

# Criminal Law – Emphasizing Privacy of the Home and Limiting Third Party Consent Under the State Constitution

*Commonwealth v. Porter P.*, 456 Mass. 254 (2010)

The Supreme Judicial Court’s decision in *Commonwealth v. Porter P.*<sup>1</sup> makes four important contributions to the jurisprudence of Article 14 of the Massachusetts Declaration of Rights. First, the decision reinforces the significance of residential privacy protection. Second, the decision specifies the requirements for valid third-party consent for police entry to search. Third, the decision resolves the applicability of the doctrine of apparent authority, under which police searches authorized by one who appears to, but in fact lacks, authority to consent, may nevertheless be upheld. Finally, the decision shows the commitment of the Supreme Judicial Court (“SJC”) to extending Article 14’s privacy protections beyond those provided by the Fourth Amendment to the United States Constitution.

The court’s application of Article 14 protection to the residence at issue—a transitional housing shelter—establishes full protection under the Declaration of Rights for even temporary residences, occupied under detailed rules that circumscribe their residents’ privacy, in which residents have no possessory interest. Its treatment of third-party consent sets forth a new standard that third parties, either coinhabitants or landlords, must meet in order to exercise actual authority to consent to a search. Further, in addressing third-party consent, the court explicitly adopts the doctrine of apparent authority under Article 14 and establishes steps police must take for entries and searches based upon apparent authority to survive. The decision builds logically upon precedents under Article 14 and rejects the cost-benefit and historical analyses of search and seizure issues often favored by the federal courts. In addition to adding to protections enjoyed by individuals in Massachusetts, *Porter P.* establishes important guidance for any lawyer whose practice involves residential properties and the operation of residences pursuant to contract.

## I. FACTS AND PROCEDURAL HISTORY

Porter P., a juvenile,<sup>2</sup> lived with his mother at the Roxbury Multi-Service Center Family House Shelter. This transitional living facility provided homeless families temporary residences, under contract to the state’s Department of Transitional Assistance, in adjoining brownstones that had been converted into a “congregate shelter.”<sup>3</sup> Each family had a private, locked, bedroom, to which it had a key; all other space in the facility was common area.<sup>4</sup> The shelter had detailed policies for residents, which included a prohibition on possession of weapons, violation of which would result in immediate

termination, and a statement in the residents’ manual that the shelter “reserves the right to contact the Police should the situation warrant.”<sup>5</sup> The manual also provided for “random room checks” by staff to ensure compliance with the housekeeping standard and health and safety requirements.<sup>6</sup>

On October 24, 2006, the shelter director received reports from a security guard that the juvenile had a gun in his residence, and the next day a resident also reported this to the director.<sup>7</sup> On October 26, the director met with a Boston Police Detective and several officers.<sup>8</sup> The director explained that, in her opinion, she could conduct room searches pursuant to the manual, which she showed the officers.<sup>9</sup> The Detective and officers considered whether to seek a search warrant, but concluded that the director had authority to consent to a search.<sup>10</sup> Shortly thereafter, the officers and the director went to Porter P.’s room, knocked on the door, and announced “room check.”<sup>11</sup> When there was no answer, “[a]lmost contemporaneously” the director opened the door with her master key.<sup>12</sup> Officers found Porter P. standing near his bed in his underwear; after the police removed him from the room they found a gun and bullets in a closet.<sup>13</sup> The Commonwealth charged Porter P. with possession of the firearm and ammunition found in his room.<sup>14</sup>

### A. Juvenile Court

The juvenile challenged the search of the room and seizure of the gun.<sup>15</sup> After an evidentiary hearing, a juvenile court judge allowed the motion to suppress, concluding that the police had seized the gun during an unreasonable warrantless search of a residence and that certain statements made by the juvenile in connection with the seizure were fruits of this illegality.<sup>16</sup> A single justice of the Supreme Judicial Court granted the Commonwealth interlocutory review in the Massachusetts Appeals Court.<sup>17</sup>

### B. Appeals Court

The Appeals Court overturned the Juvenile Court’s grant of suppression on two grounds. First, the court concluded that any subjective expectation of privacy the juvenile or his mother had in the room was not objectively reasonable.<sup>18</sup> While acknowledging that they had lived in the room for eight months, the court distinguished their room from rental property or a hotel by characterizing the shelter as a “highly regulated environment, where shelter staff were charged with maintaining order, discipline, and a safe environment”

1. 456 Mass. 254 (2010).

2. “Porter P.” was a pseudonym used because the defendant was a juvenile.

3. *Commonwealth v. Porter P.*, 73 Mass. App. Ct. 85, 96 (2008).

4. *Id.* at 86.

5. *Id.* at 88 n.1.

6. *Id.* at 88-89.

7. *Id.* at 89-90.

8. *Id.* at 90.

9. *Commonwealth v. Porter P.*, 73 Mass. App. Ct. 85, 90 (2008).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 91.

14. *Commonwealth v. Porter P.*, 456 Mass. 254, 255 (2010).

15. *Id.* at 255-56.

16. *See id.* at 255.

17. *See id.*

18. *Commonwealth v. Porter P.*, 73 Mass. App. Ct. 85, 94 (2008).

in which the juvenile and his mother had “voluntarily agreed to live.”<sup>19</sup> The Appeals Court emphasized the lack of ownership interest, that residents “had neither exclusive control nor sole access to” the room,<sup>20</sup> and the “humane mission of the shelter-to provide a safe and comfortable environment for homeless families,”<sup>21</sup> as making any expectation of privacy unreasonable.

Second, the Appeals Court concluded that, even if there had been a reasonable expectation of privacy (so that a “search” had occurred for constitutional purposes), the police could reasonably have believed that the shelter director had apparent authority to consent to the entry and search.<sup>22</sup> The court mentioned, but did not specifically rely upon, the director’s actual authority to consent.<sup>23</sup>

One view of the Appeals Court’s opinion is that no objectively reasonable expectation of privacy could be realized absent either an ownership interest in, or exclusive control of, the premises the defendant called home. On this view, the scope of the constitutional protection against unreasonable searches and seizures expands or contracts depending upon a person’s ability to exercise an interest in ownership or control, notwithstanding that the person might regard a place like a homeless shelter as home. There is support for this line of reasoning in federal case law;<sup>24</sup> similarly, there is support in federal case law for the Appeals Court’s alternative conclusion, that the shelter director had apparent authority to permit the search.<sup>25</sup>

### C. Supreme Judicial Court

The Supreme Judicial Court granted leave for further appellate review in January, 2009. After oral argument, the court sought further briefing, from the parties and amici, on the specific question of the applicability of the doctrine of apparent authority under Article 14.

## II. THE COURT’S DECISION

Five members of the Supreme Judicial Court held, in an opinion authored by Associate Justice Ralph Gants, that the entry was an unlawful search, without consent by anyone with actual or apparent authority, which required suppression under Article 14 of both physical evidence (the gun) and fruits thereof (an incriminating statement).<sup>26</sup> Although unnecessary to resolve the suppression issue in *Porter P.*, the court ruled on the applicability of the doctrine of apparent authority under Article 14. The court concluded that the doctrine could be applied so long as two conditions are satisfied: first, the police must make diligent inquiry concerning the validity of any person’s claim of common authority over a residence; and, second, the police must extend this inquiry if “surrounding circumstances could conceivably be such that a reasonable person would doubt [the assertion’s] truth.”<sup>27</sup>

### A. The Reasonable Expectation of Privacy in a Temporary Residence

The Supreme Judicial Court adopted a functional approach to identifying the residence, for constitutional purposes, as opposed to the formalistic approach of the Appeals Court. The Appeals Court had examined the shelter as a whole, viewing it as a place in which all residents had a diminished expectation of privacy throughout the entire space, including in their own rooms. The Supreme Judicial Court, by contrast, focused on the room that was the subject of the search and identified *it* as a home. *Porter P.* thus makes clear that the function of a place legitimately used as a residence is more important than its character or formal attributes in determining its constitutional status as a home.

This approach to qualification as a home, for Article 14 purposes, suggests that less affluent claimants will not be disadvantaged, since many of the attributes that the Appeals Court had identified as significant were specifically rejected by the SJC. Places used as residences by persons lacking ownership or tenancy interests, over which they do not have complete control or exclusive rights of access, qualify equally for full constitutional protection as do owner-occupied single-family homes. Neither a residence’s limited size (a single room) nor a temporary duration of occupancy will preclude a reasonable expectation of privacy. Even when residents lack complete control over the choice of the specific location in a structure where they reside (as did *Porter P.* and his mother), their rooms must nevertheless be considered “homes” for purpose of Article 14.

In applying the familiar test to determine if a constitutionally cognizable “search” has occurred—whether the claimant has a subjective expectation of privacy in the object of the search that society is prepared to accept as “reasonable”—the court eschewed overly formalistic analysis. Noting that the use of the one-room facility was sleeping and maintaining personal belongings,<sup>28</sup> and that the juvenile and his mother had a key that allowed them to lock the door, the court found it a “transitional living space [that] ... was nevertheless their home.”<sup>29</sup>

Further, the court rejected several attributes of the room, both formal and legal, that could have been bases for finding no reasonable expectation of privacy. These included the lack of ownership or rental interest by the juvenile or his mother,<sup>30</sup> significant limitations on the room’s use set forth in the shelter’s policy manual, and the authority (and ability through use of a master key) of the director and staff to enter for “professional business purposes” and “room checks,” to monitor compliance with the center’s policies.<sup>31</sup> In addition to these limitations on residents’ freedom, shelter staff had master keys with which to enter any room at any time for specified

19. *Id.* at 92.

20. *Id.*

21. *Id.* at 94.

22. *Id.* at 94-95.

23. *See* *Commonwealth v. Porter P.*, 73 Mass. App. Ct. 85, 95 (2008).

24. *See* *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (denying petitioners’ claim because they “asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized”).

25. *See* *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (accepting apparent authority as a defense to an unreasonable search and seizure).

26. *Commonwealth v. Porter P.*, 456 Mass. 254, 275 (2010).

27. *Id.* at 271-72.

28. *Id.* at 260.

29. *Id.*

30. *Id.* at 259.

31. *Commonwealth v. Porter P.*, 456 Mass. 254, 264 (2010). The court described the range of limitations on residents’ privacy in the manual, including limitations on times of visits from outsiders, bans on having outsiders in a resident’s room and being in another resident’s room, a curfew, an obligation to be outside the shelter from 9:00 a.m. to 3:00 p.m. on weekdays and a commitment to employment, education or job training. *Id.* at 276-77.

reasons, as well as the right to contact the police. Nevertheless, as the court noted, the manual did not specify that shelter staff or the director could consent to a search of a resident's room by the police.<sup>32</sup>

Distinguishing cases in which common authority had been held to undermine a reasonable expectation of privacy, such as *Commonwealth v. Welch*<sup>33</sup> and *Commonwealth v. Montanez*,<sup>34</sup> the court reasoned that surrender of even a "substantial amount of personal privacy in return for temporary housing" did not convert the room into a "common area."<sup>35</sup>

Associate Justice Cowin, joined by Associate Justice Spina, dissented on the question of whether there was a reasonable expectation of privacy in the room. Based upon the restrictions on use in the policy manual, she found that the residence was "neither a hotel nor a dormitory," and that the juvenile could have had no reasonable expectation of privacy.<sup>36</sup>

## B. Actual Authority to Consent

Having found that the intrusion was a search, the court then examined whether it was authorized by consent from one with either actual or apparent authority. The Supreme Judicial Court acknowledged the accepted principle that persons who share common authority over a home by residing in it can have authority to consent to entry by the police.<sup>37</sup> But the court distinguished between the authority of co-inhabitants to consent to a search by police and that of third parties (such as the shelter's director) whose authority is based on contract.

As with its reasonable expectation of privacy analysis, the court adopted a functional approach to actual authority that focused not on the formal property interest of the consenting party but on his or her "mutual use of the property by persons generally having joint access or control for most purposes."<sup>38</sup> Relying on U.S. Supreme Court decisions that actual authority to consent to a search by police did not necessarily flow from a third party's authority to enter premises,<sup>39</sup> and SJC decisions that even a third party's ability to conduct a search did not also confer authority to consent to a search by police,<sup>40</sup> the court delineated two categories of persons—cohabitants and landlords or property managers—who *could*, under proper conditions, through common authority over property, have actual authority to consent to a police search.

### 1. Coinhabitants

To qualify as a "cohabitant" with common authority to consent to a search by police, the individual must both live in the home "either as a member of the family, roommate, or a house guest whose

stay is of substantial duration" and have "full access" to it.<sup>41</sup> This combination provides a coinhabitant with actual authority to consent to a search because such a person exercises shared authority over a residence in ways that can affect the interests of other residents. The court suggested, though it did not reach the issue, that a coinhabitant's consent to search could be "nullified" by a resident who is physically present and refuses to consent,<sup>42</sup> which would be consistent with Fourth Amendment jurisprudence under *Georgia v. Randolph*.<sup>43</sup>

### 2. Landlords or Property Managers

Certain non-resident third parties may, depending upon the circumstance, consent to a search. One with contractual authority to consent ("generally a landlord") must have a "written contract entitling that person to allow the police to enter the home to search for and seize contraband or evidence."<sup>44</sup> Significantly, "no such entitlement may reasonably be presumed by custom or oral agreement."<sup>45</sup>

The court's discussion of the actual authority to consent to a search by police in *Porter P.* is particularly important because if any person might have been assumed to have had actual authority to consent—through common authority over property—it would have been the director or a staff member of the shelter at issue. As noted in the facts, the director and staff exercised a very high degree of authority over the property, could enter for specified reasons, and retained authority to contact police. The court specifically rejected the argument, however, that even the express written authority to contact police combined with a resident's rule violation (suspected possession of a weapon) conveyed the authority to consent to police entry to search.<sup>46</sup>

### 3. Unresolved Issues Concerning a Third Party's Actual Authority to Consent

The court's decision setting forth the ability of a third party with actual authority to consent to a search by police was limited in two ways. First, the rule announced in *Porter P.* was carefully limited to the private, rather than common, areas of residences in which there was a reasonable expectation of privacy.<sup>47</sup> Second, the court noted that it was not reaching the issue of actual authority to consent to a search of commercial rather than residential property.<sup>48</sup>

## C. Apparent Authority to Consent

Beyond entries supported by consent from one with actual authority, *Porter P.* also delineates Article 14's application in cases of "apparent authority," when police act in the reasonable but mistaken belief that the party consenting to a search has authority to do so.

32. *Id.* at 264.

33. 420 Mass. 646, 653-54 (1995) (no reasonable expectation of privacy in fire station's lieutenants' room, commonly accessible by all, where defendant controlled access only to his own locker).

34. 410 Mass. 290, 300-03 (1991) (no reasonable expectation of privacy in dropped ceiling of an apartment's common hallway where defendant neither owned nor controlled access to the space).

35. *Porter P.*, 456 Mass. at 261 n.6.

36. *Commonwealth v. Porter P.*, 456 Mass. 254, 276 (2010) (Cowin, J., dissenting).

37. *Id.* at 262.

38. *Id.* (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)).

39. *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (landlord not

authorized to consent to police search of tenant's rented home); *United States v. Jeffers*, 342 U.S. 48, 51-52 (1951) (hotel guest's permission for entry by hotel staff is not permission for police entry).

40. *Commonwealth v. Weiss*, 370 Mass. 416, 419 (1976) (airport locker attendant could make private search of locker but could not authorize police search).

41. *Commonwealth v. Porter P.*, 456 Mass. 254, 265 (2010).

42. *Id.* at 262 n.7.

43. 547 U.S. 103, 120 (2006).

44. *Porter P.*, 456 Mass. at 265.

45. *Id.*

46. *Commonwealth v. Porter P.*, 456 Mass. 254, 266-67 (2010).

47. *Id.* at 265 n.10.

48. *Id.*

The U.S. Supreme Court held in *Illinois v. Rodriguez*<sup>49</sup> that entries based upon consent from someone the police reasonably, though mistakenly, believe has common authority to consent do not violate the Fourth Amendment, because permissible warrantless searches (such as those occurring with consent) need only be “reasonable.” By definition, if “the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief” that the third party has common authority to consent, an officer acting on those facts makes a reasonable, though incorrect, decision, and thus the entry is constitutional.<sup>50</sup>

#### 4. Apparent Authority Based Upon Mistakes of Law

The SJC held, as have all federal courts analyzing the application of apparent authority, that the doctrine extends only to reasonable mistakes of fact concerning the authority to consent rather than to mistakes of law.<sup>51</sup> Although the distinction between mistakes of law and fact can sometimes be elusive, mistakes of law are traditionally understood as mistakes concerning *what* the law in given circumstances requires or permits, while mistakes of fact concern errors *about* the underlying circumstances. Unlike mistakes of fact, mistakes of law will not confer apparent authority.

In *Porter P.*, for example, if the police, after diligent inquiry and investigation of the facts, believed that the manager could consent to their search, but the applicable law required that such authority—including specifically the authority to consent to a police search—must be set forth in writing, then as a matter of *law* the manager could not have exercised actual authority.<sup>52</sup> This presumes, of course, that the question of law had been sufficiently clear for the police to have so interpreted it. This presumption is in tension with the statement in *Porter P.* announcing what in the future will be required for actual authority to consent.<sup>53</sup> Nevertheless, the court concluded this decision by the police was a mistake of law.

While this ended the apparent authority issue before the court in the case (since the only apparent authority claim was based on mistake of law), the SJC also resolved whether apparent authority based on a reasonable mistake of fact *could* validate a warrantless search under Article 14.

#### 5. Apparent Authority Based Upon Mistakes of Fact

Noting that the Appeals Court had recently upheld a consent search based upon apparent authority,<sup>54</sup> and that its own earlier decision had suggested that apparent authority would not violate Article 14, the SJC expressly recognized that the doctrine was consistent with Article 14. It reviewed the four circumstances in which Article 14 permits searches—with a warrant, with probable cause and exigent circumstances, under the “emergency aid” doctrine with reasonable belief someone requires emergency aid, and with voluntary consent by one with common authority—and noted that it had already held that none of the first three types of searches became

unreasonable if the information or facts upon which the probable cause or reasonable belief rested turned out to be untrue.<sup>55</sup> A search based upon consent by one with apparent authority, the court reasoned, was no different, since “[a]pparent authority in the context of consent to search is a police officer’s finding of actual authority based on a reasonable mistake of fact.”<sup>56</sup>

For police reliance upon apparent authority to consent to a residential search to be “reasonable” (though mistaken), the police must make “diligent inquiry” as to the consenting party’s common authority over the house. “Diligent inquiry,” according to the court, means two steps must be taken: first, the police must base their conclusions on “facts, not assumptions or impressions,” and second, they must further investigate any ambiguity concerning authority.<sup>57</sup>

The court noted two limitations on the mistakes of fact concerning apparent authority that could suffice. First, mistakes of fact must be reasonable, and would not be if authorities either knew their information leading to a belief in apparent authority was false or acted in reckless disregard of its falsity.<sup>58</sup> (The same reliance by police on information that is false, or with reckless disregard for its falsity, can invalidate probable cause.<sup>59</sup>) Second, the court limited its acceptance of mistake of fact to mistakes concerning the consenting party’s authority, not mistakes concerning the voluntariness of the consent.<sup>60</sup>

### III. FUTURE ISSUES

*Porter P.* leaves many questions unanswered, including the extent to which individuals may contract away their privacy rights under Article 14, or contract for actual authority to consent. As well, there is a question as to what kind of “diligent inquiry” by the police will satisfy Article 14, and whether apparent authority to consent to police entry is different from apparent authority to consent to a police search.

#### A. Contracting Away the Reasonable Expectation of Privacy, Contracting for Actual Authority

There are many living arrangements in which individuals have some reduced expectation of privacy. *Porter P.* suggests that expectations of privacy may be further reduced through contractual arrangements. Whether such waivers would be valid and enforceable could turn on the circumstances in which the contract was made—in a case like *Porter P.*, for example, it could be argued that any hypothetical contract for housing in the shelter could not be deemed knowing, intelligent and voluntary if it were conditioned upon a waiver of basic privacy rights.

Further, the description provided by the court for contractual authority to consent to a police search suggests several implications. First, a landlord without a written lease—or written agreement permitting authority to consent to a police search—would be unable to authorize police entry. It might be the case that landlords relying

49. 497 U.S. 177, 179 (1990).

50. *Id.* at 188-89 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

51. *Commonwealth v. Porter P.*, 456 Mass. 254, 267-68 (2010).

52. *Id.* at 268-69.

53. *Id.* at 264-65 (“We understand that the police need clear guidance as to who has common authority over a residence and therefore who is entitled to give actual consent . . . . Therefore, we declare under art. 14 . . . .”).

54. *Commonwealth v. Dejarnette*, 75 Mass. App. Ct. 88, 95-96 (2009).

55. *Porter P.*, 456 Mass. at 270-71.

56. *Commonwealth v. Porter P.*, 456 Mass. 254, 271 (2010).

57. *Id.*

58. *Id.* at 271 n.14.

59. *Franks v. Delaware*, 438 U.S. 154 (1978).

60. *Porter P.*, 456 Mass. at 271 n.15.

upon a model lease agreement or other similar instruments would be unaware that written authority to authorize police entry was lacking. Second, police entry based upon consent from a non-resident third party would seem to be invalid unless the police have actually seen the lease—thus creating a need to have the lease or similar instrument available for police inspection.

### B. What is “Diligent Inquiry” by Police that will Support Reliance upon Apparent Authority?

The “diligent inquiry” the police must undertake will likely be highly fact-intensive, given the range of circumstances under which persons might have common authority, and that “diligence” depends upon what can reasonably be accomplished at the time and place of the consent.<sup>61</sup> Whether police must go beyond appearances when authority is asserted and ask for some evidence is unclear as a matter of federal law, and the court expressly disclaimed a requirement that police verify a consenting person’s authority with a title registry<sup>62</sup>—though this could potentially verify actual authority.

If a lease, mortgage receipt, driver’s license or utility bill would presumably establish common authority, future issues will likely involve the circumstances in which the failure to obtain one of these would nevertheless qualify as diligent inquiry. If the police seek all of these and none are available, then does this raise greater ambiguity concerning the consenting individual’s authority? If they seek one, is this inquiry sufficiently “diligent”? The facts and circumstances, such as the possibility of seeking a warrant, or other facts consistent with common authority (such as possession of a key to the premises or the consenting individual’s property on the premises) will likely become important in such cases.

### C. Is Apparent Authority to Consent to Enter a Residence Different from Apparent Authority to Consent to a Search of the Residence?

The court expressly noted that this issue was pending in *Commonwealth v. Lopez*, on which it had already granted further appellate review.<sup>63</sup>

## IV. CLARIFYING THE SCOPE OF STATE CONSTITUTIONAL PROTECTION

*Porter P.* marks an important step in the court’s effort to distinguish the scope of Article 14’s privacy protections from that afforded individuals under the Fourth Amendment. In addition, the decision may have implications in contexts beyond the issue of authority to consent to search in a home.

### A. Privacy in the Home

At common law, a householder’s home was his castle, and officers entering the home without permission or legal authority could be found liable for trespass.<sup>64</sup> The purpose of such a rule, the Supreme

Judicial Court explained in an early case, was “to preserve the repose and tranquility of families within the dwellinghouse.”<sup>65</sup> This view of dwellinghouse as castle was not idiosyncratic: history shows that citizens at the time of the framing expressed opposition to “official entrances of personal houses unconditionally, not just general searches and warrants as vehicles of entrance.”<sup>66</sup>

The U.S. Supreme Court has acknowledged that the Fourth Amendment protects the right of a person to “retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>67</sup> In no place, the court has observed, “is the zone of privacy more clearly defined.”<sup>68</sup> The “home,” the court has concluded in a series of cases, may include a rental apartment,<sup>69</sup> the home of another in which a person is living,<sup>70</sup> and even the home of another in which one is an overnight guest: “To hold that an overnight guest has a legitimate expectation of privacy in his host’s home merely recognizes the every day expectations of privacy that we all share. Staying overnight in another’s home is a long-standing social custom that serves functions recognized as valuable by society.”<sup>71</sup>

Despite acknowledging the special place the home occupies in our lives, and that, in the home, individuals have a subjective expectation of privacy that is objectively reasonable, the modern Supreme Court has not consistently interpreted the Fourth Amendment to protect privacy in the home. Two cases from the Rehnquist Court are illustrative. First, in *Minnesota v. Carter*, the court reasoned that individuals who visit a friend’s apartment but do not stay overnight have no reasonable expectation of privacy while there, because, as the court reasoned, they “were not searched in ‘their ... hous[e]’ under any interpretation of the phrase that bears the remotest relationship to the well understood meaning of the Fourth Amendment.”<sup>72</sup> As the dissent noted, however, this holding vitiates the privacy supposedly enjoyed by homedwellers since it allows “their invitations to others [to] increase the risk of unwarranted governmental peering and prying into their dwelling places.”<sup>73</sup> In other words, just as individuals reasonably would believe they do not need to “remain overnight to anticipate privacy in another’s home,”<sup>74</sup> so too, homedwellers might not anticipate a reduction in their own privacy when they allow guests to enter.

Second, in *Illinois v. Rodriguez*, the apparent authority case discussed above,<sup>75</sup> the Court held that the police do not violate the Fourth Amendment when they enter a home without a warrant on the reasonable but mistaken belief that a third party has common authority, with the homedweller, over the premises.<sup>76</sup> In other words, so long as the police reasonably believe that a third party—whether a girlfriend or boyfriend, a babysitter or a cleaning person—has the authority to consent to a search of the home, there is no Fourth Amendment violation. In effect, this rationale circumscribes the control individuals have over their dwellings. It replaces the consent of a person with real authority with a determination by a third party—who may have no interest whatever in the dwelling—that

61. *Commonwealth v. Porter P.*, 456 Mass. 254, 272 n.17 (2010).

62. *Id.*

63. *Id.* at 271 n.16.

64. *See Oystead v. Shed*, 13 Mass. 520, 522 (1816).

65. *Id.* at 523.

66. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602-1791, at 552 (2009). The idea that the home is one’s castle dates at least to a 1604 case in which the court held that “the house of every one is to him as his castle and fortress.” *Semayne’s Case*, 77 Eng. Rep. 194, 195 (K.B. 1604).

67. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

68. *Payton v. United States*, 445 U.S. 573, 589 (1980).

69. *See Chapman v. United States*, 365 U.S. 610 (1961).

70. *Bumper v. North Carolina*, 391 U.S. 543, 548 n.11 (1968).

71. *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).

72. 525 U.S. 83, 97 (1998) (quoting U.S. CONST. amend. IV).

73. *Id.* at 108 (Ginsburg, J., dissenting).

74. *Id.* at 109.

75. *See supra* notes 49-50 and accompanying text.

76. 497 U.S. 177, 179 (1990).

the police may search, without requiring the police to ascertain with certainty that the third party could actually authorize such a search.

In both of these examples, the U.S. Supreme Court concluded that, once a homedweller welcomes another person into his or her home, the homedweller gives away, as a constitutional matter, some of the privacy she enjoyed in the home. Paradoxically, this means that decisions we daily make in exercising our authority over our dwellings, decisions based upon and signaling our *actual* control over those dwellings, may effectively diminish our privacy protection under the Fourth Amendment in at least two ways: first, by expanding the number of persons in our dwellings who lack the same protection afforded residents or by expanding the number of persons who might exercise apparent authority. This particularly formalistic conception of the privacy that attaches to the home is not the only way to conceive of such privacy under a constitutional rule protecting against unreasonable searches and seizures.

### **B. *Porter P.* Extends the Reach of Article 14's Protection of Privacy in the Home**

The SJC has long appreciated that it may interpret the Massachusetts Constitution to contain individual rights protections stronger than those found in their federal counterparts.<sup>77</sup> In many cases over several decades, a concern to protect privacy has animated cases in which this court has concluded that Article 14 provides individuals greater protection than the Fourth Amendment in similar circumstances. The court has held, for example, that, because of the individual privacy interest at stake, automobile stops require greater justification under Article 14 than they would under the Fourth Amendment.<sup>78</sup> And it has held that, because of the privacy concerns implicated by interpersonal communications, Article 14 generally provides greater protection against warrantless electronic surveillance than does the Fourth Amendment.<sup>79</sup>

Though in the modern day the home may no longer be one's castle,<sup>80</sup> *Porter P.* enhances state constitutional protection of the home in ways that extend beyond the protection afforded dwellings under the Fourth Amendment. *Porter P.* recognizes that, under the state constitution, individuals have more than formal authority to determine whether government agents may enter their homes. This recognition is reflected in at least two aspects of the decision: the court's emphasis on a functional inquiry into whether a particular dwelling ought to receive constitutional protection, and its understanding of how the police should determine whether a person has authority to consent to a search.

First, as discussed above,<sup>81</sup> *Porter P.* establishes that trial judges should undertake a functional inquiry into whether a dwelling is a home for constitutional purposes. Rather than focus on the formal

arrangements of the shelter, the court in *Porter P.* regarded as significant that the juvenile's relationship with the shelter was akin to that of a homeowner to his house: he "slept and kept his belongings" there and he had a key to his room, which allowed him "the degree of privacy inherent in a locked door."<sup>82</sup>

Second, *Porter P.* enhances the ability of individuals to exert control over who may have access to their homes. Unlike the U.S. Supreme Court in *Rodriguez*, the SJC endorsed an inquiry that requires a careful determination by police before they may conclude that a person has authority to consent to a search. In *Rodriguez*, the U.S. Supreme Court emphasized that police need only act reasonably—whether "the facts available to the officer at the moment" would "warrant a man of reasonable caution in the belief that the consenting party had authority over the premises."<sup>83</sup> But the SJC made clear that, under the Massachusetts constitution, a reasonable belief can be based only upon facts, not conjecture, and the officer must continue his inquiry "until he has reliable information on which to base a finding of actual authority to consent."<sup>84</sup> Further, the officer "owes a duty to explore, rather than ignore, contrary facts tending to suggest that the person consenting to the search lacks actual authority."<sup>85</sup>

Each of these aspects of the decision in *Porter P.* suggests that Article 14 protects privacy in the home in a more profound way than does the Fourth Amendment. Under the Massachusetts Constitution, homedwellers do not implicitly waive an objection they might make to a search merely by allowing others into their homes. This is in contrast to the U.S. Supreme Court's reasoning in *Carter* and *Rodriguez*, in which the high court discounted the substance of a homedweller's ability to exercise control over who may enter their dwellings while at the same time preserving some reasonable expectations of privacy vis-à-vis the government.

### **C. *Porter P.* May Have Implications in Other Search and Seizure Contexts**

In addition to clarifying and enhancing Article 14's protection of privacy in the home, the decision in *Porter P.* may have relevance in other contexts. Consider the U.S. Supreme Court's decision in *Kyllo v. United States*. In that case, the court addressed the question whether the use by the police of a thermal-imaging device aimed at a private home constituted a search within the contemplation of the Fourth Amendment.<sup>86</sup> A majority of the court concluded that the use of such a device in fact constituted a search requiring a warrant based upon probable cause.<sup>87</sup>

Writing for the majority, Justice Antonin Scalia stated:

lost none of its vitality").

81. See *supra* notes 28-38 and accompanying text.

82. Commonwealth v. Porter P., 456 Mass. 254, 260-61 (2010). Unfortunately, notwithstanding constitutional protection, economic developments leading to budget cutbacks have since forced the shelter to close its doors. Telephone Conversation by Jordan Baumer with Florence Scott, Director of Human Resources, Roxbury Multi-Service Center, in Boston, MA (Sept. 28, 2010).

83. Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (quotation omitted).

84. *Porter P.*, 456 Mass. at 271.

85. *Id.* at 272.

86. 533 U.S. 27, 29 (2001).

87. See *id.* at 40.

77. See Charles H. Baron and Lawrence Friedman, *The Constitutional Jurisprudence of the Marshall Court: The First Half Decade*, BOSTON BAR J., March/April 2005, at 10; Charles H. Baron, *The Supreme Judicial Court in its Fourth Century: Meeting the Challenge of the "New Constitutional Revolution,"* 77 MASS. L. REV. 35 (1992); see also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

78. See Commonwealth v. Lyons, 409 Mass. 16 (1990).

79. See Commonwealth v. Blood, 400 Mass. 61 (1987).

80. *But cf.* Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970) (observing that "[t]he ancient concept that 'a man's home is his castle' ... has

Obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.<sup>88</sup>

On this reasoning, the Fourth Amendment secures an important measure of protection for the home. But that protection is limited to the extent that the sense-enhancing technology at issue is “in general public use.”<sup>89</sup> At the time *Kyllo* challenged his arrest for manufacturing marijuana, in the early 1990s, the thermal imaging device used by the police was not widely available for public use.<sup>90</sup> Today, one could purchase such a device on e-Bay.<sup>91</sup> And so, it can be argued that the scope of the Fourth Amendment’s privacy protection in the home as against the government is, and will continue to be, diminished whenever technology makes it easier for anyone to observe what transpires within one’s home.

In reaching its conclusions, the court in *Kyllo* relied upon technical notions of just how the bounds of a homedweller’s privacy should be understood—that is, as limited by which sense-enhancing technologies members of the public might have at their disposal.<sup>92</sup> The

SJC’s approach in *Porter P.*, on the other hand, leaves open the possibility that protection of privacy in the home as against the government will not necessarily be diminished by the development of technical means by which privacy in the home could be undermined. For instance, as noted above,<sup>93</sup> the fact that the shelter in which the juvenile was living was not under his exclusive control was not dispositive to the court in determining whether a search had occurred—the court went on to inquire whether the room in which the juvenile lived nevertheless should be regarded as his home in the circumstances of the case. In other words, *Porter P.* suggests that expectations about what privacy *should* be protected in the home still matter under Article 14.

## V. CONCLUSION

With its decision in *Porter P.*, the SJC has clarified the scope of residential privacy protections under the state constitution, provided explicit guidance to the police regarding actual and apparent third-party consent to search, and extended the reach of Article 14’s privacy protections beyond what the Fourth Amendment might protect in similar circumstances. Though several issues involving the scope of the consent doctrines will need to be resolved, *Porter P.* rejects the formalistic path of Fourth Amendment jurisprudence, and signals that both functional and normative expectations of privacy remain vitally important when advocates argue about the meaning and application of Article 14.

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88. *Id.* at 34.

89. *Id.* at 40.

90. See, e.g., RANDY JONES, EXECUTIVE FIRE OFFICER PROGRAM OF THE NAT’L FIRE ACADEMY, EVALUATION OF CURRENTLY AVAILABLE THERMAL IMAGING EQUIPMENT TO ASSIST THE SELECTION AND SPECIFICATION FOR THE VILLAGE OF MUNDELEIN FIRE DEPARTMENT 23 (1999) (noting that thermal imaging devices have only been available to fire departments since the early 1990s).

91. See Ebay, “Thermal Imager,” [http://shop.ebay.com/?\\_from=R40&\\_trksid](http://shop.ebay.com/?_from=R40&_trksid)

=p3907.m38.l1311&\_nkw=thermal+imager&\_sacat=See-All-Categories (last visited Nov. 29, 2010).

92. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

93. See *supra* notes 20-21 and accompanying text.

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