiar barracks-style of living. Regardless of these differences, the students living in dormitories at public institutions can expect that their privacy rights are still protected under the Fourth Amendment. In light of the

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significant student privacy interests involved, it is critical that
college and university administrators fully understand a
student's Constitutional rights under the Fourth Amendment.
Failure to respect these rights may result in the institution and
its employees being held civilly liable, and/or seized evidence
being suppressed, typically in a criminal case.

In summary, this article seeks to provide insight into the
current state of the law regarding dormitory searches by
officials at public institutions of higher education. The first
section of the article provides a brief overview of the Fourth
Amendment, while the remaining sections address the
Amendment’s application to dormitory rooms and common
areas. The issue of searches conducted by Resident Assistants
is discussed, as are the various recognized exceptions to the
Fourth Amendment’s warrant requirement.

I. THE FOURTH AMENDMENT

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

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

A careful reading of the Fourth Amendment reveals that it
contains two distinct clauses: “the first protecting the basic
right to be free from unreasonable searches and seizures and
the second requiring that warrants be particular and supported
by probable cause.” Thus, regarding this first clause, “[t]he
Fourth Amendment does not proscribe all state-initiated
searches and seizures; it merely proscribes those which are

operates as a judicially created remedy designed to safeguard against future violations
of Fourth Amendment rights through the rule’s general deterrent effect.”); United
States v. Leon, 468 U.S. 897, 916 (1984) (noting “the exclusionary rule is designed to
purpose is to deter—to compel respect for the constitutional guaranty in the only
effectively available way—by removing the incentive to disregard it.”).
4. U.S. CONST. amend. IV.
unreasonable." This clause is "general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent ...." The second clause mandates that probable cause exist before warrants may be issued, and that search warrants particularly describe the place to be searched and the things to be seized. These requirements collectively serve a critical purpose in our society, and the clause itself is intended to:

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

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

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8. Id. (internal citation omitted).
9. Mincey v. Arizona, 437 U.S. 355, 390 (1978) (quotation omitted); see also Johnson v. United States, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or [g]overnment enforcement agent.").
10. United States v. Ventresca, 380 U.S. 102, 109 (1965); see also United States v. Leon, 468 U.S. 897, 922 (1984) ("Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness. . . . for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.") (internal citations and punctuation omitted); Jones v. United States, 362 U.S. 257, 270-71 (1960) ("In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be
The operation of these two clauses has, over time, resulted in the establishment of a number of well-established notions that provide the framework within which courts answer Fourth Amendment questions. The first, that warrantless searches are *per se* unreasonable, has already been mentioned.\(^1\) The second, which will be discussed more fully below, is that the Fourth Amendment "protects people, not places."\(^2\) The application of the Fourth Amendment has changed over time, and no longer requires a physical intrusion by the government in order for there to be a constitutional issue. Instead, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."\(^3\) The third notion is that probable cause, standing alone, cannot justify a warrantless search.\(^4\) Instead, probable cause must exist in conjunction with a warrant or an exception to the warrant requirement (e.g., searches incident to arrest).

When analyzing whether an unreasonable Fourth Amendment search has occurred, the first question that must be considered is whether a "search" actually took place. If the action being scrutinized does not constitute a "search," then the Fourth Amendment does not apply.\(^5\) A "search" occurs when the government intrudes upon a subjective expectation of privacy that society considers to be objectively reasonable.\(^6\)
This has become more commonly known as a "reasonable expectation of privacy." The test for whether a reasonable expectation of privacy exists is two-pronged: first, the individual must have exhibited an actual (subjective) expectation of privacy; and second, that expectation must be one that society is prepared to recognize as reasonable. If either of these prongs is not met, then the Fourth Amendment is not implicated. For example, "conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable."

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

defendant who wishes to embark upon a Fourth Amendment challenge 'must show that he had a reasonable expectation of privacy in the area searched and in relation to the items seized.' (quoting United States v. Aguirre, 839 F.2d 854, 856 (1st Cir. 1988)).


18. Id.
20. Schmerber v. California, 384 U.S. 757, 770 (1966) ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.").
handwriting exemplars.26

Similarly, the Supreme Court has held that an individual will have a reasonable expectation of privacy in the interior of the vehicle, at least in those areas of a vehicle not exposed to view from the outside.27 This same protection, however, would not be extended to the exterior of the vehicle, since the "exterior of a car...is thrust into the public eye, and thus to examine it does not constitute a 'search.'"28 Additionally, a passenger would not be entitled to Fourth Amendment protection in a vehicle which he or she neither owns, nor leases, although the passenger would retain an expectation of privacy in any personal items he or she brought into the vehicle with them.29

Additionally, the "Supreme Court has long recognized that individuals have an expectation of privacy in closed containers," such as briefcases, backpacks, purses, wallets, etc.30 However, "for there to be a reasonable expectation of privacy, the contents of [the] container should not be apparent without opening."31 Thus, "when a container is 'not closed,' or 'transparent,' or when its 'distinctive configuration...proclaims its contents,' the container supports no reasonable expectation of privacy and the contents can be said to be in


27. New York v. Class, 475 U.S. 106, 114-15 (1986) ("While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police.");Texas v. Brown, 460 U.S. 730, 740 (1983) (plurality opinion) (noting "there is no legitimate expectation of privacy...shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers").

28. Class, 475 U.S. at 114.

29. See e.g., Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Baker, 221 F.3d 438, 441-42 (3d Cir. 2000) ("[A] passenger in a car that he neither owns nor leases typically has no standing to challenge a search of the car."); United States v. Buchner, 7 F.3d 1149, 1154 (5th Cir. 1993) ("The owner of a suitcase located in another's car may have a legitimate expectation of privacy with respect to the contents of his suitcase.").

30. United States v. Ruyan, 275 F.3d 449, 461 (5th Cir. 2001) (citations omitted); accord, United States v. Ross, 456 U.S. 798, 822-23 (1982) ("[T]he Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view."); United States v. Jacobsen, 466 U.S. 109, 111 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy...."); United States v. Fultz, 146 F.3d 1102, 1105 (9th Cir. 1998) ("A person has an expectation of privacy in his or her private, closed containers.").

plain view."^{32}

Lastly, "[i]t is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'^{33} Consequently, an individual will have a reasonable expectation of privacy in his or her home. As the Supreme Court has noted:

At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle.\(^{34}\)

This protection for "private" residences has been extended to other types of dwellings, including both hotel and motel rooms,\(^{35}\) as well as rooms in boarding houses.\(^{36}\)

II. THE EXPECTATION OF PRIVACY IN DORMITORY ROOMS

The Supreme Court has established that college students do not "shed their constitutional rights' at the schoolhouse
gate.” Rather, students “have constitutional rights which must be respected,” and they can no longer be considered “members of what Graham Greene’s Secret Police Captain Segura called the ‘torturable class.’” Instead, the “Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures,” including all public institutions of higher education.

In light of these pronouncements, courts have unanimously determined that “a student who occupies a college [or university] dormitory room enjoys the protection of the Fourth Amendment.” As noted by one Federal court:

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

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

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

39. Id. (citing GRAHAM GREENE, OUR MAN IN HAVANA (1958), reprinted in TRIPLE PURSUIT: A GRAHAM GREENE OMNIBUS 376 (1971)).
41. Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971); accord, Smyth, 398 F. Supp. at 786 (“The [student’s] dormitory room is his house and home for all practical purposes, and he has the same interest in the privacy of this room as any adult has in the privacy of his home, dwelling, or lodging.”); Beauchamp v. State, 712 So. 2d 431, 432 (Fla. Dist. Ct. App. 1999) (holding the student “did have an expectation of privacy in his dormitory suite,” which the court noted was “comparable to a motel room or a room in a boarding house”).
governmental intrusion".43

Finally, the fact that "members of the public may make an occasional dormitory visit does not contravene the... finding that the living areas of a residence hall are private in nature."44 Generally, ownership is an "important consideration in determining the existence and extent of a defendant's Fourth Amendment interests."45 This ownership factor is thus applicable in the dormitory context. However, this ownership factor is not dispositive in finding that no reasonable expectation of privacy exists for students living in a university-owned dormitory.46 "Applicability of the Fourth Amendment does not turn on the nature of the property interest in the searched premises, but on the reasonableness of the person's privacy expectation."47

III. THE EXPECTATION OF PRIVACY IN COMMON AREAS

While a student's expectation of privacy in a dormitory room is well-established, there is a dearth of case law discussing whether that expectation extends into the common areas of a dormitory, such as lobbies, hallways and stairwells.

43. Piazzola, 442 F.2d at 288 (quotation omitted).
45. United States v. Angevine, 281 F.3d 1130, 1134 (10th Cir. 2002) (citation omitted); accord, United States v. Salvucci, 448 U.S. 83, 91 (1980) (noting that the Court has long recognized that property ownership is a "factor to be considered in determining whether an individual's Fourth Amendment rights have been violated... ."); Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) ("[P]etitioner's ownership of the drugs is undoubtedly one fact to be considered" in deciding whether standing existed.); United States v. Heckenkamp, 482 F.3d 1142, 1146 (9th Cir. 2007) ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of warrantless government intrusion. . . . However, we have given weight to such factors as the defendant's possessory interest in the property searched or seized, . . . the measures taken by the defendant to insure privacy, . . . whether the materials are in a container labeled as being private, . . . and the presence or absence of a right to exclude others from access.") (citations omitted).
46. Salvucci, 448 U.S. at 91 ("[P]roperty rights are neither the beginning nor the end of a Court's inquiry" into Fourth Amendment interests.).
47. Gillard v. Schmidt, 579 F.2d 825, 829 (3d Cir. 1978); see also Voyles v. State, 133 S.W.3d 303, at 306 (Tex. App. 2004) (among factors to consider in deciding whether employee had subjective expectation of privacy is "whether the accused had a property or possessory interest in the place invaded," although the court noted this factor is not dispositive); Gatlin v. United States, 833 A.2d 995, 1005 (D.C. 2003) ("Moreover, a legitimate expectation of privacy turns on consideration of all of the surrounding circumstances, including but not limited to defendant's possessory interest.") (citation omitted); United States v. Taketa, 923 F.2d 665, 672 (9th Cir. 1991) (noting that "privacy analysis does not turn on property rights").
However, because dormitory rooms are analogous to apartment or hotel rooms, it is useful to explore how courts have viewed expectations of privacy in these settings in order to understand how such common areas would likely be addressed in a dormitory. That said, the majority of Federal courts have concluded that “tenants do not have a reasonable expectation of privacy in the common areas of their apartment building.”

However, one circuit “has recognized a reasonable expectation of privacy in the common areas of an apartment building, at least when the door is locked . . . .” Notwithstanding the above, however, all Fourth Amendment questions are fact-based, and at least one court has held that a student residing in a dormitory will have an expectation of privacy in the hallway of the building.

For example, in *State v. Houvener*, a student that was attending Washington State University claimed his Fourth Amendment rights were violated by police conducting a warrantless search. After a campus police officer received a report of a theft in the dormitory, the officer initiated a search of the entire dormitory complex, beginning around the 13th floor and continuing until he eventually reached the student’s room on the 6th floor. After hearing what he believed were incriminating statements coming from inside Houvener’s room, the officer attempted a ruse to get the occupants to open the door. When that failed, he identified himself as a police officer and ordered the students to open the door. Houvener opened

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48. United States v. Miravalles, 280 F.3d 1328, 1331 (11th Cir. 2002); see also United States v. Rheault, 561 F.3d 55, 59 (1st Cir. 2009) (noting that “it is beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building”) (citations omitted); United States v. Paradis, 351 F.3d 21, 31 (1st Cir. 2003) (noting that a defendant had no privacy interest in bag of ammunition left on the back porch of an apartment building because “he had no expectation of privacy in the common areas of a multi-family building”); United States v. Nohara, 3 F.3d 1239, 1241-42 (9th Cir. 1993) (apartment hallway); United States v. Concepcion, 942 F.2d 1170, 1171-72 (7th Cir. 1991) (apartment common areas); United States v. Barrios-Moriera, 872 F.2d 12, 14-15 (2d Cir. 1989) (apartment hallway), overruled on other grounds by Horton v. California, 496 U.S. 128 (1990); United States v. Kiser, 567 F.2d 814, 816 (8th Cir. 1977) (apartment hallway); United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir. 1976) (underground parking garage of condominium).

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


51. *Id.* at 371.

52. *Id.*

53. *Id.*
the door, entered the dormitory hallway as requested, and made incriminating statements while the officer questioned him, resulting in his arrest.54 Houvener then retrieved the stolen items from his room.55 The appellate court affirmed the trial court's decision to suppress the evidence seized from Houvener's dormitory room, concluding that "it was unlawfully obtained by police when an officer conducted a building-wide search of the interior hallways of the dormitory without a warrant."56

The court focused heavily on the physical layout of the 6th floor of the dormitory, noting that (a) the floor residents share a study area and bathroom;57 (b) the residents of that floor are "viewed as a living group independent of residents of other floors;"58 (c) while outsiders can access the lobby of the dormitory, "they may not access any of the floors without a pass key or without the escort of a resident of that floor;"59 and (d) each "living group is permitted to develop its own visitation schedule for its main lounge and lobbies."60 The court distinguished students living together in a dormitory from tenants in an apartment building, reasoning that "student residents have a right to privacy in the hallway they share. These students are not strangers—they share close quarters, intimate spaces, and a common academic and social experience."61 Interestingly, the court also considered the notion of "curtilage" in its analysis, finally holding that:

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

54. Id. at 371-72.
55. Id. at 372.
56. Id. at 371.
57. Id. at 372.
58. Id. at 374.
59. Id.
60. Id. at 372 (quotations omitted).
61. Id. at 375.
Like all Fourth Amendment questions, whether a student has a reasonable expectation of privacy in a dormitory hallway or common areas may only be answered after careful consideration of the specific underlying facts. Thus, while it can reasonably be said that students will not typically have a reasonable expectation of privacy in the common areas of a dormitory, that question must ultimately be answered after considering the openness, security, and use of the area in question. So, for example, if (a) access to the area is restricted to residents or others escorted by residents based upon institution or dormitory policies and practices, (b) the area is used for "intimate" activities, such as proceeding to and from shared shower facilities, and (c) the area contains shared areas that are provided for the independent use of students on a particular floor of the dormitory, it is entirely possible that students could have an expectation of privacy in the hallways of a dormitory. Alternatively, where (a) access to the hallways of the dormitory is not restricted to residents or escorted guests, (b) shower facilities are provided in individual rooms or suites so that travel throughout the common areas is not required, and/or (c) the general use of the area is not consistent with an independent group living arrangement, a student would likely not be entitled to an expectation of privacy in the common areas of the dormitory.

IV. PRIVATE SEARCHES AND RESIDENT ASSISTANTS

The Fourth Amendment does not apply to private searches. The Supreme Court has repeatedly held that the Fourth Amendment "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official." Stated more plainly, the Fourth Amendment does not regulate private conduct, regardless of the conduct's reasonableness. Nevertheless, "[t]he government may not do, through a private individual, that

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62. Id. at 373-74 (quoting United States v. Dunn, 480 U.S. 294, 301 (1987) and Oliver v. United States, 466 U.S. 170, 180 (1984)).

which it is otherwise forbidden to do."\textsuperscript{64} Thus, if a private party conducts a search as an instrument or agent of the government, the Fourth Amendment will apply to that party's actions.\textsuperscript{65} Private searches become governmental depending "on the degree of the government's participation in the private party's activities, ... a question that can only be resolved 'in light of all the circumstances.'\textsuperscript{66} In making such a determination, the lower courts have almost uniformly applied the following two-part test or a close variant: (a) "whether the government knew of and acquiesced in the intrusive conduct," and (b) "whether the party performing the search intended to assist law enforcement efforts or to further his own ends."\textsuperscript{67} While, a court must find both before an agency relationship can be deemed to exist,\textsuperscript{68} it is important to note that the greater the government involvement in the search, the less important the private searcher's intent.\textsuperscript{69}

A. Government Knowledge and Acquiescence

The first factor courts typically consider in determining whether a search is private or governmental is the extent of the government's knowledge of, and participation in, the private actor's conduct.\textsuperscript{70} Within the context of private searches, knowledge and acquiescence "encompass the requirement that the government agent must ... affirmatively encourage,

\begin{itemize}
  \item 64. United States v. Feffer, 831 F.2d 734, 737 (7th Cir. 1987).
  \item 67. United States v. Alexander, 447 F.3d 1290, 1295 (10th Cir. 2006); United States v. Ginglen, 467 F.3d 1071, 1074 (7th Cir. 2006); United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003); United States v. Young, 153 F.3d 1079, 1080 (9th Cir. 1998); United States v. Jenkins, 46 F.3d 447, 460 (5th Cir. 1995); United States v. Malbrough, 922 F.2d 458, 462 (8th Cir. 1990); and United States v. Jarrett, 338 F.3d 339, 341-45 (4th Cir. 2003) (combining the two factors into "one highly pertinent consideration"). In United States v. Pervaz, 118 F.3d 1, 6 (1st Cir. 1997), the First Circuit Court of Appeals refused to adopt "any specific 'standard' or 'test,'" identifying instead several factors that may be relevant to this determination: "the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests."
  \item 68. Jarrett, 338 F.3d at 345; see also United States v. Poe, 556 F.3d 1113, 1123 (10th Cir. 2009), cert. denied, 130 S. Ct. 395 (2009).
  \item 69. Presley v. City of Charlottesville, 461 F.3d 180, 488 n.7 (4th Cir. 2006).
  \item 70. Alexander, 447 F.3d at 1295.
\end{itemize}
initiate or instigate the private action." Consequently, a private search can be converted into a governmental one only where there is "some exercise of governmental power over the private entity, such that the private entity may be said to have acted on behalf of the government rather than for its own, private purposes." In making this determination, courts will "consider whether the private actor performed the search at the request of the government, or whether the government otherwise initiated, instigated, orchestrated, encouraged, or participated in the search." "Mere knowledge of another’s independent action, does not produce vicarious responsibility absent some manifestation of consent and the ability to control."

Similarly, simply taking control of evidence "gathered by a private party acting without the State’s instigation or direction" does not transform a private search into a governmental one. In order for a private search to be considered governmental, courts typically require that a government agent be either involved in the search directly as a participant, or indirectly as an encourager. As one court has noted: "where [government] officials actively participate in a search being conducted by private parties or else stand by watching with approval as the search continues, [the governmental] authorities are clearly implicated in the search and it must comport with Fourth Amendment requirements." Implicit in this requirement, of course, is that the government must have knowledge of the private actor’s conduct before it actually occurs. "Where no official of the . . . government has any connection with a wrongful seizure, or any knowledge of it

71. United States v. Smythe, 84 F.3d 1240, 1243 (10th Cir. 1996).
72. United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997) (quotation omitted); see also Jarrett, 338 F.3d at 344 ("[T]o run afoul of the Fourth Amendment . . . the Government must do more than passively accept or acquiesce in a private party’s search efforts. Rather, there must be some degree of Government participation in the private search.").
73. State v. Santiago, 217 P.3d 89, 95 (N.M. 2009).
74. United States v. Koenig, 856 F.2d 843, 850 (7th Cir. 1988).
75. United States v. D'Andrea, 497 F. Supp. 2d 117, 122 (D. Mass. 2007), vacated on other grounds, 618 F.3d 1 (1st Cir. 2011); see also Jarrett, 338 F.3d at 345-16 (In order to find a private search has become governmental, there must be evidence of government "participation in or affirmative encouragement of the private search," because "passive acceptance by the Government is not enough.").
76. United States v. Leffall, 82 F.3d 343, 347 (10th Cir. 1996).
77. United States v. Mekjian, 505 F.2d 1320, 1327 (5th Cir. 1975).
until after the fact, the evidence is admissible." 78 Thus, for example, if a law enforcement officer actively sought out and requested that a private citizen conduct a search of a suspect's property (e.g., his or her computer), this would almost certainly qualify as a governmental search due to the initiation and instigation of the private action. 79 Alternatively, where a private citizen conducts a search without the government's knowledge and only later provides law enforcement personnel evidence of any crime uncovered during that search, it is likely this situation would not implicate the Fourth Amendment. 80

**B. Intent to Assist Law Enforcement**

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

A private citizen might decide to aid in the control and prevention of criminal activity out of his or her own moral conviction, concern for his or her employer's public image or profitability, or even desire to incarcerate criminals, but even if such private purpose should happen to coincide with the purposes of the government, "this happy coincidence does not make a private actor an arm of the government." 81

At least one court has noted that a private individual conducting a search "[a]lmost always... will be pursuing his own ends—even if only to satisfy curiosity—although he may have a strong intent to aid law enforcement." 82 However, as discussed above, a "private party cannot be deemed a government agent unless it was induced to act by some

78. Id.
79. See United States v. Malbrough, 922 F.2d 458, 462 (8th Cir. 1990) (noting that, in addition to the two commonly used factors, other useful criteria would include whether the private actor performed the search at the request of the government); United v. Walther, 652 F.2d 788, 793 (9th Cir. 1981) (noting that "the government cannot knowingly acquiesce in and encourage directly or indirectly a private citizen to engage in activity which it is prohibited from pursuing where that citizen has no motivation other than the expectation of reward for his or her efforts").
81. United States v. Shahid, 117 F.3d 322, 326 (7th Cir. 1997) (citation omitted).
82. United States v. Leffall, 82 F.3d 343, 347 (10th Cir. 1996).
government action.” 83 “[W]here the private party has ... a legitimate independent motivation for engaging in the challenged conduct, the [F]ourth [A]mendment would not apply.” 84 Even “[w]here the private citizen is motivated both to assist the government and to further his or her own objectives, the private citizen is not acting as an agent of the government.” 85 Two other factors relevant in determining the private actors’ motivation for conducting the search are whether the government offered a reward, 86 and whether the private actor was a confidential informant. 87 Finally, a long-line of cases holds that “an off-duty police officer acts as a government agent, where he or she stumbles upon criminal activity and attempts to collect evidence for law enforcement.” 88

C. Resident Assistants

Courts have reached inconsistent conclusions regarding whether to treat resident assistants as state or private actors for purposes of dormitory searches. While one federal court has found a search conducted by a resident assistant to be state action, 89 at least two state courts have not. 90

In Morale v. Grigel, 91 the United States District Court for the District of New Hampshire concluded that a Resident Assistant was a governmental agent and thus his search was

84. United States v. Atson, 900 F.2d 1427, 1432 (9th Cir. 1990) (citation omitted; emphasis in original); see also United States v. Koenig, 856 F.2d 843, 850 (7th Cir. 1988) (noting that “once the court is satisfied that a private entity has conducted a search for its own, private reasons and not as an instrument or agent of the government, the specific reason for the search no longer matters”) (quotation omitted).
87. Compare United States v. McAllister, 18 F.3d 1412, 1417-19 (7th Cir. 1991) (in finding a confidential informant (CI) to be a private actor, the court noted that “neither the case law nor common sense supports the proposition that a CI ... automatically obtains and retains an ongoing status as a law enforcement officer or a governmental agent ...”) with United States v. Barth, 26 F. Supp. 2d 929, 935-36 (W.D. Tex. 1998) (holding a confidential informant’s actions attributable to government).
88. United States v. Ginglen, 467 F.3d 1071, 1075-76 (7th Cir. 2006) (collecting cases).
restricted by the Fourth Amendment. The court addressed the legality of a series of dormitory searches that occurred at the New Hampshire Technical Institute (NHTI). Following the theft of a stereo in the dormitory, a room-by-room search of the dormitory was conducted by Lane, the Head Resident, and Grigel, a second-year student employed as a Resident Assistant. According to the court, it was clear that "this initial inspection . . . was performed under the authority granted Lane and Grigel by NHTI in their respective capacities as Head Resident and Resident Assistant." Because Grigel had seen a dislocated ceiling tile in Morale's room, he determined to search the room for a second time that same evening looking for the stolen stereo. Morale was not present on this second occasion and his door was locked. After attempting to pick the lock to Morale's door, Grigel obtained Lane's passkey under false pretenses and again searched the room. On this occasion, Lane was not present and Grigel's search was conducted "without any actual authority." Grigel conducted a third search one day later; according to the court, he was "on duty as a proctor at the time and assumed a general authority to search for stolen property." Accompanied by other students, Grigel's third search of Morale's room turned up a film canister with marijuana seeds in it. Upon notifying Lane of this discovery, a fourth search of Morale's room ensued, with Grigel locating a pipe in a desk. When confronted by these discoveries, Morale acknowledged the items were his.

Ultimately, Morale filed a civil suit under Title 42, United States Code Section 1983 against Lane, Grigel, and numerous others for violations of his constitutional rights. The defense claimed that at least some of these searches were private

92. Id. at 991.
93. Id. at 991-92.
94. Id. at 992.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id. at 993.
100. Id.
101. Id.
102. Id.
103. Id. at 991.
The court rejected the notion that either Lane or Grigel were acting in a privacy capacity while carrying out these searches, reminding the institution that students do no forego their Fourth Amendment rights while attending college. The court held:

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

Alternatively, in State v. Kappes, the court concluded that a Resident Assistant’s search was not a result of governmental action. A Northern Arizona University student lived in a university-owned and operated dormitory. In her housing agreement she agreed to abide by all university regulations, including one that permitted the institution to enter a dormitory room and inspect for cleanliness, safety, or maintenance issues. These routine inspections were carried out monthly, and notice of each inspection was provided twenty-four hours ahead of time. During one of these inspections by two student resident advisors, who entered the room through the use of a master key, a pipe and marijuana butts were observed in plain view on a desk. Two campus security officers were notified and the student was ultimately arrested, charged, and convicted of misdemeanor possession of marijuana. On appeal, Kappes claimed the evidence used against her had been seized in violation of the Fourth

104. Id. at 996-97.
105. Id.
106. Id. at 996.
108. Id. at 122.
109. Id.
110. Id.
111. Id. at 122-23.
112. Id. at 123.
In rejecting her claim, the court initially noted that "if a law enforcement official initiated the investigation and then gained entry to a student's room without a warrant, evidence seized thereby would be barred under the fourth amendment." The court reasoned that the "same result has followed where the entry is made by a school official who does so at the request of, or in cooperation with, law enforcement officials." However, the court held that because, "the entry [was] made by a student advisor conducting a routine dormitory inspection announced in advance, [the court could not] say that the intrusion [was] the result of government action . . . ." Instead, the court concluded that the "purpose of the room inspection [was] not to collect evidence for criminal proceedings against the student, but to insure that the rooms [were] used and maintained in accordance with the university regulations." Accordingly:

While the actions of the student resident advisors in carrying out room inspections serve the internal requirements of the university, we do not find that they are tainted with that degree of governmental authority which will invoke the fourth amendment. . . . It follows then that the student advisors acting in this capacity do so as private persons rather than government agents for the purpose of the exclusionary rule. Their conduct is not circumscribed by the fourth amendment since its sanctions do not apply to private persons.

While the results of these cases may appear inconsistent, at least one significant distinction can be drawn between the two cases: the Resident Assistant in Morale had exceeded the scope of his authority by searching for evidence of criminal activity, while the Resident Assistant in Kappes had not.

Notwithstanding the result in Kappes, it makes greater sense, practically, to consider a resident assistant a state actor for purposes of the Fourth amendment. First, while courts have typically drawn distinctions between routine health and safety inspections and those initiated to ferret out criminal activity, "searches motivated by something other than the prospect of

113. Id. at 122.
114. Id. at 123.
115. Id.
116. Id. at 124.
117. Id. at 124.
118. Id. at 124 (citations omitted).
obtaining evidence of crime [are still] subject to the general
Fourth Amendment standard of reasonableness..."[119] Second,
courts have attempted to separate resident assistants from the
institutions that employ and empower them. While
theoretically possible, the reality is that resident assistants are
so inextricably linked to the institution that it is impossible to
separate them. Resident assistants are, for all practical
purposes, public employees of the institution. Like other faculty
and staff, they receive appropriate compensation from the
institution, either directly through monetary payments or
indirectly through the provision of room and board, which may
include even a meal plan. Further, resident assistants are
empowered by the delegation of authority from the public
institution. Without that institutional authorization, resident
assistants have none of the rights they exercise in terms of
conducting dormitory searches. In light of these considerations,
it seems more reasonable to conclude that resident assistants
are public actors for Fourth Amendment purposes, rather than
to conclude they are not.

V. CONSENT SEARCHES

A search that is conducted pursuant to consent is a well
"established exception[] to the requirements of both a warrant
and probable cause."[120] Thus, "[i]n situations where the police
have some evidence of illicit activity, but lack probable cause to
arrest or search, a search authorized by a valid consent may be
the only means of obtaining important and reliable
evidence."[121] In order to withstand judicial scrutiny, a consent
search has two basic requirements: first, the consent must have
been given voluntarily; and second, the consent must have been
given by someone with either actual or apparent authority over
the area or item to be searched.[122]

121. Id. at 227.
generally prohibits the warrantless entry of a person's home, whether to make an
arrest or to search for specific objects... The prohibition does not apply, however, to
situations in which voluntary consent has been obtained, either from the individual
whose property is searched, ... or from a third party who possesses common authority
over the premises...") (internal citations omitted).
A. Voluntariness

Both “the Fourth and Fourteenth Amendments require that...consent not be coerced, by explicit or implicit means, by implied threat or covert force.”\textsuperscript{123} In making this determination, courts will look at the totality of the circumstances surrounding the giving of the consent, because “it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.”\textsuperscript{124} Courts have considered a variety of factors in determining whether consent to search was voluntarily given, including (a) the age, education, and intelligence of the individual;\textsuperscript{125} (b) the individual’s knowledge of his or her right to refuse consent;\textsuperscript{126} (c) the length of any detention that occurred prior to the giving of the consent;\textsuperscript{127} (d) the repeated and prolonged nature of any questioning that led to the consent;\textsuperscript{128} (e) whether the consent was given in writing;\textsuperscript{129} (f) the use of physical punishment, such as sleep or food deprivation;\textsuperscript{130} (g) whether the individual cooperated in the search;\textsuperscript{131} (h) whether the suspect was in custody at the time the consent was given;\textsuperscript{132} (i) the suspect’s belief that no

\textsuperscript{123} Schnechloth, 412 U.S. at 228.

\textsuperscript{124} Id. at 233.

\textsuperscript{125} Id. at 226; United States v. Asibor, 109 F.3d 1023, 1038 n.14 (5th Cir. 1997); United States v. Smith, 260 F.3d 922, 924 (8th Cir. 2001); United States v. Givan, 320 F.3d 452, 459 (3d Cir. 2003); United States v. Ivy, 165 F.3d 397, 402 (6th Cir. 1999); United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996); United States v. Taylor, 196 F.3d 854, 860 (7th Cir. 1999); United States v. Blake, 888 F.2d 795, 798 (11th Cir. 1989).

\textsuperscript{126} Schnechloth, 412 U.S. at 227; United States v. Watson, 423 U.S. 411, 424 (1976); Asibor, 109 F.3d at 1038 n.14; United States v. Jones, 286 F.3d 1146, 1152 (9th Cir. 2002); Ivy, 165 F.3d at 402; Blake, 888 F.2d at 798.

\textsuperscript{127} Schnechloth, 412 U.S. at 226; Smith, 260 F.3d at 924; Hubbard v. Haley, 317 F.3d 1245, 1253 (11th Cir. 2003); Ivy, 165 F.3d at 402; Lattimore, 87 F.3d at 650; Taylor, 196 F.3d at 860.

\textsuperscript{128} Schnechloth, 412 U.S. at 226.

\textsuperscript{129} United States v. Boone, 245 F.3d 352, 362 (4th Cir. 2001) (“Written consent supports a finding that the consent was voluntary.”); United States v. Navarro, 90 F.3d 1245, 1257 (7th Cir. 1996).

\textsuperscript{130} Schnechloth, 412 U.S. at 226; Smith, 260 F.3d at 924; Hubbard, 317 F.3d at 1253; Ivy, 165 F.3d at 402.

\textsuperscript{131} United States v. Carrate, 122 F.3d 696, 670 (8th Cir. 1997) (suspect “idly stood by while the troopers searched his car, never indicating that he objected to the search”); United States v. McSween, 53 F.3d 684, 688 (5th Cir. 1995); United States v. Givan, 320 F.3d 452, 459 (3d Cir. 2003); Blake, 888 F.2d at 798.

\textsuperscript{132} United States v. Watson, 123 U.S. 411, 424 (1976) (noting that while custody is a factor to be considered, the Court emphasized that “the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search”);
... evidence will be found; (j) the presence of coercive police procedures, such as displaying weapons or using force; (k) the individual’s experience in dealing with law enforcement officers; (l) whether the suspect was under the influence of alcohol or drugs; (m) whether the suspect was notified of his or her Miranda Warnings; (n) whether the police made promises or misrepresentations; (o) the location where the consent was given; (p) whether the defendant had been told that a search warrant could be obtained if consent was not given; and (q) whether there were repeated requests for consent. The burden of proving that consent was given voluntarily rests with the government, “is a question of fact to be determined from the totality of all the circumstances,” and “cannot be discharged by showing no more than acquiescence to a claim of lawful authority.”

Smith, 260 F.3d at 924; United States v. Asibor, 109 F.3d 1023, 1038 n.14 (5th Cir. 1997); United States v. Jones, 286 F.3d 1146, 1152 (9th Cir. 2002); Taylor, 196 F.3d at 860; Blake 888 F.2d at 798; United States v. Cellitti, 387 F.3d 618, 622-23 (7th Cir. 2004) (“Consent given during an illegal detention is presumptively invalid,” but “may nevertheless be valid provided that it is sufficiently attenuated from the illegal police action to dissipate the taint.”).

133. Asibor, 109 F.3d at 1038 n.14; Blake, 888 F.2d at 798.
134. Orhorhaghe v. Immigration and Naturalization Serv., 38 F.3d 488, 500 (9th Cir. 1994); Asibor, 109 F.3d at 1038 n.14; Taylor 196 F.3d at 860; Blake, 888 F.2d at 798.
136. Smith, 260 F.3d at 924.
137. Watson, 423 U.S. at 425; Smith, 260 F.3d at 924; Jones, 286 F.3d at 1152; Taylor, 196 F.3d at 860.
138. Watson, 423 U.S. at 424; Smith, 260 F.3d at 924; Hubbard v. Haley, 317 F.3d 1245, 1253 (11th Cir. 2003); Hadley v. Williams, 368 F.3d 747, 749 (7th Cir. 2004).
139. Watson, 423 U.S. at 424 (finding that a suspect’s consent was valid in part because it “was given while on a public street, not in the confines of the police station”); Smith 260 F.3d at 924; United States v. Givan, 320 F.3d 452, 459 (3d Cir. 2003); Lattimore, 87 F.3d at 650.
140. Jones, 286 F.3d at 1152; United States v. Soriano, 346 F.3d 963, 971 (9th Cir. 2003) (In such situations, application of this factor “hangs on whether a suspect is informed about the possibility of a search warrant in a threatening manner.”).
141. Taylor, 196 F.3d at 860; but see United States v. Jones, 254 F.3d 692, 696 (8th Cir. 2001) (noting that “[t]here is certainly no legal rule that asking more than once for permission to search renders a suspect’s consent involuntary, . . . particularly where the suspect’s initial response is ambiguous”) (internal citation omitted).
143. Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968); Orhorhaghe v. Immigration and Naturalization Serv., 38 F.3d 488, 500 (9th Cir. 1994) (“[T]here can be no effective consent to a search or seizure if that consent follows a law enforcement officer’s assertion of an independent right to engage in such conduct.”); United States v.
Within the context of a dormitory, courts will consider the above factors in determining whether a student voluntarily gave his or her consent to a search of a dormitory room. Generally, no single identified factor will be dispositive; instead, courts will consider the totality of the circumstances surrounding the consent to determine whether it was given voluntarily.

**B. Actual or Apparent Authority**

In addition to being given voluntarily, valid consent to search must be given by an individual with actual or apparent authority over the area to be searched. "Actual" authority to consent to a search of property is possessed by the owner of the property. However, a third-party possessing "common authority over or other sufficient relationship to the premises or effects sought to be inspected" can also have "actual" authority to provide valid consent to search. As stated by the Supreme Court:

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Alternatively, consent to search an area may be given by one who has apparent authority over the area to be searched. "Apparent authority turns on whether the facts available to the officer at the time would allow a person of reasonable caution to believe that the consenting party had authority over the premises." Stated differently, "apparent authority" exists

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Cedano-Medina, 366 F.3d 682, 684 (8th Cir. 2004) ("The burden of proving consent is on the government, and such burden "is not satisfied by showing a mere submission to a claim of lawful authority.") (citation omitted).


146. Id. at 171 n.7.

147. United States v. King, 627 F.3d 611, 648 (7th Cir. 2010).
when consent is given by one whom the officers, at the time of the search, reasonably, albeit erroneously, believed possessed common authority over the area to be searched.\textsuperscript{148}

The scope of any authorized consent search "is generally defined by its expressed object,"\textsuperscript{149} and courts use an objective reasonableness standard for measuring this aspect of the search.\textsuperscript{150} Further, an individual may limit the scope of any consent given,\textsuperscript{151} as well as revoke consent at any time.\textsuperscript{152} Finally, consent may be given expressly by an individual or may be inferred from his or her words and/or actions.\textsuperscript{153}

\textbf{C. Roommates}

As a general rule, "[w]hen an apartment . . . is shared, one ordinarily assumes the risk that a co-tenant might consent to a search, at least to all common areas and those areas to which

\textsuperscript{148} See, e.g., Rodriguez, 497 U.S. at 185-86 ("It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of . . . agents of the government . . . is not that they always be correct, but that they always be reasonable."); United States v. Amratil, 622 F.3d 914, 915 (8th Cir. 2010) ("A warrantless search is justified when an officer reasonably relies on a third party's demonstration of apparent authority, even if that party lacks common authority."); cert. denied, 131 S. Ct. 1541 (2011); United States v. Morgan, 435 F.3d 660, 663 (6th Cir. 2006) (quoting United States v. Hunyady, 109 F.3d 297, 303 (6th Cir. 2005)) ("Apparent authority is judged by an objective standard. A search consented to by a third party without actual authority over the premises is nonetheless valid if the officers reasonably could conclude from the facts available that the third party had authority to consent to the search.").


\textsuperscript{150} Id. ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect") (citations omitted).

\textsuperscript{151} Id. at 252 ("A suspect may of course delimit as he chooses the scope of the search to which he consents."); Walter v. United States, 447 U.S. 619, 656 (1980) (plurality opinion) ("When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization.").

\textsuperscript{152} See, e.g., Painter v. Robertson, 185 F.3d 557, 567 (6th Cir. 1999) (noting that "the consenting party may limit the scope of that search, and hence at any moment may retract his consent").

\textsuperscript{153} United States v. Hylton, 349 F.3d 781, 786 (4th Cir. 2003), abrogated in part by Georgia v. Randolph, 547 U.S. 103 (2006); United States v. Jones, 251 F.3d 692, 695 (8th Cir. 2001) ("Consent can be inferred from words, gestures, and other conduct."); United States v. Carter, 378 F.3d 584, 587 (6th Cir. 2004); United States v. Wesola, 223 F.3d 656, 661 (7th Cir. 2000) ("The fact that there was no direct verbal exchange between the parties in which the alleged consenting party explicitly said 'it's o.k. with me for you to search the apartment,' is immaterial, as the events indicate her implicit consent."); United States v. Buettner-Jantsch, 646 F.2d 759, 761 (2d Cir. 1981) ([C]onsent may be inferred from an individual's words, gestures, or conduct.").
the other has access."\textsuperscript{154} Thus, "[u]nless the complaining co-tenant has somehow limited the other's access to a piece of property, the consenting co-tenant's authority extends to all items on the premises."\textsuperscript{155} This is consistent with the Supreme Court's holding that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."\textsuperscript{156}

However, third-party consent is not without boundaries, especially when the situation involves co-tenants who differ on the issue of consent. Specifically, in instances where two roommates are present and have joint control over an area, the consent of one will not overrule the objection of the other.\textsuperscript{157} In such instances, the Supreme Court has seen the need to draw "a fine line," that is wholly contingent upon whether the potential objector is present or not: "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."\textsuperscript{158} Thus, "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given . . . by another resident."\textsuperscript{159}

Applying this logic to the issue of dormitory rooms, including dormitory suites, it becomes clear that a student may voluntarily consent to a search of the room that he or she physically occupies within the structure, along with all common areas (e.g., the sitting area in a dormitory suite with multiple student bedrooms) and other areas within the room or suite to which he or she has access (e.g., a bathroom area). The student may also give consent to search any effects within the

\textsuperscript{154} United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997); see also United States v. Janis, 387 F.3d 682, 686 (8th Cir. 2004) ("[A]n adult co-occupant of a residence may consent to a search.") (citation omitted).

\textsuperscript{155} United States v. Richard, 994 F.2d 214, 250 (5th Cir. 1993).


\textsuperscript{157} Randolph, 517 U.S. at 111 ("Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.").

\textsuperscript{158} Id. at 121.

\textsuperscript{159} Id. at 120.
room over which he or she possesses common authority. However, a student’s consent may not be honored if a roommate is physically present at the room and objects when the search request is made.

D. Landlords (and the Institution)

A landlord does not "have authority to waive the Fourth Amendment’s warrant requirement by consenting to a search of premises inhabited by a tenant who is not at home at the time of a police call." Similarly, in *Stoner v. California*, the Supreme Court rejected the government’s assertion that a hotel night clerk could consent to a search of a tenant’s room, concluding:

No less than a tenant of a house, or the occupant of a room in a boarding house, . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. . . . That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.

While a landlord or night clerk cannot ordinarily consent to a search of a tenant’s residence, he or she can consent to a search of any unoccupied spaces within the facility, as well

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160. United States v. Warner, 843 F.2d 401, 403 (9th Cir. 1988); see Chapman v. United States, 365 U.S. 610, 616-17 (1961) (holding that to uphold consent by a landlord would "reduce the Fourth Amendment to a nullity and leave tenants' homes secure only in the discretion of landlords."); United States v. Elliott, 50 F.3d 180, 186 (2d Cir. 1995) ("In general, a landlord does not have common authority over an apartment or other dwelling unit leased to a tenant."); United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992) (noting that "a landlady is not ordinarily vested with authority to authorize a search of premises leased to a tenant"); Commonwealth v. McCloskey, 272 A.2d 271, 273 n.3 (Pa. Super. Ct. 1970) ("Many other cases have held that one in the position of a lessor cannot consent to a police search of a tenant’s premises, even though the lessor, himself has a right to enter the room or apartment."). See also Stoner v. California, 376 U.S. 483, 489 (1964) ("It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent."); United States v. Jeffers, 342 U.S. 48 (1951); Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965).

161. Stoner, 376 U.S. at 490 (internal citations omitted).

162. See Elliott, 50 F.3d at 186 ("A landlord does, however, have authority to consent to a search by police of dwelling units in his building that are not leased."); United States v. Law, 528 F.3d 888, 904 (D.C. Cir. 2008) ("While a landlord cannot ordinarily consent to a search of a tenant’s home, . . . she can consent to a search of an unleased apartment.") (internal citation omitted); United States v. Williams, 523 F.2d 64, 66 (8th Cir. 1975).
as any common areas of the building over which he or she had joint access or control.\footnote{163} This becomes relevant because it is generally held that, in the case of a dormitory, "the educational institution's position is more akin to that of any other landlord."\footnote{164}

This being the case, courts are understandably reluctant to put the student who has the college as a landlord in a significantly different position than a "student who lives off campus in a boarding house." The latter student is quite obviously protected by the Supreme Court's ruling ... that a landlord may not consent to a police search of his tenant's quarters merely because he has some right of entry of his own in connection with his position as landlord. ... [T]he same may be said of the college landlord.\footnote{165}

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

E. Housing Agreements and Implied Consent

An institution of higher education has certain powers that may be exercised in carrying out the institution's educational mission. Thus, "a college has the inherent power to promulgate rules and regulations; ... to discipline; ... to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct."\footnote{166} However, "this comprehensive authority must be exercised consistently 'with fundamental constitutional safeguards.'"\footnote{167}

\footnote{163. See Elliott, 50 F.3d at 186 ("[I]f the landlord has joint access or control over certain areas of his apartment building for most purposes, he may validly consent to a search of these areas."); United States v. Kelly, 551 F.2d 760, 764 (8th Cir. 1977) (quoting United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (Even assuming that tenant had reasonable expectation of privacy in the common hallways of an apartment building, a landlord could validly consent to search of common areas "over which he had 'joint access or control for most purposes."); United States v. Kellerman, 431 F.2d 319, 324 (2d Cir. 1970) (holding that a landlord of an apartment building could consent to a search of a common basement area).}

\footnote{164. People v. Superior Court, 49 Cal. Rptr. 3d 831, 845 (Cal. Ct. App. 2006) (quotation and citation omitted).}

\footnote{165. Id. (quotation omitted).}

\footnote{166. Esteban v. Cent. Mo. State Coll., 415 F.2d. 1077, 1089 (8th Cir. 1969).}

It is common for a student living in a dormitory at a public institution to be required to sign a standard "housing agreement" form. These agreements may contain a provision permitting the institution to conduct random inspections of dormitory rooms for purposes of ensuring the health and safety of the residential population.\(^{168}\) As one court has noted:

Students attending a university require and are entitled to an atmosphere that is conducive to educational pursuits. In a dormitory situation, it is the university that accepts the responsibility of providing this atmosphere. Thus, it is incumbent upon the university to take whatever reasonable measures are necessary to provide a clean, safe, well-disciplined environment in its dormitories.\(^ {169}\)

For these reasons, "[a]dministrative checks of dormitory rooms for health hazards are permissible pursuant to the school’s interest in the maintenance of its plant and health of its students, as are searches in emergencies, such as in the case of fire."\(^{170}\) However, while courts have acknowledged that an institution "retains broad supervisory powers which permit it to adopt" housing regulations, these regulations may not be overly broad.\(^{171}\) Instead, inspection provisions in housing regulations are permissible only if the "regulation is reasonably construed and is limited in its application to further the [institution’s] function as an educational institution."\(^ {172}\)

The regulation cannot be construed or applied so as to give consent to a search for evidence for the primary purpose of a criminal prosecution. Otherwise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room.\(^ {173}\)

\(^{170}\) Devers v. S. Univ., 712 So. 2d 199, 205 (La. Ct. App. 1998); State v. Kappes, 550 P.2d 121, 124 (Ariz. Ct. App. 1976) ("The university has an obligation to provide a safe and studious environment for those in attendance. It must be solicitous of the health, welfare and safety of its students, many of whom are experiencing life away from home for the first time. It is entirely appropriate that it routinely inspect its dormitory rooms for orderliness and safety, and its authority to do this does not compromise a student’s right to protection of the [Fourth Amendment].").
\(^{171}\) Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971).
\(^{172}\) Id.
\(^{173}\) Id. (footnote omitted); see also Smyth v. Lubbers, 398 F. Supp. 777, 788 (W.D.
In other words, "authority granted for a limited purpose does not translate into a general authority to authorize a search." Thus, while a student's signature on a housing agreement may constitute "consent to the [institution's] entry into [the student's] dorm room under" certain circumstances, it "cannot be reasonably construed as [the student] having given such consent to others." For example, in *State v. Hunter*, the court concluded that a warrantless search conducted pursuant to a provision in the housing agreement was constitutional in light of, *inter alia*, the institution's "interest in maintaining a safe and proper educational environment ..." The student attended Utah State University, lived in a campus dormitory, and, like other dormitory residents, signed a residential agreement that provided, in relevant part, that:

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

After numerous incidents of vandalism and other problems on the second floor of the dormitory, which University officials attributed to violations of the institution's alcohol and explosives policies, the residents of that floor, including Hunter, were warned that further occurrences would result in

Mich. 1975) ("[A] blanket authorization in an adhesion contract that the College may search the room for violation of whatever substantive regulations the College chooses to adopt and pursuant to whatever search regulation the College chooses to adopt is not the type of focused, deliberate, and immediate consent contemplated by the Constitution.").

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


176. Id. at 849-50.


178. Id. at 1038.

179. Id. at 1034.
room-to-room inspections. Following additional violations, campus officials undertook a search of all rooms located on the second floor. Because Hunter was not present when officials arrived to search his room, a passkey was used to gain entry. Upon entering, stolen university property was discovered. Ultimately, Hunter was charged with misdemeanor theft. He filed a motion to suppress the evidence discovered in his room, which was granted, and the State appealed that decision.

In reversing the trial court, the appellate court noted that "[t]he right of privacy protected by the fourth amendment does not include freedom from reasonable inspection of a school-operated dormitory room by school officials." Further, the court referred to the Supreme Court's recognition that "where state-operated educational institutions are involved ... [there is a] 'need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" In light of these overarching principles, the court concluded that the search was a "reasonable exercise of the university's authority to maintain an educational environment." By signing the ... housing contract, Hunter agreed to the university's right of reasonable inspection and waived any Fourth Amendment objections to the university's exercise of that right." Additionally, this was "not a case in which university officials took action at the behest of or as part of a joint investigation with the police," nor was it one in which "university officials attempt[ed] to delegate their right to inspect rooms to the police, which would [have] result[ed] in the circumvention of traditional restrictions on police activity."
Alternatively, in *Devers v. Southern University*, the court affirmed a lower court’s ruling that the institution’s housing agreement was unconstitutional. Devers was a student at Southern University and A & M College, located in Louisiana. As a condition of living in residential housing, he signed a rental agreement that provided, in pertinent part, that the “University reserves all rights in connection with assignments of rooms, inspection of rooms with police, and the termination of room occupancy.” During a dormitory search authorized by the institution’s housing agreement, twelve bags of marijuana were found in Devers’s room. He was arrested, issued an administrative expulsion, and prohibited from entering classes. Ultimately, Devers filed a civil lawsuit alleging his constitutional rights had been violated based upon the search of his dormitory room. After a trial court found the dormitory search policy prima facie unconstitutional, the institution appealed.

In support of the search’s constitutionality, the University argued the safety of students justified the random dormitory searches, and that the regulation at issue was similar to that upheld by the court in *Hunter*. However, this argument was unpersuasive, as the court distinguished the actions in this case from those in *Hunter*. First, “*Hunter* was not a case in which university officials took action at the behest of or as part of a joint investigation with the police.” Further, the university officials in *Hunter* did not “attempt to delegate their right to inspect rooms to the police, which would result in circumvention of traditional restrictions on police activity.” Additionally, while the regulation in *Hunter* “specifically stated the purpose of its inspections [was] for maintenance of university property, the health and safety of students, and maintenance of discipline in an educational atmosphere,”

193. *Id.* at 201.
194. *Id.* at 204 (emphasis in original).
195. *Id.* at 201.
196. *Id*.
197. *Id*.
198. *Id*.
199. *Id.* at 205.
200. *Id*.
201. *Id*.
202. *Id*.
Southern University's regulation "[did] not specify such a purpose, rather it allow[ed] entry of dormitory rooms accompanied by police without any stated purpose."203 In light of these facts, the court rejected the University's appeal:

The regulation utilized by Southern University clearly authorizes police involvement in the entry and search of the dormitory rooms. With police routinely assisting in the entry and search of a dormitory room, there are no factors which would characterize such an intrusion as a benign "administrative" search. . . . [A] check of a student's dormitory room is unreasonable under the Fourth Amendment unless Southern University can show that the search furthers its functioning as an educational institution. Southern University's housing regulation, as written, clearly authorizes unconstitutional searches. The search must further an interest that is separate and distinct from that served by Louisiana's criminal laws.204

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

F. Uncovering Criminal Evidence During an Administrative Search

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

203. Id.
204. Id. at 206.
In *Illinois v. McArthur*, the Supreme Court addressed the issue of temporarily seizing an individual’s “residence” in order to obtain a search warrant. The facts of the case are relatively straightforward: Police officers received a request from a woman to accompany her to the trailer she shared with her husband, Charles McArthur, so that she could collect her belongings without his interference. While the wife went inside to collect her possessions, the police remained outside. After collecting her property, the wife spoke to one of the officers on the porch of the residence and informed him he should consider searching the trailer because her husband “had dope in there.” She further stated that she had seen McArthur “slid[e] some dope underneath the couch.”

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

McArthur was charged with misdemeanor possession of drug paraphernalia and marijuana. He sought to suppress the evidence “on the ground that they were the ‘fruit’ of an unlawful police seizure, namely, the refusal to let him reenter the trailer unaccompanied, which would have permitted

206. Id. at 328.
207. Id. at 328-29.
208. Id. at 329.
209. Id.
210. Id.
211. Id.
212. Id.
213. Id.
214. Id.
215. Id.
him . . . to ‘have destroyed the marijuana.’”

The trial court granted McArthur’s suppression motion, and the appellate court affirmed suppression of the evidence. The Supreme Court decided to hear the case in order to determine whether the Fourth Amendment prohibits the temporary seizure of a residence when probable cause exists to believe that evidence of a crime is located therein.

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

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

216. Id.
217. Id. at 329-30.
218. Id. at 330.
219. Id. at 331.
220. Id. at 330.
221. Id. at 331 (emphasis in original); see also United States v. Place, 462 U.S. 696, 701-02 (1983).
222. McArthur, 531 U.S. at 331.
223. Id.
diligence, to obtain the search warrant.\footnote{Id. at 331-33.}

The Court's holding in \textit{McArthur} informs the appropriate actions to be taken in situations where institutional officials (e.g., Resident Assistants) uncover evidence of a crime during a routine administrative inspection of a dormitory room. If a Resident Assistant uncovers evidence of a crime, such as stolen property or other contraband, the prudent course is for the Resident Assistant to cease searching and notify campus law enforcement officials immediately of the discovery. Resident Assistants should be instructed that, while the discovery of contraband may be used to support probable cause for the issuance of a search warrant, it does not give them license to begin carrying out a general search of the room for additional evidence of criminal activity. Instead, the dormitory room should be secured immediately, and the evidence photographed and left in place. No resident of that room should thereafter be permitted to enter unless under law enforcement observation while issuance of a search warrant is pending. Law enforcement officers are within their rights to request consent to search from the individual whose room has been temporarily seized. However, if that request is denied, law enforcement officials must be diligent in attempting to procure a search warrant for the room in order to minimize the intrusion into the student's personal privacy.

\section*{VI. Plain View}

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant."\footnote{Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).} In order to justify a seizure under the "plain view" doctrine, three requirements must be met: first, a law enforcement officer must lawfully be in a position to observe the item to be seized; second, the incriminating nature of the item must be immediately apparent; and third, the officer must have a "lawful right of access to the object itself."\footnote{Horton v. California, 496 U.S. 128, 135-37 (1990).}

\subsection*{A. Lawful Position to Observe}

With regard to the first requirement, a law enforcement
officer may be lawfully present to make the observation of the evidence or contraband either because he or she has a valid search or arrest warrant or because an exception to the warrant requirement is present, such as when the search is conducted pursuant to the terms of a housing agreement.

B. Incriminating Nature Immediately Apparent

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

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

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227. Id. at 135 ("An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character."); United States v. Reinholz, 245 F.3d 765, 777 (8th Cir. 2001) (holding that officers executing a search warrant were lawfully on premises); United States v. Hamie, 165 F.3d 80, 82 (1st Cir. 1999) (holding that officers were lawfully on premises because they "had a valid warrant to search the premises"); United States v. Munoz, 150 F.3d 101, 111 (5th Cir. 1998) (holding that a plain view seizure was permissible during execution of arrest warrant); United States v. Calloway, 116 F.3d 1129, 1133 (6th Cir. 1997) (holding that a plain view seizure was permissible where officers were present because they "were executing a valid search warrant").

228. Horton, 496 U.S. at 136 ("Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate."); United States v. Reed, 141 F.3d 641, 649 (6th Cir. 1998); United States v. Jackson, 131 F.3d 1105, 1109 (4th Cir. 1997) (noting that when "an officer's presence in a residence is justified . . . by any recognized exception to the warrant requirement, including consent, he may seize incriminating evidence that is in his plain view").

229. Horton, 496 U.S. at 136 (holding that "not only must the item be in plain view; its incriminating character must also be 'immediately apparent'") (citation omitted).

230. Arizona v. Hicks, 480 U.S. 321, 326 (1987) ("We have not ruled on the question whether probable cause is required in order to invoke the 'plain view' doctrine. . . . We now hold that probable cause is required."); Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) ("If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object . . . the plain-view doctrine cannot justify its seizure."); Texas v. Brown, 460 U.S. 730, 738 (1983) (holding that a plain view seizure is "presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity") (citation omitted).
instantaneous sensory perceptions.\textsuperscript{231}

C. Lawful Right of Access

In addition to the above requirements, for the plain view doctrine to apply, an officer "must also have a lawful right of access to the object itself."\textsuperscript{232} As noted by the Supreme Court:

Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.\textsuperscript{233}

For example, in \textit{Commonwealth v. Neilson}, a student lived in a dormitory suite, comprised of four bedrooms, at Fitchburg State College, a public institution.\textsuperscript{234} As part of his housing agreement, Neilson signed a document that stated, \textit{inter alia}, that "[r]esidence life staff members will enter student rooms to inspect for hazards to health or personal safety."\textsuperscript{235} When a maintenance worker overheard a cat inside Neilson's dormitory suite, he informed college officials, who notified one of the residents of the suite (not Neilson) that "any cat must be removed pursuant to the college's health and safety regulations."\textsuperscript{236} Notice was also posted on all four bedroom doors that a "door to door" check would be conducted later that evening in order to ensure the cat had been removed.\textsuperscript{237} Neilson was not present for the later search of his room.\textsuperscript{238} However, "[w]hile searching the defendant's bedroom, the officials noticed a light emanating from the closet. The officials, fearing a fire hazard, opened the closet door. There, they discovered two four-foot tall [marijuana] plants, along with lights, fertilizer, and numerous other materials for [marijuana] cultivation and use."\textsuperscript{239}

Following this discovery, the campus police department was

\textsuperscript{231} United States v. Calloway, 116 F.3d 1129, 1133 (6th Cir. 1997).
\textsuperscript{232} \textit{Horton}, 496 U.S. at 137.
\textsuperscript{233} \textit{id.} at 137 n.7 (citations omitted).
\textsuperscript{235} \textit{id.}
\textsuperscript{236} \textit{id.}
\textsuperscript{237} \textit{id.}
\textsuperscript{238} \textit{id.}
\textsuperscript{239} \textit{id.}
called. Upon arrival, the officers entered Neilson's room, observed the marijuana plants, took photographs of them, and then seized them as evidence.241 At his trial, the student moved to suppress all of the evidence seized based on a violation of his Fourth Amendment rights.242 The trial court agreed, and the government appealed the judge's ruling.243 The court concluded that Neilson "consented to reasonable searches to enforce the college's health and safety regulations when he signed the residence contract," and that the "hunt for the elusive feline fit within the scope of that consent."244 The court further reasoned that "when the college officials opened the closet door they were reasonably concerned about health and safety."245 Thus, the court held that the initial search was reasonable "because it was intended to enforce a legitimate health and safety rule that related to the college's function as an educational institution."246

However, this did not end the court's inquiry, because "the crux of the defendant's argument [was] that [a] constitutional violation occurred when the campus police searched the room and seized evidence"247 without either a search warrant or an exception to the warrant requirement. In holding the search unconstitutional, the court noted the officers entered the dormitory room "without a warrant, consent, or exigent circumstances."248 In light of this, the court held the plain view doctrine did not apply in this instance, because "the officers were not lawfully present in the dormitory room when they made their plain view observations."249

The plain view doctrine would only have justified the officers' observations of the marijuana if the entry into the room had been made pursuant to a lawful justification (e.g., warrant, consent, or exigent circumstances).
VII. SEARCHES INCIDENT TO ARREST

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

In order to have a valid search incident to arrest, two requirements must be met. First, there must be an actual arrest supported by probable cause, as opposed to some lesser form of detention; second, the search must be "substantially contemporaneous" with the arrest. Whether a search was conducted "substantially contemporaneous" with the arrest is a fact-specific determination that focuses on various factors.

251. Chimel v. California, 395 U.S. 752, 762-63 (1969); Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009) ("The [search incident to arrest] exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations."); Robinson, 414 U.S. at 234 ("The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial."); United States v. Edwards, 415 U.S. 800, 802-03 (1974) (explaining that the search incident to arrest exception "has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained"); Agnello v. United States, 269 U.S. 20, 30 (1925) ("The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.").
254. Knowles v. Iowa, 525 U.S. 111, 118-19 (1998) (holding that the search incident to arrest exception was a "bright-line" rule that was not extended to situations in which an arrest was not effected).
including where the search was conducted;\(^{256}\) when the search was conducted in relation to the arrest;\(^{257}\) and whether the defendant was present at the scene of the arrest during the search.\(^{258}\) Generally speaking, a search will likely be considered to have been "substantially contemporaneous" with the arrest as long as the administrative processes incident to the arrest and custody have not been completed at the time the search occurs.\(^{259}\) Finally, it is possible that the search could take place prior to the arrest, subject to certain conditions.\(^{260}\)

As noted, the scope of a search incident to arrest includes not only the arrestee's person, but also the area "within his immediate control."\(^{261}\) The area under an individual's "immediate control" is determined at the time of the arrest, and not at the time the search is conducted.\(^{262}\) The rule is the same regardless of whether the arrest occurs in a residence, on the street, or in a vehicle.\(^{263}\) Further, the area within an individual's immediate control would include containers within the arrestee's immediate control at the time of the arrest, such as backpacks or briefcases.\(^{264}\)

\(^{256}\) See, e.g., Holmes v. Kucynda, 321 F.3d 1069, 1082 (11th Cir. 2003) (explaining that the exception "places a temporal and a spatial limitation on searches incident to arrest . . .") (quoting *Belton*, 453 U.S. at 465).

\(^{257}\) See, e.g., United States v. Sanchez, 555 F.3d 910, 922 (10th Cir. 2009) (holding that a search of an arrestee occurred "promptly after his arrest, and can readily be characterized as 'substantially contemporaneous.'"). *cert. denied*, 129 S. Ct. 1657 (2009).

\(^{258}\) See, e.g., United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (upholding a search incident to arrest even though it occurred after the defendant had been transported from scene of arrest).

\(^{259}\) See United States v. Rupomex, 702 F.2d 61, 66 (5th Cir. 1983) (citing United States v. Edwards, 415 U.S. 800, 804 (1974)).

\(^{260}\) Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) (holding that police were entitled to search petitioner before arresting him, as he already admitted to owning a large amount of drugs found in someone else's purse).


\(^{262}\) In re Sealed Case 96-3167, 153 F.3d 759, 767 (D.C. Cir. 1999) ("The critical time for analysis, however, is the time of the arrest and not the time of the search.").

\(^{263}\) *Id.* at 767-78 (explaining that the rule does not change based on the location of the arrest).

\(^{264}\) See, e.g., United States v. Donnes, 947 F.2d 1430, 1437 (10th Cir. 1991) ("[A] warrantless search of a container located in the area of the arrestee's immediate control."). See also United States v. Uriocche-Casillas, 946 F.2d 162, 166 (1st Cir. 1991) (wallet); United States v. Tavolacci, 895 F.2d 1423, 1428-29 (D.C. Cir. 1990) (locked suitcase); United States v. Swann, 149 F.3d 271, 273 (4th Cir. 1998) (film canister); United States v. Ivy, 973 F.2d 1184, 1187 (5th Cir. 1992) (briefcase); United States v. Richardson, 121 F.3d 1051, 1056 (7th Cir. 1997) (shaving bag); United States
Because dormitories have been found to be analogous to other residential settings (e.g., apartments, motels, and hotels), additional aspects of how the law regarding searches incident to arrest might be applied within those types of buildings is appropriate. First of all, it should be noted that when an arrest occurs inside a residence, the law "does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a 'search incident to the arrest.'" 265 Further, where an arrest occurs outside of a residence, it is not typically permissible to enter the residence itself. 266 As noted by the Supreme Court:

The Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search. On the contrary, "it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein." 267

However, some courts have carved out an exception to this general rule, and have permitted law enforcement officers to accompany an arrestee into his or her residence in order to obtain clothing or identification. 268 For example, in Chrisman,

v. Oakley, 153 F.3d 696, 698 (8th Cir. 1998) (backpack).
265. United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983) (citation and quotation omitted).
266. See, e.g., James v. Louisiana, 382 U.S. 36, 37 (1965) (holding that a warrantless search of a home after the defendant was arrested two blocks away was unconstitutional) (citation omitted); United States v. Varner, 481 F.3d 569, 571 (8th Cir. 2007) ("Ordinarily, the arrest of a person outside of a residence does not justify a warrantless search of the residence itself.") (citation omitted).
268. Cf. Varner, 481 F.3d at 571-72 ("One of the exceptions to this rule, however, is when an officer accompanies the arrestee into his residence . . . . Even absent an affirmative indication that the arrestee might have a weapon available . . . the arresting officer has authority to maintain custody over the arrestee and to remain literally at the arrestee's elbow at all times.") (citation omitted); United States v. Wilson, 306 F.3d 231, 241 (5th Cir. 2002) (en banc) (holding that "the potential of a personal safety hazard to the arrestee places a duty on law enforcement officers to obtain appropriate clothing . . . .") overruled in part, United States v. Gould, 364 F.3d 578 (5th Cir. 2004); United States v. Gwinn, 219 F.3d 326, 333 (4th Cir. 2000) (officers re-entered trailer to get shirt and boots for arrestee); United States v. Butler, 980 F.2d 619, 620-21 (10th Cir. 1992) (officials accompanied arrestee back inside trailer to get shoes); United States v. Di Stefano, 555 F.2d 1094, 1101 (2d Cir. 1977) (official accompanied arrestee, who was wearing only a nightgown and bathrobe, to get dressed), with United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983) (finding entry unlawful absent a "specific request or consent.") (citation and quotation omitted);
a campus police officer at Washington State University placed a college student under arrest and accompanied him to his dormitory room, where the student wished to go to obtain his identification. Initially, the student entered, while the officer remained in the open doorway. However, according to the Court:

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

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

In reversing the Supreme Court of Washington, the Court concluded that the campus police officer’s actions had been lawful, since once the officer had arrested the student, he was “authorized to accompany him to his room for the purpose of obtaining identification.” The Court held that “[t]he officer had a right to remain literally at [the arrestee’s] elbow at all

United States v. Kinney, 638 F.2d 941, 945 (6th Cir. 1981) (entry impermissible where ‘the defendant did not request permission to secure additional clothing and did not consent to an entry of his home.”).

270. Id.
271. Id. at 4.
272. Id.
273. Id.
274. Id. at 5.
275. Id.
276. Id. at 6 (footnote omitted).
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times; nothing in the Fourth Amendment is to the contrary."\(^{277}\)

Further, "the officer's need to ensure his own safety—as well as the integrity of the arrest—[were] compelling."\(^{278}\) According to the Court:

Every arrest must be presumed to present a risk of danger to the arresting officer. . . . There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious. Although the Supreme Court of Washington found little likelihood that [the arrestee] could escape from his dormitory room, an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after-the-fact assessment of the particular arrest situation.\(^{279}\)

Therefore, the Court found that it was reasonable under the Fourth Amendment "for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest."\(^{280}\) In this instance, the officer was lawfully present in the room, so his plain view observations of the narcotics and associated paraphernalia was appropriate.

VIII. EXIGENT CIRCUMSTANCES

"The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."\(^{281}\) Consequently, the Supreme Court recognizes that "exigent circumstances" constitute an exception to the warrant requirement.\(^{282}\) Courts define "exigent circumstances" in various ways, such as "those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence

\(^{277}\) Id.

\(^{278}\) Id. at 7.

\(^{279}\) Id. (citations omitted).

\(^{280}\) Id.


\(^{282}\) Michigan v. Tyler, 436 U.S. 499, 509 (1978) ("[A] warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant.").
improperly frustrating legitimate law enforcement efforts.” The government bears the burden of proving that “exigent circumstances” existed to justify the warrantless search, and must establish that (a) probable cause existed, and (b) that an exigency existed.

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

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

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283. United States v. McConney, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc); see also Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002) (“Exigent circumstances exist where there are ‘real immediate and serious consequences’ that would certainly occur were a police officer to postpone action to get a warrant.”) (internal citations and brackets omitted).
285. See United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991) (“A warrantless search is allowed, however, where both probable cause and exigent circumstances exist.”); United States v. Lindsey, 877 F.2d 777, 780 (9th Cir. 1989) (For valid claim of exigent circumstances, the burden is on the government to demonstrate that: (1) the police had probable cause to search the defendant’s apartment; and (2) exigent circumstances excused the lack of a warrant.).
286. 2006 Ohio 1588 (Ohio Ct. App. 2006).
287. *Id.* at ¶7.
288. *Id.*
289. *Id.* at ¶8.
290. *Id.* at ¶9.
291. *Id.* at ¶10.
292. *Id.*
removed that contraband from Defendant's room. 293

Ellis was indicted and convicted on one count of trafficking marijuana based upon the drugs seized during the search of his dormitory room. 294 He was sentenced to five years of community control sanctions and a $250 fine. 295 On appeal, Ellis claimed the marijuana seized from his room should have been suppressed due to a violation of his Fourth Amendment rights. 296

The court addressed Ellis' contention that the safety inspection conducted by the Resident Assistants was impermissible and did not fall within the administrative exception to the Fourth Amendment. Starting from the premise that the Fourth Amendment "limits only official government behavior or state action," 297 the court noted that the "mere fact that evidence found and obtained during a search by a private person is ultimately turned over to the police does not destroy the private nature of the search ...." 298 Instead, it is only when "a private person acts as the agent of the police ... [that] the result is different." 299 Thus, "[o]fficial participation in the planning or implementation of a private person's efforts to secure evidence may taint the operation sufficiently as to require suppression of the evidence." 300 In this instance, the court concluded that "the search the Resident Life staff performed which yielded the marijuana that campus police seized was an administrative search by private persons, and therefore not a search subject to the Fourth Amendment's warrant requirement." 301

However, this did not dispose of the matter, since Ellis raised a second issue that required the court's attention. Specifically, he argued that the campus police entry into his room and the subsequent seizure of the marijuana was unconstitutional. 302 After consideration of the issue, the court

293. Id. at ¶17.
294. Id. at ¶2.
295. Id.
296. Id. at ¶3.
297. Id. at ¶14.
298. Id.
299. Id.
300. Id.
301. Id. at ¶15.
302. Id. at ¶16.
agreed that when the campus police officers entered Ellis' dormitory room, they infringed upon an area where he had a reasonable expectation of privacy. Consequently, the campus police needed either a search warrant or an exception to the warrant requirement in order to lawfully enter Ellis' room, and because they had neither, the entry into the room was illegal. Therefore, the plain view exception did not apply because the police were not lawfully in a position to observe the marijuana: "The plain view exception did not apply because police did not observe the contraband until after they had unlawfully entered Defendant's room, and any intrusion affording the plain view observation must otherwise be lawful."

Finally, the court found the officers' entry could not be justified under the exigent circumstances exception, because there was no possibility of the evidence being concealed by Ellis at that point, nor was there any realistic possibility the evidence would be destroyed. Instead, the court concluded that the "Resident Assistants were in the room, [the] Defendant was not, and [the] Defendant could have easily been kept out of the room by police and the evidence preserved until police had secured a warrant."

IX. CONCLUSION

Students have a reasonable expectation of privacy in a dormitory room. In light of that, administrators at public universities must comply with the Fourth Amendment when conducting searches of those rooms. Because of the institution's responsibility to provide a safe educational environment, reasonable health and safety inspections of dormitory rooms are generally permitted under the terms and agreements of a student housing agreement. Such agreements will not, however, support general searches by campus officials to locate

303. Id. at ¶18 ("By entering Defendant's dormitory room, campus police infringed upon the reasonable expectation of privacy that Defendant had in that place which is entitled to the same level of protection against unreasonable search and seizure as a private home.").
304. Id. at ¶20.
305. Id. at ¶19 (footnote omitted).
306. Id. ("Neither does the exigent or emergency circumstances exception justify the entry, for instance to prevent the concealment or destruction of evidence.").
307. Id.
evidence of criminal activity, even where the institution's interest are significant. In fact, overly broad wording in such agreements has been found to be an unconstitutional attempt to coerce a student into waiving his or her Fourth Amendment rights. Finally, there are a variety of exceptions to the search warrant requirement that may be utilized to support a search of a student's dormitory room. Each has requirements specific to the exception that must be met in order for any subsequent search to be constitutionally permissible.

308. Smyth v. Lubbers, 398 F. Supp. 777, 790 (W.D. Mich. 1975) ("While the College has an important interest in enforcing drug laws and regulations, and a duty to do so, it does not have such special characteristics or such a compelling interest as to justify setting aside the usual rights of privacy enjoyed by adults.").