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WARRANTLESS SEARCH OF A COLLEGE DORMITORY

RONALD J. BACIGAL*

STUDENT CONDUCT is as much a part of the collegiate experience as intellectual pursuit, and regulation of student conduct has been a concern of university officials for as long as there have been students and universities. Until the 1960s the courts had few occasions to concern themselves with the regulation of student conduct; and, university officials were free to take any action short of action that was arbitrary and capricious.¹ University officials were deemed to stand in loco parentis and thus could make and enforce any regulation for the physical training, moral enrichment, and betterment of their pupils that a parent would make for the same purpose.² This view of life in the Ivory Tower may or may not have been an accurate appraisal of actual campus life in the past; but, it clearly bore no relation to campus life in the 1960s. As one federal district court judge observed:

I take notice that particularly in recent years the universities have become theaters for stormy and often violent protests over such matters as war and peace, racial discrimination in our cities and elsewhere, and the quality of American life; that this phenomenon adds new and unanticipated dimensions to the regulation of conduct in the universities; and that those charged with governance of these institutions have been struggling to preserve many competing values involved.³

To some extent this struggle to preserve many competing values was transferred from university officials to the courts when *Dixon v. Bd. of Educ.*⁴ abandoned the judiciary's traditional reluctance to examine academic due process.⁵ In *Dixon* the court stated that "[w]henever a

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¹ The president and faculty of a university necessarily have "inherent general power to maintain order and to exclude those who are detrimental to the student body and the institution's well-being, so long as they exercise sound discretion and do not act arbitrarily or capriciously." *Barker v. Hardway*, 283 F.Supp. 228, 235 (S.D. W.Va. 1968).

² *Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924).

³ *Soalin v. Kauffman*, 295 F.Supp. 978, 988 (W.D. Wisc. 1968). Although the 1960s may have been a watershed in student activism, there is not yet any basis for believing that the 1970s will mark a period of tranquility. Bayer & Astin, *Campus Unrest, 1970-71: Was It Really All That Quiet?* 52 Educ. Rec. 301-313 (Fall 1971).

⁴ 294 F.2d 150 (5th Cir. 1961).

⁵ In *Zanders v. Bd. of Ed.*, 281 F.Supp. 747, 760 (W.D. La. 1968), the court expressed some apparent impatience with the failure of university officials to accord students their rights under due process of law.

If minimum standards of fairness, having been repeatedly articulated for over 50 years, are not afforded to students in disciplinary cases, then, as is becoming the rule rather than the exception in all fields today, courts, state and federal,

governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."⁶ The holding of *Dixon* is limited to state-supported colleges⁷ and is vague regarding specific rights included under due process;⁸ but, the decision did clearly establish that disciplinary action of university officials was subject to judicial review.⁹

Dixon established only the perimeters of judicial review, recognizing that a student has a right to procedural safeguards greater than those present in an informal interview, but less than all the safeguards inherent in a criminal proceeding.¹⁰ The specific rights embodied between these two perimeters are uncertain and there has been extensive discussion of exactly what due process rights a student possesses.¹¹ The scope of this article is confined to an examination of one of those rights, the fourth amendment right to be free of unreasonable searches and seizures. There are relatively few cases dealing with the search of a student's dormitory room¹² and the

will draft rules on an ad hoc, a case by case, basis to insure that rights of students adequately are protected.

The federal district court for the western district of Missouri so willingly plunged into the struggle that rather than evolve the standards on a case by case basis, it promulgated a *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968).

⁶ *Dixon v. Bd. of Ed.*, 294 F.2d 150, 155 (5th Cir. 1961) [hereinafter cited as *Dixon*].

⁷ Public universities are considered to be instruments of the state, thus the action of public university officials is state action and the students are entitled to that degree of due process required by the fourteenth amendment. With private universities there is a lack of state action thus the fourteenth amendment does not apply. Courts have held that attendance at a private school is not a right but a privilege which may be discontinued at the option of the university, and there are no constitutional limitations on the exercise of that option. For a summary of existing law and arguments in favor of applying the fourteenth amendment to private universities see *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795 (1970).

⁸ E.g., *Procedural Due Process and Campus Disorder: A Comparison of Law and Practice*, 1970 DUKE L.J. 763 (1970); Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582 (1968); *Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Note, 3 GA. L. REV. 426 (1969).

⁹ "[W]ith the exception of dictum in one district court case, there has been no challenge by any court, state or federal, to the basic proposition for which *Dixon* stands, that students at a public institution of higher learning do have constitutional rights that the courts will recognize and protect." Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1032 (1969) [hereinafter cited as Wright]. But it is not as clear that legislatures will accept this basic proposition as readily as the courts. E.g., OKLA. STAT. ANN. § 301 (Supp. 1973) (providing for expulsion without any provision for a hearing).

¹⁰ To require a "full dress judicial hearing" would be "impractical and detrimental to the educational atmosphere and functions of a university." *Goldberg v. Regents of the Univ. of Calif.*, 248 Cal. App.2d 867, 881-82, 57 Cal. Rptr. 463, 473 (Cal. App. 1967); accord, *Esteban v. Central Mo. State College*, 290 F. Supp. 622 (W.D. Mo. 1968).

¹¹ *Supra* note 8.

¹² Before the age of the student as a militant litigator few cases reached the courts because universities preferred to handle matters quietly within the university and thus avoid any publicity which could damage the university's image. The university would

holdings are frequently unclear because they mix consideration of the existence of the right to privacy with the methods of protecting the right. It is suggested that some of the confusion could be avoided if the courts were to consider first whether the fourth amendment right to privacy applies to a university dormitory room, and then determine what procedures are applicable in relation to the right: *e.g.*, the requirement for a search warrant; the standards of probable cause; and the application of the exclusionary rule.¹³

THE RIGHT TO PRIVACY

The first question the courts must consider is whether there are any limitations on when and how university officials may search a dormitory room. Since the fourth amendment has no application to searches and seizures conducted by private individuals,¹⁴ the courts have jurisdiction to review only state action infringing on the constitutional right to a reasonable expectation of privacy. In spite of indirect public financial support and state regulation of private universities, the courts have thus far held that the actions of private university officials are not to be considered as a form of state action.¹⁵ Thus this article is concerned only with the actions of public university officials, since such action is state action within the meaning of the fourteenth amendment.¹⁶

If the university is deemed a public university, the courts must then consider whether the constitutional right to a reasonable expectation of privacy¹⁷ exists in a dormitory room, thereby affording the resident fourth

"simply exile the tainted student from the academic community. Once administrators had accomplished their goal, the matter was usually forgotten by all concerned." *Armstrong, College Search and Seizure: Privacy and Due Process Problems on Campus*, 5 CRIM. L. BULL. 537, 552 n.85 (1969).

¹³ In oral argument before the Supreme Court on *United States v. Calandra*, 94 S. Ct. 613 (1974), argued Oct. 11, 1973, Chief Justice Burger stated "I do not recall any case where the court has discussed [the exclusionary rule] except as a means of keeping the system healthy. . . . It is spoken of as a benefit to the system of justice—not to the individual. . . . It is not a right of the individual." 14 CRIM. L. RPTR. 4045 (Oct. 17, 1973).

¹⁴ Although there is some academic debate as to whether the fourth amendment applies to searches by private citizens, *see e.g.* *United States v. McGuire*, 381 F.2d 306, 313 n.5 (2d Cir. 1967), the law is fairly well settled that private individuals acting independent of government involvement may conduct a search which would be unconstitutional if performed by the government. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

¹⁵ *See note 7 supra. But see* *Guillory v. Tulane Univ.*, 203 F. Supp. 855 (E.D. La. 1962). In *Hammond v. Univ. of Tampa*, 344 F.2d 951 (5th Cir. 1965), the court noted that

"[a]lthough the University of Tampa is not a state or city institution in the usual sense, its establishment was largely made possible by the use of a surplus city building and the use of other city land leased for the University purposes. . . . [T]he City's involvement in the establishment and maintenance was of such a nature as to require a holding that "state" action under the Fourteenth Amendment was involved in the denial of appellants' rights.

¹⁶ *Supra* note 7.

¹⁷ *Katz v. United States*, 389 U.S. 347 (1967).

amendment protection against unreasonable searches by university officials. Professor Charles Wright has contended that there can be no reasonable expectation of privacy in a dormitory room, thus the courts need never concern themselves with searches of dormitory rooms.¹⁸ Such an approach would certainly simplify matters for the courts, and in the search and seizure area, would signal a return to pre-*Dixon* days. Anyone who has ever resided in a college dormitory is aware of the practical limitations on his privacy; but, can it be said as a matter of law that there is no reasonable expectation of privacy?¹⁹ The various theories advanced against a reasonable expectation of privacy are considered below.

ABSENCE OF PROPERTY RIGHTS

The courts have avoided classifying a dormitory resident's status in the classic terminology of property law,²⁰ thus some commentators have suggested that by casting their powers in property terms universities could preserve an option to enter at will.²¹ Such a theory diametrically contravenes Justice Stewart's view that:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.²²

The subtleties of the law of property in distinguishing a license from an interest in property should have no significance within the context of the fourth amendment. "Anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."²³ Although it is arguable whether the dormitory resident and the university stand in a tenant-landlord relationship,²⁴ it is clear that the student possesses at least the rights of a lodger.²⁵ The complete relationship between a dormitory

¹⁸ Wright, *supra* note 9. Cf. Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968) [hereinafter cited as Moore]; Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970).

¹⁹ "To suggest that a student who lives off campus in a boarding house is protected but that one who occupies a dormitory room waives his constitutional liberties is at war with reason, logic and law." People v. Cohen, 292 N.Y.S.2d 706, 713 (1st Dist. 1968).

²⁰ E.g., Moore, 284 F. Supp. 725 (M.D. Ala. 1968). Perhaps the courts seek to avoid collateral complications that could arise from according students a status as a tenant, licensee, or lodger.

²¹ E.g., Knowles, *Crime Investigation in the School: Its Constitutional Dimensions*, 4 J. FAMILY L. 151, 164 (1964). See also United States v. Donato, 269 F. Supp. 921, 924 (E.D. Pa. 1967); People v. Overton, 283 N.Y.S.2d 22 (1967).

²² Katz v. United States, 389 U.S. 347, 351-52 (1967).

²³ Jones v. United States, 362 U.S. 257, 267 (1960).

²⁴ Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 Ky. L.J. 643, 681 (1966).

²⁵ The fourth amendment protects the right of privacy in rented houses, Chapman v. United States, 365 U.S. 610 (1961); rooms in boarding houses, McDonald v. United

resident and the university encompasses much more than the ordinary lodger-proprietor relationship, but the additional relations between student and university should be considered on their own merits, and should not be viewed as destroying the traditional fourth amendment rights of a lodger. Inherent in the lodger-proprietor relationship is the proprietor's duty to respect the lodger's privacy in the premises.

CONSENT-WAIVER

Obviously there is no invasion of privacy when one freely and voluntarily consents to an entry. Thus it has been argued that even if a reasonable expectation of privacy could exist in regard to a dormitory room, the right is waived when the student consents to dormitory regulations which allow university officials to enter at will for inspection purposes.²⁶ The difficulty with the consent theory is in determining whether a student's acquiescence to dormitory regulations can be classified as consent, freely and voluntarily given. It is clear that the burden of establishing free and voluntary consent rests upon the prosecution;²⁷ but it is not as clear, within the context of student rights, what facts are required to meet this burden. In *Schneckloth v. Bustamonte*,²⁸ the Supreme Court defined the test for voluntary consent thusly: "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied is a question of fact to be determined from the totality of all circumstances."²⁹ The Court went on to make an interesting distinction between the standard for *consent* to a search (factual determination of voluntariness) vis-à-vis the standard for *waiver* of certain constitutional rights ("an intentional relinquishment or abandonment of a known right or privilege").³⁰ The Court held that the

States, 335 U.S. 451 (1948); and hotel rooms, *Stoner v. California*, 376 U.S. 483 (1964). In *Commonwealth v. McClosky*, 217 Pa. Super. 432, 272 A.2d 271 (1970), the court reasoned that a dormitory room is analogous to an apartment or hotel room, and affords the occupant a reasonable expectation of privacy.

²⁶ A typical regulation was that cited in *Moore*, 284 F. Supp. 725, 728 (M.D. Ala. 1968): "The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary the room may be searched and the occupant required to open his personal baggage and any other personal material which is sealed." Even absent such an explicit provision, courts have held that every dormitory resident impliedly consents to entry by university officials. "It is implicit in the rules that the appellant had agreed that the master, in the performance of his duties in upholding the high disciplinary standards and integrity of the school, might enter the room." *People v. Kelley*, 195 Cal. App.2d 72, 77-78, 16 Cal. Rptr. 177, 182 (Ct. App. 1961). The usual corollary of a student's consent to an entry by university officials is that the university officials may then consent to entry by the police. *People v. Cohen*, 292 N.Y.S.2d 706, 709 (1st Dist. 1968), rejected the corollary thusly: "[E]ven if the doctrine of implied consent were imported into this case, the consent is given, not to police officials, but to the University and the latter cannot fragmentize, share or delegate it."

²⁷ *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

²⁸ 412 U.S. 218 (1973).

²⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) [hereinafter cited as *Schneckloth*].

³⁰ *Id.* at 235-38.

stricter standard for waiver had "[a]lmost without exception . . . been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."³¹ The Court noted "that there is no universal standard that must be applied in every situation where a person forgoes a constitutional right,"³² and that

[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.³³

If *Schneckloth* is accepted at face value, it seems clear that the university need not inform a dormitory resident of his right to privacy before eliciting a waiver of that right.

However, the factual situation before the Court in *Schneckloth* dealt with the consent to a search, given on the scene and during an investigation. The practical limitations of obtaining consent in such a factual situation clearly played a part in the decision, for the Court noted that:

Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under *informal* and *unstructured* conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. (Emphasis added.)³⁴

Obviously, none of the above characteristics of a "normal consent search" would apply to a university requirement that all dormitory residents consent to all future searches. The university is not acting under "informal and unstructured conditions." The circumstances prompting a search have not developed "quickly" nor is the request "a logical extension of investigative police questioning." The university is not investigating "further suspicious circumstances" and is not following up "leads developed in questioning persons at the scene of a crime." Nothing could be further removed from the factual situation in *Schneckloth* than the structured conditions under which a student is admitted to a university and accepted as a dormitory resident. The university is not eliciting consent to a specific search which is a part of an investigation; rather, the university seeks complete abandonment of the right to privacy and consent to all future entries. *Schneckloth* may have been correct in observing that: "It would be unrealistic to expect that in the informal, unstructured

³¹ *Id.* at 237.

³² *Id.* at 245.

³³ *Id.* at 241.

³⁴ *Id.* at 231-32.

context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination. . . ." required to establish a knowing and intelligent waiver of a constitutional right.³⁵ But, it does not seem unrealistic, within the typical setting of student registration, to require the university to inform the student that he is being asked to waive an important constitutional right. At registration a student is faced with a multitude of forms and informational materials, and it would not place an unreasonable burden upon the university to require that the materials include a written waiver form explaining to the student what rights he must surrender in order to qualify as a dormitory resident. Assuming that such a wholly prospective and complete abandonment of a constitutional right does not violate public policy,³⁶ the university could then forcefully argue that the written waiver constituted an intelligent relinquishment of a known right.

If the concept of waiver is inapplicable to a university dormitory situation, then the less strict standard for consent will be applied and the university will be required to establish only that the consent was voluntary and not the result of coercion.³⁷ However, it is doubtful if the university can meet even this lesser burden. In many universities first and second year students are required to live in a dormitory; and, they are, therefore, required to accept dormitory regulations which eliminate the right to privacy. Even when residence in a university dormitory is a matter of choice, the student has no right to negotiate on the terms of the dormitory regulations; thus, he is coerced into giving up his fourth amendment rights. Of course, it can always be argued that the student does have a choice because he is free to choose not to reside in a dormitory, or in fact may choose not to attend a university. While such a choice may be voluntary within the literal definition of voluntariness,³⁸ it is not the type of voluntary choice contemplated by the Constitution. "[T]he State cannot condition the granting of even a privilege upon

³⁵ *Id.* at 245.

³⁶ The courts would have to consider the wisdom of allowing a person to enter into an agreement whereby he surrenders his constitutional rights in future situations which he cannot foresee at the time of the waiver. This may be a purely academic question since it is difficult to conceive of anyone making such a general waiver of rights in the absence of some pressure or coercion being applied. If there is coercion, even in the form of withholding a privilege, then "the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *United States v. Chicago, M. St. P. & P. R. Co.*, 282 U.S. 311, 328-29 (1931).

³⁷ *Schnecko*th, 412 U.S. at 248.

³⁸ In *Schnecko*th, 412 U.S. at 224, n.7, the court noted that the presence of disagreeable alternatives does not eliminate the possibility of choice. "As between the rack and a confession, the latter would usually be considered the less disagreeable; but it is nonetheless a voluntary choice." 3 J. Wigmore, *Evidence* § 826 (J. Chadbourne rev. 1970). But in determining the legal standard for voluntary choice, the court noted that "neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'" *Schnecko*th, 412 U.S. at 224.

renunciation of the constitutional right to procedural due process."³⁹ If it is accepted that a dormitory resident possesses the constitutional right to be free of unreasonable searches and seizures, then "a tax-supported public college may not compel a 'waiver' of that right as a condition precedent to admission."⁴⁰ Any consent obtained under such a condition must be considered involuntary.

IN LOCO PARENTIS

As noted earlier, the actions of public university officials are to be considered as a form of state action.⁴¹ But the in loco parentis theory contends that the fourth amendment is limited to a specific form of state action, *i.e.*, state action in fulfilling the police function of collecting evidence to be used in a criminal prosecution. University officials are not serving the police function but rather the parental duty of caring for a wayward child.⁴² Thus, the argument goes, the student has no need for the protection of the fourth amendment because the possible university sanctions against the student are much less severe than the sanctions facing the criminal defendant,⁴³ and the motivation of university officials conducting the search is totally different from the motivation of the police.⁴⁴ The obvious rebuttal to this argument is that the university sanction may indeed be severe since suspension or expulsion from college may prevent admission to other institutions thus amounting to a lifelong stigma.⁴⁵ Should this stigma prevent a student from ever attaining a college degree, it may cost the student up to \$178,000 in potential lifetime income.⁴⁶ As for the university officials' motivation, the initial problem is in factually determining subjective motivation. But even if university officials could establish that they were motivated by the noblest of considerations, motivation should never be accepted as a justification for a violation of constitutional rights. It is hard to resist the cliché that the road to hell is paved with good intentions; but, one need only look to the "Watergate"

³⁹ Dixon, 294 F.2d at 156.

⁴⁰ Moore, 284 F. Supp. at 729.

⁴¹ *Supra* note 7.

⁴² See text accompanying note 2 *supra*.

⁴³ See *Esteban v. Central Mo. State College*, 290 F. Supp. 622, 628 (W.D. Mo. 1968), where the court held that "the disciplinary process is not equivalent to the criminal law processes. . . . For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision."

⁴⁴ *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971); *Keene v. Rodgers*, 316 F. Supp. 217 (D. Me. 1970); *Commonwealth v. McCloskey*, 217 Pa. Super. 432, 272 A.2d 271 (1970). All of the above cases held, at least in dicta, that a university can conduct a warrantless search for educational or proprietary purposes but not "for the *primary purpose* of a criminal prosecution." *Piazzola* at 289 (emphasis added).

⁴⁵ Sherry, *Governance of the University: Rule, Rights, and Responsibilities*. 54 CALIF. L. REV. 23, 36-37 (1966).

⁴⁶ Based on projected average lifetime income of males with educational backgrounds ranging from a high school diploma to a college degree. 1962 Statistical Abstract of the United States 119; See also 1972 Statistical Abstract of the United States 114.

situation to observe where justification based on high motivation can lead. Also, there is really no need to grapple with the philosophical question of whether the end can justify the means, when it is clear that the purpose of the fourth amendment is to protect "the common-law right of a man to privacy in his home. . . . To say that a man suspected of crime has a right to protection against a search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity."⁴⁷ In considering the fourth amendment right to privacy, subjective motivation is simply irrelevant. "It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the 'intent' of the invading officers."⁴⁸

Perhaps the most glaring weakness of the in loco parentis theory is that focusing on subjective motivation ignores the very practical consideration that breaches of university regulations frequently constitute crimes (e.g., unlawful possession of drugs) and thus subject the student to prosecution regardless of the original purpose of the search. It is of no comfort to a student facing criminal prosecution to be told that the university officials had not originally contemplated any criminal prosecution. "The intent of the executioner cannot lessen the torture or excuse the result."⁴⁹ In *Mathis v. United States*⁵⁰ the Supreme Court held that when in an investigation of a civil matter, there exists the possibility of criminal sanctions, even though not contemplated, the person should be given *Miranda* warnings before interrogation. Since the mere possibility of criminal prosecution is enough to trigger the applicability of the fifth amendment, there appears no reason why the possibility of criminal sanctions should not also make the fourth amendment applicable, regardless of the subjective intent of the individuals conducting the search.

PUBLIC INTERESTS

Perhaps the most forthright argument against a reasonable expectation of privacy in a dormitory room is the simple realization that the right to privacy is not absolute and must at times yield to a greater public interest. The fourth amendment prohibits only "unreasonable" searches, and because of the public interest in a given situation, a warrantless search may be considered reasonable.⁵¹ Further, it has been stated that a large

⁴⁷ *District of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1949). The Supreme Court recognized this principle in *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967), where the court held that "it is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior."

⁴⁸ *Abel v. United States*, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting).

⁴⁹ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 477 (1947) (Burton, J., dissenting).

⁵⁰ 391 U.S. 1 (1968).

⁵¹ Such an approach is based on the theory that the warrant clause and the reasonableness clause of the fourth amendment are independent. Thus the constitutional validity of a search can be judged solely on the basis of its reasonableness, regardless

concentration of youth within the campus setting tends to create a dynamic situation likely to produce criminal conduct.⁵² To deal with these dynamic situations university officials must be given "reasonable" authority even if the authority to some extent infringes on "minor" interests protected by the fourth amendment.⁵³ One can certainly differ with the opening premise—that college "youth" are more prone to criminal conduct. It may not even be accurate to classify college students as youth since in many jurisdictions the age of 18 is now recognized as constituting legal majority, and only seven percent of total college enrollment is below the age of 18.⁵⁴ Even if statistics do indicate a greater likelihood of crime on campus, mere statistical probability has never been a legitimate basis for conducting a search.⁵⁵ To recognize mere statistical probability would allow the search of any home in a high crime area on nothing more specific than crime report statistics for the year.

A further weakness of the "public interest" theory is the tendency to generalize about situations rather than deal with specifics. The argument is advanced that a college campus is such a volatile situation that the right to privacy must be put aside; yet, University of Texas officials have preserved discipline without ever authorizing a search, and the University voluntarily relinquished any claim to the power to authorize a search.⁵⁶ The balancing of public interests and private rights should not take place in the general abstract where courts must deal with such concepts as a youth's disposition to mischief. The balancing should be done through the warrant procedure where a specific situation can be examined, and if

of the feasibility of procuring a warrant. See *United States v. Rabinowitz*, 339 U.S. 56 (1950). The validity of *Rabinowitz* is highly doubtful in light of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where the court held that warrantless searches were "per se unreasonable" subject only to well recognized exceptions.

⁵² A college dormitory brings together a large group of energetic, adventurous and often irresponsible young persons. *Englehart v. Serena*, 318 Mo. 263, 300 S.W. 268 (1927).

⁵³ In other words, if the regulation—or, in the absence of a regulation, the action of the college authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere," then it will be presumed facially responsible despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of the students.

Moore, 284 F. Supp. at 729. This reasoning is similar to that in *Frank v. Maryland*, 359 U.S. 360, 367 (1959), where the court held that fire, health and housing inspections are socially necessary and are reasonable because they "touch at most upon the periphery of the important interests safeguarded by... [the fourth amendment as applied through the] Fourteenth Amendment's protection against official intrusion..." *Frank* was overruled in *Camara v. Municipal Court*, 387, U.S. 523 (1967).

⁵⁴ Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS. Q. 1, 17-18 (1965). See, *People v. Cohen*, 57 Misc.2d 366, 292 N.Y.S.2d 706 (1968), where the court emphasized that university students are adults.

⁵⁵ An invasion of privacy cannot "be justified on the grounds that there is a statistical chance that a violation may be discovered." *Commonwealth v. Swager*, 300 A.2d 66, 69 (1973). See T. SKOLNICK, *JUSTICE WITHOUT TRIAL*, 217-18 (1966).

⁵⁶ Wright, *supra* note 9.

necessary the determination made that in *this particular situation* the right to privacy must yield to a greater public interest.⁵⁷ As the Supreme Court stated in *Camara v. Municipal Court*: "[A]n argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant."⁵⁸ Whether the right to privacy must yield to public interest in a particular situation is a question to be confronted each time a warrant is requested for the search of a specific area. This question should not be preempted by a general rule eliminating the need to examine a specific factual situation. It is simply not necessary or reasonable to announce the general rule that, no matter whatever other factors are present, one can never have a reasonable expectation of privacy in a dormitory room.⁵⁹

THE WARRANT REQUIREMENT

If it is accepted that the fourth amendment does protect a student's right to privacy in a dormitory room, the next area of concern is whether the right can be set aside only pursuant to a valid search warrant. "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is per se unreasonable... 'subject only to a few specifically established and well-delineated exceptions.'"⁶⁰ The recognized situations where a warrant has generally not been required are: consent,⁶¹ incident to arrest,⁶² stop and frisk,⁶³ emergency,⁶⁴ incident to arrest made inside a house,⁶⁵ and plain view.⁶⁶ If a search by university officials falls within one of these traditional exceptions to the warrant requirement the warrantless search will be valid. The current concern is whether university officials are covered by a distinct exception, *i.e.*, will nothing other than the fact of the search being authorized by university officials justify bypassing the warrant procedure. All exceptions to the warrant requirement are based

⁵⁷ Absent emergency or exceptional circumstances, warrantless administrative inspections are unreasonable under the fourth amendment. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

⁵⁸ 387 U.S. 523, 533 (1967).

⁵⁹ "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none they may not perform within the limits of the Bill of Rights." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

⁶⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁶¹ *Id.* at 218; *Bumper v. North Carolina*, 381 U.S. 543 (1968).

⁶² *Chimel v. California*, 395 U.S. 752 (1969).

⁶³ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁶⁴ *Chambers v. Maroney*, 399 U.S. 42 (1970).

⁶⁵ *Vale v. Louisiana*, 399 U.S. 30 (1970).

⁶⁶ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

on necessity,⁶⁷ thus it must be determined if there is anything unique about a college dormitory necessitating the elimination of the requirement for a warrant issued by a magistrate. No court has squarely confronted this question although *Moore v. Student Affairs Comm. of Troy State Univ.*⁶⁸ held that a warrantless search was not violative of the fourth amendment because it was "necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an 'educational atmosphere.'"⁶⁹ While *Moore* determined that the act of searching was necessary, it did not address itself to the issue of why it was necessary to bypass the warrant procedure. Thus *Moore* evaded the thrust of *Camara v. Municipal Court*⁷⁰ which recognized that individual rights may have to yield to a valid interest, but this determination is to be made by a magistrate not by the person conducting the search. The only time that the magistrate may be bypassed is when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."⁷¹ Thus the question *Moore* did not address itself to is whether obtaining a warrant would have frustrated the university's purpose of maintaining discipline and an educational atmosphere.

Although the courts have not had an opportunity to rule on the contention, it has been argued that the psychological effect of university officials confronting students with search warrants would destroy the trust and cooperativeness of an "educational atmosphere."⁷² Although there exists no empirical data on the psychological effect of a search warrant, it seems highly doubtful that the modern student would prefer to entrust protection of his rights to the benevolence of university officials rather than have university officials observe constitutional procedures. Rather than create an unpleasant educational atmosphere the "provision of procedural protection should enhance a school's reputation for fairness and thus prove a positive benefit."⁷³ A search warrant would indicate to a student that the university official was not acting on whim or prejudice, but pursuant to a lawful warrant issued by a neutral party—a judicial officer. Whatever the cause, Ralph Naderism, the Civil Rights Movement, etc., it seems clear that today's college student places more faith in the judicial system than in any other public institution of our society.

Aside from the psychological effect of a search warrant, it has been

⁶⁷ [T]he Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451, 456 (1948).

⁶⁸ 284 F. Supp. 725 (M.D. Ala. 1968).

⁶⁹ *Id.* at 729.

⁷⁰ 387 U.S. 523 (1967).

⁷¹ *Id.* at 533.

⁷² Comment, 17 KAN. L. REV. 512, 523 (1969).

⁷³ *Academic Freedom*, 81 HARV. L. REV. 1045, 1138 (1968).

argued that the cost in terms of money and manpower of procuring a warrant would be prohibitive, thus frustrating the university's educational purpose.⁷⁴ It is pure speculation as to how much time and money would be expended if the university were required to seek a warrant before entering a dormitory room. Evidence of high cost might well be an indication that the university is making excessive use of its claimed right to enter dormitory rooms at will. As *Camara* stated there is no need to seek a warrant when the individual allows the official to enter, and this would be the normal situation.⁷⁵ It is only the relatively unusual situation when the individual chooses to stand on his right to privacy that a warrant must be procured. Were this situation to occur frequently it may indicate that university officials are abusing their claimed right of entry at any time. The exercise of self-restraint and caution by university officials may be the best way to avoid excessive cost, as well as providing its own reward. Knowledge by university officials that they must rationally justify, to a magistrate, their need to enter a particular room may discourage impulsive entries based on the belief that there is an absolute right to enter at any time. Encouraging university officials to act more cautiously and rationally, might well promote the atmosphere of trust and cooperativeness which is one of the goals of the university. "Due process of law is not for the sole benefit of an accused. It is the best insurance . . . against those blunders which leave lasting stains on a system of justice but which

⁷⁴ One reason for fearing that the warrant procedure would be financially costly could be the view that it would be necessary for universities to establish a separate warrant procedure when searching for a non-criminal violation of university regulations. This view maintains that when university officials are investigating non-criminal behavior "a magistrate located 'downtown' would probably be powerless to issue warrants. Consequently, the institution must develop within its own structures a surrogate competent to review applications for search warrants." Note, 3 GA. L. REV. 426, 456 (1969). The cost in money and manpower of establishing such a separate warrant procedure might indeed be prohibitive. But suffice it to say, that aside from the wisdom and need for such a system it is questionable if the procedure would be constitutional. If the right to privacy in a dormitory room is recognized, that privacy cannot be breached absent a validly issued search warrant or established exceptions to the warrant procedure. There is no authority for the proposition that the warrant could be issued by anyone other than a magistrate. The fact that university officials are investigating non-criminal behavior does not eliminate the need to procure a warrant from a magistrate. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the court faced a factual situation where health inspectors were investigating non-criminal behavior. The court refused to uphold the health inspector's determination of the necessity for the inspection, and the court affirmed the need for a search warrant issued by a detached judicial party. When dealing with non-criminal activity, obviously the definition of probable cause to enter must be redefined; but, there is no alteration in the concept of who it is that must determine probable cause for entry.

⁷⁵ [A]s a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.

Camara v. Municipal Court, 387 U.S. 523, 539-40 (1967).

are bound to occur on *ex parte* consideration."⁷⁶

Aside from posing speculation on the financial costs and psychological effects of search warrants, university officials have not carried the burden of establishing that procuring a warrant would frustrate proper university functions. If the campus situation is truly volatile requiring immediate action then university officials are justified in bypassing the warrant requirement under the traditional emergency exception.⁷⁷ If the situation does not necessitate immediate action then there is no reason why university officials should not seek a warrant. It is always *inconvenient* to procure a search warrant, but inconvenience should not be the basis for negating the warrant requirement.

STANDARD OF PROBABLE CAUSE

If it is accepted that the fourth amendment requires university officials to procure a search warrant before entering a dormitory room, the next concern is what grounds must be established before the search warrant can be properly issued. The traditional test for issuing a search warrant is the establishment of probable cause to believe that seizable items, *i.e.*, fruits, instrumentalities, or evidence of a crime, are located in the area to be searched.⁷⁸ If the university officials are searching for evidence of a crime (*e.g.*, unlawful possession of drugs) there appears no reason why the traditional standard of probable cause should not be applicable. Whether the university officials actually contemplated a criminal prosecution is irrelevant. Subjective intent is not the determining factor; what is significant is an objective determination that the university officials should have been aware that seizure of such items would subject the student to possible prosecution.⁷⁹

If the university officials are searching for an item that merely violates a university regulation (*e.g.*, possession of firearms) and has no connection with a crime, then obviously the traditional definition of probable cause is inapplicable. Rather than offer facts establishing a reasonable belief that items connected with a crime are present, the university officials would be required to establish a "valid public interest [which] justifies the intrusion contemplated . . ."⁸⁰ Presumably the valid public interest would be the right and need to enforce university regulations. Thus every suspected violation of university regulations would create a valid public interest in seeing those regulations enforced. Clearly the requirement to establish a reasonable belief of a violation of regulations does not place an unreasonable burden on the university. In fact since all

⁷⁶ *Shaughnessey v. United States*, 345 U.S. 206, 224-5 (1953) (Jackson, J., dissenting).

⁷⁷ *Vale v. Louisiana*, 399 U.S. 30 (1970).

⁷⁸ B. SCHWARTZ, *CONSTITUTIONAL LAW* 237 (1972).

⁷⁹ See text accompanying notes 49 and 50 *supra*.

⁸⁰ *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967).

regulations are presumed to be reasonable,⁸¹ it has been argued that creating such a low standard of probable cause makes the search warrant automatic and the result is the same as if the warrant were eliminated entirely.⁸² The Supreme Court in *Camara* rejected the argument that lessening the standard of probable cause would lead to "rubber stamp" warrants. Even a lesser standard of probable cause to be passed on by a magistrate is preferable to leaving the decision to search to the discretion of the official conducting the search. The adequacy of probable cause must be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."⁸³ As the Supreme Court emphasized in *Coolidge v. New Hampshire*⁸⁴ and *Spinelli v. United States*,⁸⁵ the requirement that a warrant be issued by a magistrate serves a valid purpose and is not a meaningless procedure. "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice."⁸⁶

APPLICATION OF THE EXCLUSIONARY RULE

The wisdom and effectiveness of the exclusionary rule continue to engender heated debate,⁸⁷ but the principle is quite clear: When government officials violate the criminal defendant's fourth amendment right to privacy, they may not offer in evidence the fruits of such an illegal search.⁸⁸ The fact that the criminal defendant is a student and the government officials are university officials should not in any way alter the applicability of the exclusionary rule to criminal prosecutions.⁸⁹ University officials cannot engage in illegal action and then present the fruits of such action to the prosecutor on a silver platter. Although the exclusionary rule should be applied to a criminal prosecution of a student, it is a more difficult question whether the rule is applicable to a university disciplinary proceeding. Whether the rule applies depends upon a determination of the nature of a university disciplinary proceeding.

The application of the exclusionary rule is limited to proceedings which are of a criminal or quasi-criminal nature.⁹⁰ Cases are greatly

⁸¹ Moore, 284 F. Supp. at 729.

⁸² See *v. Seattle*, 387 U.S. 541, 554-5 (1967) (Clark, J., dissenting).

⁸³ *Aquilar v. Texas*, 378 U.S. 108, 111 (1964).

⁸⁴ 403 U.S. 443 (1971).

⁸⁵ 393 U.S. 410 (1969).

⁸⁶ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

⁸⁷ For a bibliography see Schneckloth, 412 U.S. at 267, n.24 (Powell, J., concurring).

⁸⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. U.S.*, 232 U.S. 383 (1914).

⁸⁹ *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971); *People v. Cohen*, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (Dist. Ct. 1968); *Commonwealth v. McClosky*, 217 Pa. Super. 432, 272 A.2d 271 (1970).

⁹⁰ *Abel v. United States*, 362 U.S. 217 (1960); *Boyd v. United States*, 116 U.S. 616 (1886).

divided as to what constitutes a quasi-criminal proceeding;⁹¹ but, thus far the courts have uniformly rejected the proposition that university disciplinary proceedings are criminal in nature and effect.⁹² The plaintiffs in *Esteban v. Central Mo. State College*⁹³ contended that public institution disciplinary proceedings were analogous to criminal and juvenile proceedings; thus, the procedural due process guarantees applicable in criminal and juvenile cases should be afforded to students facing possible expulsion and lesser disciplinary penalties. The court rejected this argument, stating that "[t]he nature and procedure of the disciplinary process . . . should not be required to conform to federal processes of criminal law, which are . . . designed for circumstances and ends unrelated to the academic community."⁹⁴ Thus even if students succeed in having the courts recognize their fourth amendment right to be free of unreasonable searches of a dormitory room, the most effective protection of that right—the exclusionary rule—may be denied to students if the university is willing to forego criminal prosecution and take disciplinary action.

Since the courts refuse to analogize university disciplinary proceedings to criminal prosecutions, there is no binding precedent for applying the rule to disciplinary proceedings. If the exclusionary rule is to apply in university disciplinary proceedings the rule will probably have to evolve through the same process which led the courts to apply it in criminal cases. This means that students will have to appeal to ethical considerations,⁹⁵ and/or prove that there is no other effective method of preserving fourth amendment rights. The appeal to ethical considerations seems particularly strong when considering the conduct of educators.

[Educators] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional

⁹¹ See generally *Abel v. United States*, 362 U.S. 217 (1960); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966); *Lassoff v. Gray*, 207 F. Supp. 843 (W.D. Ky. 1962); *In re Martinez*, 83 Cal. Rptr. 382, 463 P.2d 734 (1970); *Carson v. State*, 221 Ga. 299, 144 S.E.2d 384 (1965); *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E.2d 481 (1964).

⁹² *Dixon v. Bd. of Ed.*, 294 F.2d 150 (5th Cir. 1961); *Esteban v. Central Mo. State College*, 290 F. Supp. 622 (W.D. Mo. 1968); *Goldberg v. Regents of Univ. of California*, 284 Cal. App. 2d 867, 57 Cal. Rptr. 463 (Cal. App. 1967); *Cornette v. Aldridge*, 408 S.W.2d (Texas Ct. Civ. App. 1966).

⁹³ 290 F. Supp. 622 (W.D. Mo. 1968).

⁹⁴ *Id.* at 629.

⁹⁵ The ethical consideration is whether, apart from the Constitution, a court should accept evidence obtained by a criminal act. See generally *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (Brandeis, J., dissenting); *Williams v. Williams*, 8 Ohio Misc. 156, 221 N.E.2d (1966); *Del Presto v. Del Presto*, 92 N.J. Super. 305, 223 A.2d 217 (1966). The appeal to ethical considerations may indeed be persuasive to university officials. A survey of American colleges and universities revealed that "50 percent of the schools replying indicated that their hearing boards could not consider evidence obtained in violation of law or university regulations. Only 16 percent indicated that they would use such evidence, the remainder failing to respond." Project, 1970 DUKE L.J. 763, 770 (1970).

freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.⁸⁶

But, the courts should be careful to note that merely because one recognizes the importance of educators setting an example, and one accepts this as a proper goal, it does not necessarily follow that this goal can only be achieved by adopting the exclusionary rule.

Ethical considerations aside, the continued existence of the exclusionary rule in its present form is under attack and the climate does not seem right for uncritical extension of the rule. Perhaps, the Chief Justice Burger has suggested, it is time to reexamine the effectiveness of the exclusionary rule and consider new alternatives.⁸⁷ University disciplinary proceedings could provide a viable area for testing the effectiveness of proposed alternatives to the exclusionary rule.

SUMMARY

Unless the judiciary abandons its willingness to examine academic due process, it appears that university officials will be forced to recognize a student's right to privacy in a dormitory room. The concept of a reasonable expectation of privacy announced in *Katz* should clearly afford dormitory residents protection against arbitrary entry by university officials. To prove that a warrantless entry of a dormitory room is reasonable and not arbitrary, university officials have offered nothing except speculation as to the financial costs and supposed psychological effects of the warrant procedure. The burden of establishing the necessity for bypassing the warrant procedure rests upon university officials, and they cannot satisfy the burden by offering such unsubstantiated fears. The standard of probable cause for issuing a search warrant is well established in law, regardless of whether university officials are searching for evidence of a crime or merely for violation of university regulations. The only area for legitimate debate is the question of applying the exclusionary rule to university disciplinary proceedings. A debate and experimentation in this area could be a tremendous aid to the entire criminal law field. For it is in this area of university disciplinary proceedings that the courts are free of precedent binding them to the exclusionary rule. This area provides a microcosm in which to test and rethink the proposals that existed before *Mapp v. Ohio*⁸⁸ and that were again put forward in Chief Justice Burger's dissent in *Bivens v. Six Unknown Named Agents*.⁸⁹ A reexamination of the merits of the exclusionary rule would not only achieve justice within the area of university disciplinary proceedings, it would provide valuable empirical data which could be used if the Supreme Court reconsiders the exclusionary rule's application to criminal prosecutions.

⁸⁶ *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

⁸⁷ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411-24 (1971) (Burger, C.J., dissenting).

⁸⁸ 367 U.S. 643 (1961).

⁸⁹ 403 U.S. 388, 411-24 (1971).