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Do Not Disturb: Fourth Amendment Expectations Of Privacy In Hotel Rooms

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Do Not Disturb: Fourth Amendment Expectations of Privacy in Hotel Rooms

Jason C. Miller[†]

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I. INTRODUCTION

With guns drawn, police officers storm into a hotel room, spot drugs in plain view on the coffee table, and then arrest the occupant. But the officers lack probable cause. Under the Fourth Amendment, whether the occupant of the illegally-searched hotel room can suppress the evidence depends on his or her expectation of privacy in the room.¹ This ability to challenge the search, also known as “standing,” might depend on how the occupant obtained the hotel room and what he or she is doing there. Cases have examined rooms registered under an alias,² registered

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¹ *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

² *United States v. Domenech*, 623 F.3d 325, 328 (6th Cir. 2010). The author served as a law clerk to a judge on the *Domenech* panel. As this Article was going to print the panel vacated the original opinion, which discussed expectation of privacy issues, and instead resolved the appeal based on exigent circumstances without reaching the expectation-of-privacy question. *United States v. Domenech*, 2011 U.S. App. LEXIS 14452, at *8 (6th Cir. July 12, 2011). Although no longer law, this Article continues to

to a third party,³ procured by an agent,⁴ and obtained with a fraudulent credit card.⁵ Guests have stayed a little past the checkout time,⁶ and well past the checkout time,⁷ at hotels with lax checkout policies,⁸ and at hotels with strict policies.⁹ The expectation of privacy differs for visitors who use a room only to party or to process drugs,¹⁰ and the privacy expectation might change based on length of occupancy—courts have distinguished between the boyfriend of the person who rented the hotel staying overnight and a room used temporarily by a prostitute plying her trade.¹¹

The Supreme Court has stated that “the Fourth Amendment protects people, not places.”¹² However, the Court has conditioned this statement by stating that “the extent to which the Fourth Amendment protects people may depend upon where those people are.”¹³ Specifically, “an overnight guest in a home may claim the protection of the Fourth Amendment,”¹⁴ but those “essentially present for a business transaction” cannot.¹⁵ The Court has also said that what is “permitted by society” will determine the legitimacy of a Fourth Amendment expectation of privacy,¹⁶ but lower courts do not always agree on exactly what society allows.

A possible circuit split is evolving on the issue, with the Tenth Circuit requiring a defendant to “demonstrate that the room was registered to him,”¹⁷ and the Sixth Circuit holding that an invalid hotel

cite to the original opinion because it is the most recent discussion of some of the issues presented and its analysis remains persuasive. At least one judge continues to consider it correct. *Id.* at * 18.

³ *United States v. Rollins*, No. 2:04CR747 TC, 2005 U.S. Dist. LEXIS 43849, at *12 (D. Utah July 18, 2005) (guest of registered guest).

⁴ *United States v. Lyons*, 706 F.2d 321, 324 (D.C. Cir. 1983).

⁵ *United States v. Cunag*, 386 F.3d 888, 895 (9th Cir. 2004).

⁶ *United States v. Dorais*, 241 F.3d 1124, 1130 (9th Cir. 2001); *see also* *United States v. Wai-Keung*, 845 F. Supp. 1548, 1563 (S.D. Fla. 1994) (search after expiration of late checkout period was valid).

⁷ *United States v. Watson*, 783 F. Supp. 258, 259 (E.D. Va. 1992).

⁸ *Id.* at 259–63.

⁹ *United States v. Kitchens*, 114 F.3d 29, 32 (4th Cir. 1997) (“[T]he manager of the motel testified that the motel had a strict policy regarding check out.”).

¹⁰ *Minnesota v. Carter*, 525 U.S. 83, 90 (1998).

¹¹ *United States v. Conway*, 854 F. Supp. 834, 838 (D. Kan. 1994) (no expectation of privacy by visitor to room using it only to have sex).

¹² *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹³ *Carter*, 525 U.S. at 88.

¹⁴ *Id.* at 90.

¹⁵ *Id.*

¹⁶ *Id.* at 88 (quotation marks and citations omitted).

¹⁷ *United States v. Carr*, 939 F.2d 1442, 1446 (10th Cir. 1991).

registration is a legal concern “only” to the hotel.¹⁸ If a defendant cannot challenge an illegal search because of invalid registration, then invalid registration (for whatever reason) can provide an after-the-fact justification for an illegal search. Hotel rooms pose interesting problems, but ultimately the expectation of privacy in hotels should be measured in the same way that the Fourth Amendment deals with other types of residences. This Article analyzes some distinct problems faced in hotel rooms, including invalid registrations, guests of guests, and guests who stay beyond the rental period, and proposes that courts apply a universal rule that requires the hotel to act first to terminate the expectation of privacy of a guest who violates hotel policy.

II. HOTEL PRIVACY ISSUES

A. *Hotels and the Fourth Amendment*

In general, the Fourth Amendment “requires police officers to obtain a warrant before searching or seizing persons, houses, papers, and effects.”¹⁹ Courts have held that “this constitutional protection also applies to hotel rooms.”²⁰ However, before being able to suppress the results of an illegal search, a defendant must meet his burden of showing a reasonable expectation of privacy in the hotel room.²¹ This is done by establishing a subjective expectation of privacy in the place searched and society’s willingness to accept the reasonableness of this expectation.²² Thus, a hotel room, as “a temporary abode,” receives the same Fourth Amendment protections as a home,²³ because the occupant of a hotel

¹⁸ *United States v. Domenech*, 623 F.3d 325, 330 (6th Cir. 2010). The risk of a split was alleviated when the Sixth Circuit replaced the original opinion, which dealt with expectation of privacy issues, and replaced it with one deciding the case based on exigent circumstances. *See United States v. Domenech*, 2011 U.S. App. LEXIS 14452, at *8 (6th Cir. July 12, 2011).

¹⁹ *United States v. Allen*, 106 F.3d 695, 698 (6th Cir. 1997) (internal quotation marks and citations omitted).

²⁰ *See, e.g., id.* (citing *Hoffa v. United States*, 385 U.S. 293, 301 (1966); *Stoner v. California*, 376 U.S. 483, 490 (1964)).

²¹ *See Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *see also Rakas v. Illinois*, 439 U.S. 128, 132 n.1 (1978) (“The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.”).

²² *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

²³ *United States v. Singleton*, 922 F. Supp. 1522, 1527 (D. Kan. 1996) (citing *Hoffa*, 385 U.S. at 301; *United States v. Foxworth*, 8 F.3d 540, 544 (7th Cir. 1993); *United States v. Richard*, 994 F.2d 244, 247 (5th Cir. 1993); *United States v. Parizo*, 514 F.2d 52, 54 (2d Cir. 1975); *United States v. Croft*, 429 F.2d 884, 887 (10th Cir. 1970)).

room has an expectation of privacy “no less than a tenant of a house, or the occupant of a room in a boarding house.”²⁴

It makes sense to apply the same legal test to hotels as to apartments or homes, rather than assigning a lesser degree of privacy.²⁵ Not all hotels are as nice as a Hilton—drawing a line between a weekly or monthly-rate hotel and a month-by-month apartment lease can be difficult,²⁶ and deciding that an individual’s constitutional rights depend on that determination would be absurd.

Hotel guests may face the same Fourth Amendment privacy problems as apartment tenants. Occupants of a hotel room, for example, might not be able to reasonably assume that someone in an adjoining room or in the hall cannot hear their conversations,²⁷ but an apartment dweller with thin walls might face the same problem. Hotel guests retain no expectation of privacy in the hotel’s guest registration records,²⁸ in the same way that apartment renters often have their names on a list at the management office and homeowners provide information to mortgage-holders.²⁹ Homeowners, like apartment dwellers,³⁰ also cannot expect privacy in the parking lot.³¹ The expectation of privacy question becomes complicated when a guest occupies a room in violation of some hotel policy, such as under an invalid registration card.³²

²⁴ *Stoner*, 376 U.S. at 490.

²⁵ Guests in other countries might not enjoy the kind of privacy that Americans do in hotel rooms. See Harvey Riskikof, *Combating Terrorism in the Digital Age: A Clash of Doctrines*, 78 *Miss. L.J.* 381, 413 (stating that in other countries hotel rooms are regularly searched and hotel phone networks monitored).

²⁶ See *United States v. Kimber*, 395 Fed.App’x. 237 (6th Cir. 2010) (per curium) (regarding a former hotel converted into a residential apartment building).

²⁷ 68 *AM. JUR. 2D Searches and Seizures* § 73 (2010) (citing *United States v. Agapito*, 620 F.2d 324 (2d Cir. 1980)); Jon Sands and Shawdy Banihashemi, *Heartbreak Hotel and the Fourth Amendment: A Motel Graphic*, *CHAMPION*, Oct. 2008, at 22–23 (2008) (citing *United States v. Llanes*, 398 F.2d 880 (2d Cir. 1968)).

²⁸ 68 *AM. JUR. 2D, supra* note 27, § 73 (citing *United States v. Cormier*, 220 F.3d 1103 (9th Cir. 2000)).

²⁹ *Kostrikin v. United States*, CV-F-99-6732, 1999 WL 1424991, at *2 (E.D. Cal. Dec. 17, 1999) (no expectation of privacy in mortgage records held by third party).

³⁰ *Lease v. Tyler*, No. 1:05-CV-618, 2008 WL 2673381, at *6 (M.D. PA. June 30, 2008) (“Because of the number of residents and guests visiting a multiple-occupancy residence, some courts have reasoned that there is ‘no justified expectation of privacy as to a portion of the home which all residents and visitors must use to enter, the common yard open to the public, or the parking lot open to all users of the apartment building.’”) (quoting *WAYNE LAFAVE*, 1 *SEARCH & SEIZURE* § 2.3(f)).

³¹ *United States v. Diaz*, 25 F.3d 392, 396 (6th Cir. 1994).

³² *United States v. Domenech*, 623 F.3d 325, 330 (6th Cir. 2010).

B. Invalid Registration: Aliases, Agents, and the Like

Hotels of ill repute may draw a law enforcement presence, if only to cruise the parking lot to run license plates.³³ However, once a police officer is able to enter a room, she might find drugs or weapons in plain view.³⁴ The Sixth Circuit dealt with several hotel privacy issues resulting from exactly this type of law enforcement investigation in a recent case, *United States v. Domenech*, where a divided panel found an expectation of privacy in a hotel room rented by a man using a fake name.³⁵ After noticing suspicious activity and fearing that evidence might be destroyed, officers entered the room without a warrant and found two brothers, Alejandro and William Domenech, with contraband and two female companions.³⁶ The case was a procedural mess,³⁷ coming into federal court “[a]fter a state court suppressed the evidence found in the room as the result of an illegal search.”³⁸ The government argued that the brothers lacked an expectation of privacy because they failed to prove that they were either the registrants of the room or were sharing the room with someone who was such a registrant. The room was, in fact, rented under an alias by “[a] man who called himself ‘Rogelio’ [who] filled out a registration card later described by officers as ‘full of nonsense.’”³⁹ The Domenech brothers could not demonstrate

³³ See, e.g., *id.* at 327; *United States v. Barnum*, 564 F.3d 964, 967 (8th Cir. 2009).

³⁴ *Domenech*, 623 F.3d at 327; *United States v. Dorais*, 241 F.3d 1124, 1127 (9th Cir. 2001).

³⁵ *Domenech*, 623 F.3d at 330.

³⁶ The room initially drew the attention of officers who ran the plates of the cars in the parking lot and found one belonging to a parole absconder, which the occupants were borrowing. *United States v. Domenech*, No. 1:06:CR:245, 2007 U.S. Dist. LEXIS 25758, at *2–3 (W.D. Mich. Apr. 6, 2007). The Sixth Circuit recounts the following events:

Two sheriff’s deputies knocked on the door while Trooper Burchell from the state police went around behind the motel room and stationed himself behind the closed, frosted bathroom window of Room 22. When the officers knocked on the front door, Burchell saw the light turn on and observed a figure enter the room and lean over; but the frosted window prevented him from actually seeing any fixtures or the person in the bathroom. Expecting (correctly) that the person in the bathroom was about to flush away evidence, Burchell opened the window and swung his flashlight at Alejandro. The commotion prompted the officers at the front of the motel room to burst through the door and to find Alejandro and his brother William with two women, drugs, guns, and counterfeit currency.

Domenech, 623 F.3d at 327.

³⁷ The briefing also addressed procedural irregularities (problems with counsel) that the defendants alleged prevented them from testifying at the sentencing hearing, but these issues were conceded as moot at oral argument. *Id.* at 328 n.1.

³⁸ *Id.* at 328.

³⁹ *Domenech*, 623 F.3d at 327.

that they were registered to the room or that they were the guests of Rogelio.⁴⁰ However, they did prove the following: 1) Alejandro paid for the rooms; 2) Alejandro directed Rogelio to rent the rooms for the group; 3) the group spent the previous night at the hotel before switching rooms; 4) Room 22 was for William and 31 for Alejandro; 5) the entire party was in Room 22 at the time of arrest; 6) the Domenech brothers were in a state of undress when the police arrived; and 7) the brothers were undressed, possessed the room key, and had luggage in the room at the time the police arrived.⁴¹ The Sixth Circuit reversed the district court, finding the defendants' agent's use of an alias, and the resulting invalid hotel registration, did not eliminate the defendants' expectations of privacy.⁴²

The Court recognized that if "the Domenech brothers rented Room 22 under their own name, they unquestionably would possess a legally cognizable expectation of privacy."⁴³ Using an agent did not change this because a person can reasonably expect to have privacy in a room provided by another.⁴⁴ This appears perfectly reasonable as our society expects that certain individuals, such as travelling business executives, celebrities, or political leaders, often have an agent or employee obtain their rooms, but fully expect privacy in their room. What complicated the situation in *Domenech* was the fact that Rogelio was not the agent's real name.⁴⁵

The Sixth Circuit rejected the claim "that the agent's use of an alias forecloses the Domenech brothers from holding any reasonable privacy expectations."⁴⁶ Reviewing cases from the Eleventh,⁴⁷ Fifth,⁴⁸ Seventh,⁴⁹ and Eighth Circuits,⁵⁰ the Sixth Circuit found that one could retain an

⁴⁰ *United States v. Domenech*, No. 1:06:CR:245, 2007 U.S. Dist. LEXIS 25758, at *8–12 (W.D. Mich. Apr. 6, 2007).

⁴¹ *Domenech*, 623 F.3d at 328.

⁴² *Id.* at 329.

⁴³ *Id.*

⁴⁴ *Id.* (citing *United States v. Lyons* 706 F.2d 321, 324 (D.C. Cir. 1983)).

⁴⁵ *Id.* at 327 (stating registration card was "full of nonsense").

⁴⁶ *Id.* at 329.

⁴⁷ *United States v. Newbern*, 731 F.2d 744, 748 (11th Cir. 1984) (recognizing a reasonable expectation of privacy in a hotel room registered under an alias).

⁴⁸ *United States v. Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992) (packages delivered under fictitious name); *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. 1981) (packages).

⁴⁹ *United States v. Pitts*, 322 F.3d 449, 457–59 (7th Cir. 2003) ("[T]he expectation of privacy for a person using an alias in sending or receiving mail is one that society is prepared to recognize as reasonable.").

⁵⁰ *United States v. Watson*, 950 F.2d 505, 507 (8th Cir. 1991) (defendant possessed expectation of privacy in house purchased under an alias).

expectation of privacy in a hotel room registered under an alias.⁵¹ Even if “rental through an alias militates against deeming the occupant’s expectation of privacy legitimate,” the “*specific factual setting*” in the case protected the expectation.⁵² The Sixth Circuit addressed the alias issue as a part of the broader question: whether the district court was correct to apply “the registration-required-for-privacy rule.”⁵³ In this regard, the Sixth Circuit faced a potential conflict with the Tenth Circuit’s ruling in *United States v. Carr*.⁵⁴

Like *Domenech*, *Carr* involved an odd procedural posture.⁵⁵ Also, as in *Domenech*, the defendant in *Carr* stayed in a hotel room illicitly and thus could not meet the court’s requirement that he “demonstrate that the room was registered to him . . . or that he was sharing it with someone to whom the room was registered.”⁵⁶ But the Sixth Circuit rejected the legal significance the Tenth Circuit attached to hotel registration in *Carr*, concluding that: “Only to the motel is the Domenech brothers’ invalid registration a legal concern.”⁵⁷ This conclusion relied on a number of cases that required an owner to act first to terminate an illegal renter’s possession.⁵⁸

Rather than reading *Carr* as “espousing the registration-required-for-privacy rule applied by the district court,” the Sixth Circuit focused on language in *Carr* explaining that “[i]mportant considerations in the expectation of privacy equation include ownership, lawful possession or

⁵¹ *Domenech*, 623 F.3d at 330.

⁵² *Id.* The court did note that dicta in *United States v. Bruce*, 396 F.3d 697, 709 n.7 (6th Cir. 2005), *vacated on other grounds*, *United States v. Bruce*, 405 F.3d 1034, 1035 (6th Cir. 2005), treated the use of an alias as weighing against the legitimacy of an expectation of privacy. *Id.*

⁵³ *Id.*

⁵⁴ 939 F.2d 1442, 1446–49 (10th Cir. 1991).

⁵⁵ As the Sixth Circuit explained: “In *Carr*, after the defendant failed to present any evidence to establish his expectation of privacy, the district court denied his motion to suppress, citing the failure of proof. The defendant sought to remedy the evidentiary shortcoming later with an affidavit. The Tenth Circuit affirmed the district court’s refusal to consider the affidavit, but went on—obviously in dicta—” to discuss the merits of the expectation of privacy under the affidavit. *Domenech*, 623 F.3d at 329.

⁵⁶ *Carr*, 939 F.2d at 1446.

⁵⁷ *Domenech*, 623 F.3d at 330.

⁵⁸ *Id.* (citing *United States v. Cunag*, 386 F.3d 888, 895 (9th Cir. 2004) (occupant of fraudulently obtained hotel room had expectation of privacy until hotel took affirmative steps to repossess the room); *see also United States v. Washington*, 573 F.3d 279, 284–85 (6th Cir. 2009) (apartment tenant in violation of lease maintained expectation of privacy because landlord did not evict him); *United States v. McClendon*, 86 F. App’x 92, 95–96 (6th Cir. 2004) (invalid sublet in violation of lease insufficient to render expectation unreasonable); *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997) (occupant with insufficient funds possessed expectation of privacy until locked out).

lawful control of the premises searched.”⁵⁹ These widely accepted factors⁶⁰ emerged from the Supreme Court’s decision in *Rakas v. Illinois*,⁶¹ and the Sixth Circuit applied them to the facts of the case to find an expectation of privacy. The Sixth Circuit said that “[t]he Domenech brothers demonstrated lawful control/possession with evidence that they procured the room for their own use through their agent, paid for the room, possessed the key to the room, and occupied it both physically and with belongings.”⁶² Moreover, because the hotel “accepted a registration card ‘full of nonsense’ for two rooms from an individual acting for someone else who admitted that others would stay with him . . . the Domenech brothers exercised control over Room 22 with this de facto permission of the motel.”⁶³ De facto permission from the motel, which had not been withdrawn, was enough to establish lawful control/possession and thus a reasonable expectation of privacy enabling the defendants to challenge the search.⁶⁴

The Sixth Circuit’s approach in *Domenech* better comports with the “understandings that are recognized and permitted by society.”⁶⁵ Whenever a hotel guest fails to fill out a registration card, or registers using false information, she possesses an invalid registration and cannot necessarily meet the Tenth Circuit’s requirements to demonstrate that the room was registered to her or that she was sharing it with a registered guest. While “most hotel guests formally register,”⁶⁶ at least some do not, or do so under fictitious names.⁶⁷ While this renders the registration invalid, their expectation of privacy remains intact.⁶⁸

⁵⁹ *Domenech*, 623 F.3d at 330 (quoting *Carr*, 939 F.2d at 1446).

⁶⁰ See, e.g., *United States v. McRae*, 156 F.3d 708, 711 (6th Cir. 1998) (relying on *Carr*’s list of considerations); see also *United States v. Gale*, 136 F.3d 192, 195–96 (D.C. Cir. 1998) (defendant who changed the locks to an apartment rented to another and proceeded to use the apartment for the purpose of packaging drugs had no legitimate expectation of privacy in the apartment because he did not have legal authority to be there).

⁶¹ 439 U.S. 128, 143 n.12 (1978).

⁶² *Domenech*, 623 F.3d at 330.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Rakas*, 439 U.S. at 143 n.12.

⁶⁶ *State v. Sletten*, 664 N.W.2d 870, 877 (Minn. App. 2003).

⁶⁷ See *United States v. Watson*, 783 F. Supp. 258, 259 (E.D. Va. 1992) (noting without comment that defendant had rented room under a pseudonym); see also *United States v. McConnell*, 903 F.2d 566, 569 (8th Cir. 1990) (same).

⁶⁸ See *Moberg v. State*, 810 S.W.2d 190, 194 (Tex. Crim. App. 1991) (“[T]he appellant in this particular case registered under an alias, we fail to perceive how that standing alone diminished appellant’s expectation of privacy in the room he had let.”); 68 AM. JUR. 2D, *supra* note 27, § 73 (treating use of alias as acceptable).

Society recognizes that a person expects privacy in a hotel room registered under a fake name and, in fact, may enjoy a greater degree of privacy. This might explain why celebrities do so. Matt Damon, for example, checked into the Mayfair Hotel in London as Arthur Ripley, the name of his character from the movie *The Talented Mr. Ripley*,⁶⁹ while English celebrity Cheryl Cole used the fake name Lily English in Los Angeles.⁷⁰ Aside from celebrities, one can imagine many situations where a person might use a false name (and a correspondingly invalid registration) to secure additional privacy: a battered woman fleeing an abusive husband, an informant enrolled in the witness protection program, or even adulterous lovers hiding from their spouses.⁷¹ The Sixth Circuit properly rejected the argument that criminal behavior precludes a defendant from sharing the benefit of privacy that society understands as attaching when registering under an alias.⁷² Moreover, the Sixth Circuit's approach puts more emphasis on the will of the property owner by finding de facto permission on the facts of the case and relying on cases that require management to act first to eliminate an expectation of privacy rather than by over-emphasizing the legal significance of the registration process.

⁶⁹ *Matt Damon Uses Fairly Unoriginal Fake Name at London Hotel*, HOTELCHATTER.COM (Apr. 15, 2008, 4:42:00 PM), http://www.hotelchatter.com/story/2008/4/15/163527/987/hotels/Matt_Damon_Uses_Fairly_Unoriginal_Fake_Name_at_London_Hotel; *Matt's Secret Hotel Name*, THE DAILY STAR, Apr. 13, 2008, available at <http://www.dailystar.co.uk/thebiz/view/34893/Matt-s-secret-hotel-name/>.

⁷⁰ *Cheryl Cole Using A False Name During LA Visit*, OMG MUSIC.COM (Aug. 1, 2010, 1:08:00 PM), <http://www.omgmusic.com/news/cheryl-cole-using-a-false-name-during-la-visit>.

⁷¹ Indeed, our culture and literature is full of examples where people flee to a hotel to hide from bad guys. Two recent, if not particularly quality examples, include the movies COP-OUT (Warner Bros. 2010) and THE BOUNTY HUNTER (Columbia Pictures 2010). Aliases are also a part of American history. A.K. SANDOVAL-STRAUSZ, HOTEL: AN AMERICAN HISTORY 222 (Yale Univ. Press 2007) (noting use of aliases in nineteenth century American hotel registrations, specifically use by a slave escaping to the north).

⁷² The Sixth Circuit explained:

This court explicitly rejected the principle that criminality undermines privacy expectations in *United States v. Washington*, holding [that] the notion that drug use or illegal activity eviscerates any right to challenge a search cannot possibly be sustained. A criminal may assert a violation of the Fourth Amendment just as well as a saint. At oral argument, the government suggested that society accepts a celebrity's hotel registration under an assumed name to avoid the paparazzi, but insisted that society would reject the Domenech brothers' use of an alias because it hides their illegal activity. Yet *Washington* holds that "the use of a space for illegal activity does not alter the privacy expectations of a person who would otherwise have" a reasonable expectation.

United States v. Domenech, 623 F.3d 325, 329 (6th Cir. 2010) (internal quotations and citations omitted).

C. Guests of Guests: Connection and Purpose

Even where a room is validly registered, the situation can become complicated when the hotel's guest invites his or her own guest into the room, whether or not prohibited by hotel policy. The Supreme Court has provided a little guidance on when an individual can claim an expectation of privacy in the home of another. Specifically, "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."⁷³ In *Minnesota v. Carter*, the court rejected an expectation of privacy for individuals who were in a home temporarily to process drugs: "Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours."⁷⁴

Applying those principles to the hotel room context, overnight guests of the primary (or registered) guest have standing.⁷⁵ Conversely, casual visitors do not have an expectation of privacy.⁷⁶ Thus, where a room is rented to facilitate a drug transaction, and the defendant is in the room "momentarily" for the "sole purpose of conducting an illegal transaction," he cannot "invoke the protections of the Fourth Amendment."⁷⁷ Similarly, the employees or guests of a legitimate business using a hotel room for a meeting, rather than for lodging, would not possess an expectation of privacy.⁷⁸ When the room does not belong

⁷³ *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). The emphasis on "overnight" should be understood to refer to one who is using a place as lodging, whether it is the primary guest or a guest of the guest. Certainly a third-shift worker who sleeps during the day and works at night would not lose an expectation of privacy by virtue of his or her occupation if hotel management were willing to accommodate an "overday" guest. In fact, this author once negotiated to rent a hotel room for a non-traditional period (for a day rather than a night) next to an airport to fit in sleep during a difficult schedule.

⁷⁴ *Id.* at 90.

⁷⁵ *People v. Olson*, 556 N.E.2d 273, 277 (Ill. App. 1990) (relying on *Minnesota v. Olson*, 495 U.S. 91 (1990)).

⁷⁶ *United States v. Masi*, No. 96-4673, 1998 U.S. App. LEXIS 3069, at *11 (4th Cir. Feb. 24 1998) (per curiam) ("[A] mere casual visitor . . . cannot invoke the protections of the Fourth Amendment"); *United States v. Maddox*, 944 F.2d 1223, 1234 (6th Cir. 1991) (holding that a "purely transient party guest" had no reasonable expectation of privacy in his host's home); *United States v. Grandstaff*, 813 F.2d 1353, 1357 (9th Cir. 1987) (holding that "mere presence in the hotel room of another is not enough" to establish a legitimate expectation of privacy in one's surroundings); *Floyd v. State*, 516 S.E.2d 96, 97-98 (Ga. Ct. App. 1999) (holding that a transient visitor "does not have a reasonable expectation of privacy in the premises of another").

⁷⁷ *Masi*, 1998 U.S. App. LEXIS 3069, at *10-11 (per curiam).

⁷⁸ For example, the University of Michigan Law School has historically drawn so many interested employers that it holds its "on campus interviews" in hotel rooms at a nearby hotel. See *University of Michigan Office of Career Services 2010-11 Interview Program*, available at <http://www.law.umich.edu/currentstudents/careerservices/>

to the defendant seeking to object to the search, courts investigate the defendant's relationship with the room.⁷⁹

In addition to the registration issues in *Domenech*, both brothers were arrested in one brother's room,⁸⁰ creating a question as to whether the guest-of-a-facto-hotel-guest could challenge a search of the room. The court applied Sixth Circuit case law that permitted non-overnight guests to claim an expectation of privacy in a residence: "Alejandro [Domenech] clearly demonstrated a meaningful relationship to his brother's room: he paid for the room, had his personal belongings in the room, and held the room key in his pocket."⁸¹ Thus, the court concluded that the defendant "legitimately regarded [the room] as his temporary residence."⁸² Other courts have looked to those same factors in determining whether a guest had an expectation of privacy.⁸³ Thus, defendants who do not have a key to the room, keep any luggage in the room, or pay the bill, lack an expectation.⁸⁴ These features help a court to determine the defendant's relationship with a room.⁸⁵

The primary issue is whether the defendant legitimately sees the room as a temporary residence and, if not, whether some substantial relationship creates an expectation of privacy.⁸⁶ While in most situations, such as a prostitute temporarily visiting a room to "turn a trick" or a commercial visitor using the room to process drugs, the result is obvious under current precedent—the temporary visitors lack an

employerresources/Documents/EarlyInterviewWeek2010.pdf (last visited Apr. 21, 2011). The students visiting these hotel rooms do not plan on using them as their temporary abode and do not have a close relationship to the room.

⁷⁹ See *United States v. Domenech*, 623 F.3d 325, 331 (6th Cir. 2010).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *United States v. Masi*, No. 96-4673, 1998 U.S. App. LEXIS 3069, at *10 (4th Cir. Feb. 24 1998) (per curiam) (defendant that did not stay overnight, did not plan to stay overnight, did not have any luggage, and did not pay a portion of the rental bill did not have standing); *United States v. Wai-Keung*, 845 F. Supp. 1548, 1562 (S.D. Fla. 1994) (registration, keeping belongings in the room, and paying for the room are factors in determining whether an expectation of privacy exists) (citing *United States v. Carter*, 854 F.2d 1102, 1105–06 (8th Cir. 1988) for the proposition that "whether defendant checked into, kept personal belongings in, and paid for room are factors in determining expectation of privacy"); *Smith v. State*, 663 S.E.2d 142, 147 (Ga. Ct. App. 2008) (person who was not a registered guest, had no key, and no luggage in the room had no expectation of privacy).

⁸⁴ See *supra* note 84 and accompanying text.

⁸⁵ See, e.g., *State v. Belisle*, 127 P.3d 1034, at *3 (Kan. Ct. App. 2006) (table) ("In Kansas, a person cannot establish a reasonable expectation of privacy in a hotel or motel room which is registered to another person, absent a showing of a relationship with the registered guest.").

⁸⁶ *Domenech*, 623 F.3d at 331.

expectation of privacy. It gets more complicated if the prostitute stays overnight.⁸⁷ But in complicated situations, courts should apply the Fourth Amendment in a manner which follows cases involving other types of residences—for example, cases addressing the expectation of privacy held by “non-overnight guests who are permitted to keep items in the residence.”⁸⁸ In such a context, there is no reason to treat hotel rooms any differently. Hotel rooms do pose a distinct problem when guests stay beyond the rental period.

D. Late Checkout: Expiration of the Rental Period

A defendant who stays or keeps possessions in a room beyond the hotel’s checkout time can lose his expectation of privacy.⁸⁹ The Fourth Circuit explained that generally, “a guest does not have a reasonable expectation of privacy in his hotel room after his rental period has terminated.”⁹⁰ This is a “well-established rule.”⁹¹ An expectation of privacy becomes unreasonable because:

When the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it. The manager of the motel may then freely enter the room, rent the room to others, and remove any belongings left in the room. These belongings may be retained and eventually sold by the motel to pay for back rent. Since after the rental period expires a guest has no right of privacy, there can be no invasion thereof.⁹²

⁸⁷ The complication arises because *Carter* holds that a commercial visitor has no expectation of privacy, but one who stays overnight has such an expectation of privacy. *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). An overnight prostitute represents a commercial visitor whose business is to stay overnight.

⁸⁸ *United States v. Washington*, 573 F.3d 279, 283 (6th Cir. 2009).

⁸⁹ *United States v. Haddad*, 558 F.2d 968, 975 (9th Cir. 1977) (holding that a guest has no expectation of privacy in a hotel room after checking out, whether voluntarily or involuntarily).

⁹⁰ *United States v. Kitchens*, 114 F.3d 29, 31 (4th Cir. 1997) (citing *United States v. Jackson*, 585 F.2d 653, 658 (4th Cir. 1978)); *see also* *United States v. Dorais*, 241 F.3d 1124, 1128 (9th Cir. 2001); *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997) (stating that no legitimate expectation of privacy in a hotel room exists after rental period has expired); *United States v. Huffhines*, 967 F.2d 314, 318 (9th Cir. 1992) (holding that no violation of the Fourth Amendment occurred when a search took place after the motel had repossessed the room for nonpayment of rent); *United States v. Rahme*, 813 F.2d 31, 34 (2d Cir. 1987) (“[W]hen a hotel guest’s rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room . . .”); *United States v. Larson*, 760 F.2d 852, 855 (8th Cir. 1984).

⁹¹ *United States v. Singleton*, 922 F. Supp. 1522, 1527 (D. Kan. 1996) (citing *Huffhines*, 967 F.2d at 318; *Rahme*, 813 F.2d at 34; *United States v. Ramirez*, 810 F.2d 1338, 1341 (5th Cir. 1987); *United States v. Croft*, 429 F.2d 884, 887 (1970)).

⁹² *Singleton*, 922 F. Supp. at 1528 (quoting *Croft*, 429 F.2d at 887); *see also* *United States v. Lee*, 700 F.2d 424, 425 (10th Cir. 1983).

Thus, “once the rental period expires, control over the room reverts to the motel manager, and the former tenant no longer can reasonably assert an expectation of privacy in a place from which he is being evicted.”⁹³ This applies even if the reason the defendant missed the checkout time was because he was under arrest and could not pay for another night.⁹⁴

A different situation arises when the hotel tolerates late checkouts or staying beyond the normal rental time.⁹⁵ In such cases, a hotel’s policies and customs become very important, because the “understandings that are recognized and permitted by society”⁹⁶ provide guests with some flexibility after the checkout time. It is relatively common for hotels to permit guests to stay beyond the normal checkout time. For example, a hotel’s normal checkout time might be noon, but management might nevertheless extend late checkout privileges until 3:00 pm as a courtesy to guests who request it.⁹⁷ When a hotel has regularly permitted a guest to stay beyond the checkout time on prior occasions, a guest may reasonably expect privacy after the normal checkout time.⁹⁸ In *Dorais*, the defendant “proved that the hotel did not enforce its check-out time strictly.”⁹⁹ Thus, “it was not normal hotel policy to issue trespass notices to overstaying guests immediately at noon but, rather, . . . the standard practice was to ask guests at noon when they would be leaving.”¹⁰⁰ Consistent with hotel policy, a housekeeper asked Dorais when he planned to leave, and Dorais told her that he would remain in the room until 12:30 pm.¹⁰¹ Thus, the Ninth Circuit held that his expectation of privacy extended beyond the standard 12:00 pm

⁹³ *Singleton*, 922 F. Supp. at 1528 (citing *United States v. Rambo*, 789 F.2d 1289, 1295–96 (8th Cir. 1986)).

⁹⁴ *Croft*, 429 F.2d at 887; *United States v. Angel Reyes*, 908 F.2d 281, 285–866 (8th Cir. 1990) (relying on *Croft* in holding that a person had no reasonable expectation of privacy in a bus locker after the rental period expired).

⁹⁵ *Dorais*, 241 F.3d at 1128.

⁹⁶ *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

⁹⁷ *See, e.g., United States v. Wai-Keung*, 845 F. Supp. 1548, 1555 (S.D. Fla. 1994).

⁹⁸ *United States v. Kitchens*, 114 F.3d 29, 31 (4th Cir. 1997) (“A guest may still have a legitimate expectation of privacy even after his rental period has terminated, if there is a pattern or practice which would make that expectation reasonable.”); *United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986) (guest who had previously remained in his motel room past check-out time without consequence maintained reasonable expectation of privacy in that room).

⁹⁹ *Dorais*, 241 F.3d at 1130.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

check-out until 12:30 pm, but did not last until 12:40 pm, when police officers arrived at the hotel's request to evict him.¹⁰²

Similarly, when a hotel permits a guest to pay for the room late on prior days, the expiration of the rental period does not automatically eliminate an expectation of privacy.¹⁰³ Conversely, a hotel's harsh policy concerning checkout times and payment will defeat the reasonableness of a late-staying guest's expectation.¹⁰⁴ In other words, society does not accept as reasonable one's expectation of privacy in a room after a hotel's vigorously-enforced checkout time has past. But when a hotel has a policy allowing late check-outs, one court has suggested that it "may be advisable" to wait to conduct a search until after the period expires, even if the guest did not explicitly request a late check-out.¹⁰⁵

Of course, if a guest is gone for too long, the absence itself could constitute abandonment, and a guest loses her expectation of privacy after abandoning a hotel room.¹⁰⁶ Abandonment depends on the circumstances and is often indicated by a lack of belongings in the room.¹⁰⁷ But where the defendant left belongings in his room and had established a pattern of paying next day's rent well-after check-out time, the Eastern District of Virginia found no abandonment when he had left the room after check-out time without paying for the next night.¹⁰⁸ Thus, even with guests staying or leaving property after the check-out time, the hotel's actions are important in determining a Fourth Amendment expectation of privacy.

III. REQUIRING THE OWNER TO ACT FIRST

When the hotel management validly evicts a guest on the owner's behalf, or solicits the involvement of the police for that purpose, the

¹⁰² *Id.*; see also *Wai-Keung*, 845 F. Supp. at 1563 (search after expiration of late checkout period was valid).

¹⁰³ *United States v. Watson*, 783 F. Supp. 258, 259–63 (E.D. Va. 1992).

¹⁰⁴ *United States v. Kitchens*, 114 F.3d 29, 32 (4th Cir. 1997) ("[T]he manager of the motel testified that the motel had a strict policy regarding check out.").

¹⁰⁵ *Wai-Keung*, 845 F. Supp. at 1563 ("Even if the hotel were forced to extend late check-out privileges for purposes of consenting to a warrantless search, which may be advisable in order to vindicate fully guests' Fourth Amendment rights, the search of the rooms took place after 3:00.").

¹⁰⁶ *Watson*, 783 F. Supp. at 262; *Abel v. United States*, 362 U.S. 217, 241 (1960) (hotel had exclusive right to possession of hotel room where petitioner had abandoned the room by paying his bill and vacating the room).

¹⁰⁷ See *Wai-Keung*, 845 F. Supp. at 1563 ("[T]he lack of any personal belongings in any of the rooms . . . bolsters the finding of abandonment." (citation omitted)).

¹⁰⁸ *Watson*, 783 F. Supp. at 259.

guest loses any expectation of privacy.¹⁰⁹ But before a guest loses his or her privacy expectations, the hotel itself must act. The Ninth Circuit explains that “a defendant has no reasonable expectation of privacy in a hotel room when the rental period has expired *and* the hotel has taken affirmative steps to repossess the room.”¹¹⁰ Thus, “the mere expiration of the rental period, in the absence of affirmative acts of repossession by the lessor, does not automatically end a lessee’s expectations of privacy.”¹¹¹

This rule does not require the hotel manager to personally respond to a problem with the guest; it only requires the police act (at least in part) on the manager’s behalf, which appears to be a relatively common occurrence.¹¹² *Domenech* applied this rule in holding that false registration was an issue for the management.¹¹³ Courts have recognized that managers actually do involve the police to effectuate an eviction for false registration.¹¹⁴ Similarly, other violations of hotel policy—having too many individuals in the room, allowing an unregistered guest to stay over, using the room for an illicit purpose, etc.—are issues for management first.

The case of a fraudulently-obtained room—where a guest used a fake credit card, for example – is more difficult because the hotel’s permission was premised on the lie. Here too the hotel-acts-first rule makes sense. The Ninth Circuit held that the occupant who fraudulently obtained a hotel room maintained an expectation of privacy until the hotel took affirmative steps to repossess the room.¹¹⁵ Indeed, a district court in Florida stated that once a hotel found out “that the rooms were guaranteed with a fraudulent credit card, it had every right to terminate the occupancy of the rooms occupied by the defendants.”¹¹⁶

¹⁰⁹ *United States v. Dorais*, 241 F.3d 1124, 1128–29 (9th Cir. 2001) (defendant has no expectation of privacy in a room that he has been legally ejected from); *United States v. Singleton*, 922 F. Supp. 1522, 1528 (D. Kan. 1996).

¹¹⁰ *Dorais*, 241 F.3d at 1128 (emphasis added) (citing *United States v. Huffhines*, 967 F.2d 314 (9th Cir. 1992)).

¹¹¹ *Id.* at 1129.

¹¹² *See, e.g., United States v. Kitchens*, 114 F.3d 29, 31 (4th Cir. 1997) (officers acting with consent of the manager); *Carter v. State*, 72 P.3d 1256 (Alaska App. 2003) (hotel acted first); *Sumdum v. State*, 612 P.2d 1018, 1021 (Alaska 1980) (desk clerk entered room after normal check-out time with police at her side).

¹¹³ *United States v. Domenech*, 623 F.3d 325, 330 (6th Cir. 2010).

¹¹⁴ *See United States v. McConnell*, 903 F.2d 566, 569 (8th Cir. 1990) (hotel evicting defendant for registering under false name).

¹¹⁵ *United States v. Cunag*, 386 F.3d 888, 895 (9th Cir. 2004).

¹¹⁶ *United States v. Wai-Keung*, 845 F. Supp. 1548, 1563 (S.D. Fla. 1994) (citing FLA. STAT. ANN. § 509.402 (West 1988)).

Some courts refuse to recognize any expectation of privacy in a room obtained by fraud, comparing it to possessing a stolen car.¹¹⁷ A stolen car is the wrong analogy for an improperly-obtained hotel room, which should be analyzed as an improperly-obtained residence. If a defendant committed mortgage fraud, or rented an apartment but wrote a bad check at move-in, society would not treat the resident's privacy in the home the same as a car-thief.¹¹⁸ The difference is that the resident entered the property with permission—permission that can rightfully be revoked. The lessor or hotel owner might want to try to collect the money due and leave the tenant in place, whereas the automobile owner just wants his or her car back. Similarly, a guest obtaining a hotel room by fraud should not be regarded as a squatter lacking any rights because the guest entered with permission, although one who simply takes over a room should be treated like all other squatters.¹¹⁹

Requiring hotel management to act first is consistent with how Fourth Amendment law is applied to other types of residences.¹²⁰ Moreover, it prevents law enforcement officers from using an unlawfully-obtained room as an after-the-fact justification for an illegal search. Most importantly, this rule fits with the “understandings that are recognized and permitted by society.”¹²¹ Generally, we expect to be left alone in a hotel room. If we violate a hotel policy, we expect that the owner or her agents will throw us out. Even if management might call the cops to throw us out, our relationship is with the hotel and our violation of hotel rules affects the hotel first and foremost.

¹¹⁷ *State v. Delvechio*, 687 S.E.2d 845, 848 (Ga. Ct. App. 2009).

¹¹⁸ *See United States v. Jeter*, 394 F. Supp. 2d 1334, 1343–44 (D. Utah 2005) (discussing problem with government's argument that violations eliminate expectation of privacy).

¹¹⁹ Squatters lack an expectation of privacy. *See, e.g., Zimmerman v. Bishop Estate*, 25 F.3d 784 (9th Cir. 1994) (squatters and their guest lacked “objectively reasonable expectation of privacy” in another's property and consequently were precluded from claiming search of shack on property violated Fourth Amendment); *United States v. Ruckman*, 806 F.2d 1471, 1472–74 (10th Cir. 1986) (squatter lacked privacy expectation to challenge search of cave in which he resided on federal land in Utah); *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11–12 (1st Cir. 1975) (squatters on farmland owned by Commonwealth of Puerto Rico lacked Fourth Amendment reasonable expectation of privacy to support injunction protecting their homes).

¹²⁰ *See, e.g., United States v. Washington*, 573 F.3d 279, 284–85 (6th Cir. 2009) (apartment tenant in violation of lease maintained expectation of privacy because landlord did not evict him); *United States v. McClendon*, 86 F. App'x 92, 95–96 (6th Cir. 2004) (invalid sublet in violation of lease insufficient to render expectation unreasonable); *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997) (occupant with insufficient funds possessed expectation of privacy until locked out).

¹²¹ *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

IV. CONCLUSION

Although the possible permutations are as diverse as America's hotels and motels, the Fourth Amendment's treatment of hotel rooms does not need to be overly complex. Applying the precedents from other residential situations will ensure that the court's determination of what society reasonably expects, and what society actually expects, will be more in line with each other. The rule that best fits this is to require the hotel to undertake some affirmative action in enforcing its own policies—and if there is a close call, to err on the side of requiring the hotel to act first, before extinguishing an enforceable right to privacy. The Tenth Circuit should repudiate its dicta from *Carr* and accept the apparent majority rule—that without a warrant, exigent circumstances, or a management effort to evict, the Fourth Amendment tells police: Do Not Disturb.