STUDENT PRIVACY, CAMPUS SAFETY, AND RECONSIDERING THE MODERN STUDENT-UNIVERSITY RELATIONSHIP

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INTRODUCTION

College and university law is in a period of transition, especially with respect to student privacy and campus security. Several factors are contributing to the uncertainty of the transition. First, colleges and universities are becoming less and less uniform. Academic institutions come in many variations: public or private, religious or secular, big or small, urban or rural, residential or commuter. Crafting legal doctrines to accommodate so many different institutions may seem like an impossible task. Colleges and universities are also seeing changes in student demographics, with more "non-traditional" students, including online and "distance" learning students and older first-time freshman, each year. This

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shift in student demographics comes with new and difficult questions regarding how to provide a safe and secure campus. The legal uncertainty colleges and universities face makes the transition even more difficult.

As of 2009 there were roughly 4,500 degree-granting institutions in the United States, including around 1,700 two-year schools and 2,800 four-year schools.[1] Of the four-year schools, 672 were public institutions and 2,102 were private institutions.[2] The College Board, a leading resource for perspective students, broadly sorts institutions into four categories: universities, liberal arts colleges, community colleges, and vocational/technical schools.[3] Within each category, institutions can be sorted by size, demographics, academic specializations, geographic setting, religious or secular affiliation, and many other classifications.[4]

In 2009, 20.4 million students were enrolled in degree-granting institutions, 12.9 million of whom were enrolled in four-year institutions.[5] Amongst four-year institutions, 7.7 million students were enrolled in public colleges or universities while 5.2 million were enrolled in private institutions.[6] Enrollment in degree-granting colleges and universities grew from 15.3 million students in 2000 (an increase of 33.3%) and 13.8 million students in 1990 (47.8%); enrollment has nearly doubled since 1980.[7]

Enrollment has grown as a result of increases in full-time enrollment and enrollment of older students. Between 1999 and 2009, full-time enrollment grew 45% while part-time enrollment grew 28%.[8] Over the same period, enrollment of students over 25-years old rose 43% while enrollment of students between ages 18 and 24 grew 27%.[9] Another key contributor to growth has been the increase in online or "distance" learning. In 2008, 4.2 million students, about 20% of all students, were taking at least one course online or through distance learning; 770,000, or roughly 4% of all students, were taking their entire program through online or distance learning.[10] Since 2004, the total number of students taking any online or distance courses grew 44%, from 2.9 million.[11] A "college

1. U.S. Census Bureau, *Higher Education – Institutions and Enrollment*, 2012 STATISTICAL ABSTRACT, at 178, tbl.278.

2. *Id.*

3. *Types of Colleges*, COLLEGE BOARD, http://www.collegeboard.com/student/csearch/where-to-start/2.html (last visited Mar. 23, 2012).

4. *Id.*

5. U.S. Census Bureau, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Fast Facts*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=98 (last visited Mar. 23, 2012).

9. *Id.*

10. U.S. Department of Education, National Center for Educational Statistics, *The Condition of Education 2011*, Table A-43-1, at 282–85.

11. *Id.*

student" thus cannot be defined in any single way: while the "traditional" student (a recent high school graduate physically attending full time classes at a four-year institution) is still the majority, colleges and universities must increasingly adapt to serve "non-traditional" students, including commuters, telecommuters, and older students.

Though these changes bring many welcome benefits, they also present colleges and universities with new and difficult questions of student safety and campus security. According to College Bound Network, approximately 40% of public institution students and 64% of private institution students live on campus; another 40% and 19%, respectively, live in off-campus housing while only about 20% and 17%, respectively, live with their parents or other relatives.[12] Although these figures vary greatly from school to school, for most students, the college and university campus is much more than just a classroom, often also serving as workplace, social setting, medical facility, fitness center, and many other functions.[13] Colleges and universities must meet the unique needs of a diverse student population, not only in the classroom, but also for many other services. Providing a safe and secure campus is perhaps the most important of these many functions.

This article considers the unsettled legal framework of campus safety and security confronting colleges and universities as they attempt to navigate a period of transition. It argues for a new approach that would allow and encourage institutions to be proactive in creating safe campuses. By recognizing the unique relationship between an institution and its students, particularly those residing on campus, and adjusting the authority of the institution to maintain a safe environment and enforce campus rules, colleges and universities can adequately balance the interests of safety with the interests of student privacy.

In Part I, this article reviews Fourth Amendment jurisprudence. In Part II, it discusses the evolution of the student-university relationship. Part III looks at search and seizure law on college and university campuses today, showing the uncertainty colleges and universities face in planning campus safety. Finally, Part IV proposes an alternative approach that would allow and encourage colleges and universities to be proactive towards security, rather than reactive and reserved.

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12. *30 Things You Need to Know about Dorm Life*, COLLEGE BOUND NETWORK, http://www.collegebound.net/content/article/30-things-you-need-to-know-about-dorm-life/8850/ (last visited Mar. 23, 2012).

13. *See* Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 431–32 (2007) (comparing universities to modern day "Athenian city-states"); Anne Matthews, *The Campus Crime Wave*, N.Y. TIMES, Mar. 7, 1993, at 38 (noting "many [modern] institutions of higher education are promoting, as never before, the campus as intellectual resort—Club Med with books").

I. MODERN FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment to the Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[14] Though the phrase "houses, papers, and effects" had previously caused the Supreme Court to focus almost exclusively in property rights, [15] in more recent times the Court has shifted its focus. As far back as 1967, the Court said that "the principal object of the Fourth Amendment is the protection of privacy rather than property, and [the Court has] increasingly discarded fictional and procedural barriers rested on property concepts."[16] Over time, "[t]his shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform."[17] *Katz v. United States* was a watershed decision in this shift of emphasis.[18] In *Katz*, the petitioner challenged the lower court's admittance of evidence obtained by the use of an electronic listening device, attached to the outside of a public phone booth, used to record conversations of the petitioner.[19] The parties argued over whether or not a public phone booth was a "constitutionally protected area" that warranted the protection of the Fourth Amendment.[20] The Court found this to be the wrong inquiry: the question was not whether the specific area was "constitutionally protected" because "the Fourth Amendment protects people, not places."[21] *Katz* expressly rejected the prevailing physical-spaces approach: "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. . . . [T]he 'trespass' doctrine there

14. U.S. CONST. amend. IV.

15. *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942) (evidence acquired by attaching a Dictaphone to the exterior of petitioner's house did not violate Fourth Amendment where there was no physical trespass into the house); Weeks v. United States, 232 U.S.383, 390 (1914) (emphasizing the maxim "every man's house is his castle" as the purpose underlying the Amendment); Ex Parte Jackson, 96 U.S. 727, 733 (1877) (emphasizing "papers" in applying the Amendment to sealed, but not unsealed, mail).

16. Warden v. Hayden, 387 U.S. 294, 304 (1967). The Court there noted that, over time, privacy interests had even been recognized in goods which, traditionally, no 'possessory interest' could be held, including stolen goods (Henry v. United States, 361 U.S. 98 (1959) and contraband (Trupiano v. United States, 334 U.S. 699 (1948).

17. *Warden*, 387 U.S. at 304.

18. 389 U.S. 347 (1967).

19. *Id.* at 348.

20. *Id.* at 349–50.

21. *Id.* at 351. The Court added "[i]n the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" *Id.* at 350.

enunciated [in *Goldman v. U.S.*] can no longer be regarded as controlling."[22]

Instead, the application of the Fourth Amendment must turn on whether an individual has an expectation of privacy that society is prepared to protect: in short, whether such an expectation is "reasonable."[23] It is not enough that the individual has a subjective expectation of privacy against government invasion. Moreover, the expectation must be "legitimate."[24] If an expectation of privacy is deemed objectively reasonable, the next inquiry is whether an action of the state, either a search or seizure, was unreasonable.[25]

First, the terms "search" and "seizure" should be defined. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."[26] "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property,"[27] and also when the person himself or herself is seized, as by arrest.[28] The text of the Fourth Amendment expressly imposes two requirements: all searches and seizures must be "reasonable," and, if required, a warrant may not be issued unless (a) probable cause is properly established and (b) the scope of the authorized search or seizure is set out with particularity.[29] Importantly, the Fourth Amendment does not make a warrant an explicit requirement for a search or seizure to be "reasonable." The Court has however, stated that "[t]he Fourth Amendment demonstrates 'a strong preference for searches conducted pursuant to a warrant . . . .'"[30] The preference for a warrant is especially strong for searches or seizures occurring within the home.[31] Thus, despite the emphasis of *Katz* that "the

22. *Katz*, 389 U.S. at 352–53.

23. *See* Rawlings v. Kentucky, 448 U.S. 98, 104–05 (1980); United States v. Jacobsen, 466 U.S. 109, 122 (1984).

24. *See* Illinois v. Caballes, 543 U.S. 405, 408–09 (2005) (illicit and illegal behavior typically does not warrant protection because they are not 'objectively reasonable,' meaning that society is not prepared to protect them).

25. *Id.* at 409.

26. *Jacobsen*, 466 U.S. at 113. *See also* Smith v. Maryland, 443 U.S. 735, 739–41 (1979); Terry v. Ohio, 393 U.S. 1, 9 (1968).

27. *Jacobsen*, 466 U.S. at 113. *See also* United States v. Place, 462 U.S. 696 (1983); United States v. Chadwick, 433 U.S. 1, 13–14, n.8 (1977).

28. *See* Scott v. Harris, 550 U.S. 372 (2007).

29. U.S. CONST. amend. IV; *see* Payton v. New York, 445 U.S. 584 (1980).

30. Ornelas v. United States, 517 U.S. 690, 699 (1996) (*quoting* Illinois v. Gates, 462 U.S. 213, 236 (1983)).

31. *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("It is a 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'"); Groh v. Ramirez, 540 U.S. 551, 559 (2004).

Fourth Amendment protects people, not places,"[32] location of the search or seizure undoubtedly plays a significant role in determining the reasonableness of the expectation of privacy. The lesson of *Katz*, however, is that location is not the only factor, nor even a determinative factor.

Though the Fourth Amendment has been "held to apply to" a variety of locations including hotel rooms,[33] rental storage units,[34] rental properties,[35] and even dormitories,[36] these "applications" are used mostly for the categorization of Fourth Amendment cases. "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness,'"[37] and a warrant, therefore, may not be required for a search to be reasonable. In determining "reasonableness," the Court should first look to statutes and common law at the time the Fourth Amendment was enacted,[38] then turn to balancing the "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[39] In general, there is a distinction made between police searches for the purpose of law enforcement and searches the government conducts for a variety of other roles, from regulator to employer. For law-enforcement searches, a warrantless search is typically invalid unless falling within one of a number of narrowly defined exceptions the courts have recognized.[40] A search conducted for another non-law-enforcement purpose, unsupported by probable cause, can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[41] Thus, the reasonableness of a search turns not only on the expectation of privacy of an individual, but also on the reason the search is being conducted.

Law enforcement searches and seizures typically require a warrant in order to be reasonable under the Fourth Amendment,[42] though the courts have recognized a number of exceptions to this general rule. Widely

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32. *Katz*, 389 U.S. at 351.

33. Stoner v. California, 376 U.S. 483 (1964); Finsel v. Cruppenink, 326 F.3d 903 (7th Cir. 2003).

34. United States v. Smith, 353 Fed. App'x. 229 (11th Cir. 2009).

35. United States v. Howe, 414 Fed. App'x. 579 (4th Cir. 2011).

36. State v. Houvener, 186 P.3d 370 (Wash. Ct. App. 2008).

37. *Brigham City*, 547 U.S. at 403. *See also* Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

38. *See* Virginia v. Moore, 553 U.S. 164, 168 (2008). *See also* Wilson v. Arkansas, 514 U.S. 927, 931 (1995).

39. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (*quoting* Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 619 (1989).

40. Flippo v. West Virginia, 528 U.S. 11, 13 (1999); *Katz*, 389 U.S. at 357.

41. *Vernonia Sch. Dist. 47J*, 515 U.S. at 652 (*quoting* Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

42. *Flippo*, 528 U.S. at 13.

recognized exceptions include searches by consent,[43] with probable cause under exigent circumstances,[44] plain-view searches, and searches pursuant to a valid arrest.

Consent is a well-developed exception to the warrant requirement.[45] The rights protected by the Fourth Amendment can be waived, in part because "the community has a real interest in encouraging consent" to searches.[46] Consent does not actually "waive" the protections of the Fourth Amendment; rather, consent makes a search "reasonable."[47] Consent may be granted by any person holding joint control over the premises or information[48] on the understanding that when a person "knowingly exposes" information to another, the expectation of privacy held by the owner is compromised.[49]

Law enforcement is entitled to rely on consent granted by individuals whom they reasonably believe to have common authority over the relevant area.[50] In *Rodriguez*, the respondent's home was searched and he was arrested after consent to search the home was given by a woman the police had reason to believe was the respondent's live-in girlfriend.[51] Police responded to the woman's complaint that the respondent had abused her, accompanied her to the apartment where she told police that the respondent was asleep, entered the apartment after the woman opened the door with her keys, and observed drug paraphernalia and cocaine in plain view inside the apartment.[52] Some time after the arrest, the police learned that the woman no longer resided at the apartment; based on this fact, the lower courts suppressed the evidence obtained in the search.[53] In reversing that decision, the Supreme Court made it clear that the Fourth Amendment protects only against "unreasonable" searches: here, the police were justified in their belief that the woman had equal access to the apartment based on what she told them and the fact that she had keys to the apartment.[54]

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43. See *infra* notes 45–54 and accompanying text.

44. See *infra* notes 55–68 and accompanying text.

45. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973); U.S. v. Matlock, 415 U.S. 164, 168 (1974).

46. *Schneckloth*, 412 U.S. at 243.

47. *Id.*

48. *Matlock*, 415 U.S. at 169.

49. *Katz*, 389 U.S. at 351; *Matlock*, 415 U.S. at 171.

50. Illinois v. Rodriguez, 497 U.S. 177 (1990)

51. *Id.* at 180–81.

52. *Id.* at 179–80.

53. *Id.* at 180.

54. *Id.* at 183. *See also* Brinegar v. United States, 338 U.S. 160, 176 (1949) ("[R]oom must be allowed for some mistakes on [the agents'] part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.").

In *Georgia v. Randolph*, however, the Court clarified that the express consent of one person with apparent control over premises could not go so far as to override the explicit, contemporaneous refusal of consent by another with apparent authority.[55] In *Randolph*, the estranged wife of the respondent called police to the home in which they were currently co-residing, regarding a domestic dispute.[56] When the police arrived, they questioned the respondent and asked for consent to conduct a search, which he refused.[57] The estranged wife, however, told police that there was evidence of drug possession in the home and gave the police consent.[58] The police searched the home, found evidence of drug paraphernalia, and arrested the respondent.[59] In affirming the state supreme court's reversal of the conviction, the Court denied that the consent of the estranged wife was effective, reasoning that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority."[60]

What *Rodriguez*, *Randolph*, and the host of other consent cases have in common is that they ultimately turn on the reasonableness of the circumstances. In *Rodriguez*, it was reasonable for the police to rely on the apparent authority of the woman over the apartment. In *Randolph*, however, it was not reasonable for police to conclude that the ex-wife had greater authority over the residence than did the respondent. *Randolph* summarized this point, stating that the expectations of privacy protected by the Fourth Amendment depend upon "widely shared social expectations."[61]

A second widely-recognized exception to the general warrant requirement comes into play when probable cause exists alongside exigent circumstances, making a warrantless search reasonable. "Exigent circumstances" is a category that catches a wide range of scenarios that make the requirement to obtain a valid search warrant impractical or unduly burdensome, including entering to provide emergency aid,[62] following a suspect into a dwelling in "hot pursuit,"[63] and preventing "imminent destruction of evidence."[64] Exigent circumstances must be accompanied by probable cause to justify a warrantless entry.[65] "Probable cause exists where 'the facts and circumstances within [an officer's]

55. 547 U.S. 103 (2006).
56. *Id.* at 107.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Randolph*, 547 U.S. at 113–14.
61. *Id.* at 111.
62. *See Brigham City*, 547 U.S. at 403.
63. *See* United States v. Santana, 427 U.S. 38, 42–43 (1976).
64. *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990). *See also Randolph*, 547 U.S. at 116, n.6 (2006).
65. *Ornelas*, 517 U.S. at 696.

knowledge and of which [he or she] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution'" to believe that "an offense has been or is being committed."[66] Probable cause standards are "fluid concepts that take their substantive content from particular contexts" and cannot be reduced to a rigidly applied set of rules.[67] Additionally, probable cause must be based on individualized suspicion.[68]

In *Brigham City v. Stuart*, police responded to complaints of a large, noisy house party.[69] When they arrived they could see, through a screen door, an altercation breaking out in the home.[70] The police announced their presence and when the fighting did not cease, the police entered the home, broke up the fight, and subsequently arrested the respondent.[71] At trial, the respondent sought to suppress all evidence on the grounds that the entrance, search, and arrest were warrantless and unjustified; the state court agreed.[72] In reversing, the Supreme Court emphasized the importance of objectivity in determining the reasonableness of a warrantless entry.[73] Whether the police had some alternative subjective motive other than providing aid or quelling violence was irrelevant; there existed a sufficient, objective reasonable basis for entering the dwelling under the circumstances.[74] The subjective intent of the officers has no bearing on the Fourth Amendment because the amendment focuses on the individual's expectation of privacy, which turns on the objective reasonableness of the circumstances.[75]

In *Kentucky v. King*, the Court again dealt with a warrantless entry based on exigent circumstances.[76] Police followed the respondent, a suspected drug dealer, to his apartment; when they smelled marijuana coming from inside, they knocked and announced their presence.[77] Shortly thereafter, they heard noises coming from the apartment which led them to

66. *Brinegar*, 338 U.S. at 175–76. The Court has identified numerous factors that are to be considered in determining the "reliability" of information, including the degree to which known facts imply prohibited conduct (Adams v. Williams, 407 U.S. 143, 148 (1972)); the specificity of information received (Spinelli v. United States, 393 U.S. 410, 416–17 (1969)); and the reliability of the source itself (Aguilar v. Texas, 378 U.S. 108, 114 (1964)).

67. *Ornelas*, 517 U.S. at 695–96; *Gates*, 462 U.S. at 230.

68. Chandler v. Miller, 520 U.S. 305, 308 (1997).

69. 547 U.S. at 400–01.

70. *Id.* at 401.

71. *Id.*

72. *Id.*

73. *Id.* at 403.

74. *Brigham City*, 547 U.S. at 406.

75. *Id.* at 404; *see also* Graham v. Connor, 490 U.S. 386, 397 (1989).

76. *King*, 131 S. Ct. at 1849.

77. *Id.* at 1854.

believe the respondent was destroying evidence.[78] The officers announced their intent, knocked down the door, and observed drugs in plain view.[79] The Court found that the numerous circuit-developed tests for "police-created exigency" were fundamentally flawed, in part because they were needlessly overcomplicated.[80] "[T]he answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable. . . ."[81] The Court rejected various circuit tests, which unnecessarily focused on extraneous factors, such as bad faith, reasonable foreseeability, and proper investigative tactics.[82] The Court set forth a broader rule "that the exigent circumstances rule applies when the police do not gain entry to premises by means of an *actual or threatened* violation of the Fourth Amendment."[83]

The Court's rule focuses on the reasonableness of the expectations of the defendant, not on the intent of the police. In *Brigham City*, it was objectively reasonable for the respondent to expect that the police would intervene to provide aid or prevent violence.[84] In *King*, it was reasonable to expect police to conduct an investigation by knocking on the door and announcing themselves, then respond appropriately when they reasonably suspected that evidence of a crime was being destroyed.[85] While the "exigent circumstances" rule is stretched and modified to cover a wide variety of scenarios, it ultimately depends on analyzing the reasonableness of the individual's expectation of privacy.

The courts have recognized that Fourth Amendment analysis must be altered when applied beyond the realm of law enforcement, and have developed alternative approaches for applying the Amendment in other

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78. *Id.*
79. *Id.* at 1854–55.
80. *Id.* at 1859–61.
81. *King*, 131 S. Ct. at 1858.
82. *Id.* at 1859–61.
83. *Id.* at 1862 (emphasis added).
84. 547 U.S. at 406.
85. 131 S. Ct. at 1862:

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. When the police knock on a door but the occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and the occupants "will have the kind of warning that even the most elaborate security system cannot provide." And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time. [Citations omitted.]

"government search" situations. Where "'special needs, beyond the normal need for law enforcement,' make the warrant and probable-cause requirement impracticable,"[86] the same analysis may not be appropriate. In situations where the government acts as an employer,[87] and in closely regulated industries,[88] the Court has found that because of the "special needs" of government beyond law enforcement, a different analytical approach was required, one with less stringent requirements to justify the government conduct.

In *City of Ontario*, the respondent was a police officer employed by the City and was provided a cell phone.[89] The City would bear additional costs if users exceeded the usage limit, therefore, the City established usage rules that reserved the right to monitor and log all usage.[90] After the respondent exceeded his data usage numerous times, the City investigated his usage to determine if an increase in the usage limit would be appropriate.[91] In conducting this inquiry, the City discovered that the respondent was using his phone largely for inappropriate personal use.[92] The respondent challenged the City's investigation, claiming in part that it violated his Fourth Amendment rights.[93]

Even assuming *arguendo* that the respondent had a reasonable expectation of privacy in the text messages and that the City engaged in a Fourth Amendment search, the Supreme Court reversed the circuit court and ruled that "the 'special needs' of the workplace" may justify an exception from the general rule that "warrantless searches 'are *per se* unreasonable under the Fourth Amendment.'"[94] Where the government acts as an employer, rather than in its law enforcement role, a "warrantless search is reasonable if it is 'justified at its inception' and if 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' the circumstances giving rise to the search."[95] Compared to the "exigent circumstances" analysis examined above, the "special needs" exception subjects the government conduct to a significantly lower standard. Although the Court has recognized that "it would be '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,'"[96] the extent of that protection turns on the

86. City of Ontario v. Quon, 130 S. Ct. 2619, 2628 (2010).
87. *See id.*; Nat'l Treasury Emps Union v. Von Raab, 489 U.S. 656 (1989).
88. *See* Skinner v. Ry. Labor Execs' Ass'n., 489 U.S. 602 (1989).
89. *City of Ontario*, 130 S. Ct. at 2624–25.
90. *Id.*
91. *Id.* at 2626.
92. *Id.*
93. *Id.*
94. *Id.* at 2630.
95. *Id.*
96. New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).

"reasonableness" of the expectation given the circumstances surrounding the search. "As with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the Amendment.'"[97] Thus, just as with "exigent circumstances" analysis, the Court must consider the surrounding circumstances when considering "special needs" searches. Whereas an "exigent circumstances" case may turn on the risk that evidence would be destroyed, a "special needs" case may turn on the need of the government, as employer, to efficiently provide benefits to employees.

Searches within public schools are another major category of "special needs" searches. In these cases, several unique circumstances are in play. First, the government is acting in a unique role in a school setting. It is acting in neither its law enforcement nor its employer role when it is educating students. Second, the persons typically being searched are students and, more often than not, are minors. These two important factors must play an important role in balancing the needs of the government against the individual's expectation of privacy. The Supreme Court has addressed school searches at the elementary or secondary school level in three notable cases. It does not appear that the Court has ever addressed a search case on a college or university campus.

In *New Jersey v. T.L.O.*, a high school principal searched a student's purse following suspicion that the student had been smoking cigarettes in the school lavatory.[98] In that case, the Court expressly held that the Fourth Amendment applies in the context of a public school.[99] The Court nonetheless went on to hold that the search of the student's purse was reasonable.[100] Emphasizing that "what is reasonable depends on the context within which a search takes place,"[101] the Court engaged in a lengthy discussion of balancing the competing interests,[102] ultimately concluding:

> that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.[103]

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97. O'Connor v. Ortega, 480 U.S. 709, 716 (1987). *See also T.L.O.*, 469 U.S. at 337.

98. *T.L.O.*, 469 U.S. at 328.

99. *Id.* at 333–34.

100. *Id.* at 343.

101. *Id.* at 337.

102. *Id.* at 337–43.

103. *Id.* at 341.

The Court continued on: "[b]y focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[104]

In *Vernonia School District 47J v. Acton*, the Court again took in the "special needs" presented by a school district.[105] In *Acton*, the school district conducted random drug testing of student athletes participating in inter-scholastic athletic leagues in order to protect their health and safety.[106] The Court found that "[s]omewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[107]

Most recently, in *Safford Unified School Dist. v. Redding*, the Court revisited administrative searches in schools to reinforce the importance of analyzing the "reasonableness" of the circumstances surrounding the search.[108] There, a school district conducted a search of the respondent, a thirteen-year-old female student, based on the statements of two other students that the respondent gave them prescription strength pain-killers.[109] After confronting the respondent, who denied any participation, the school principal ordered the school nurse to search the respondent's bag and clothing, including her underwear, for the drugs.[110] The Court engaged in a lengthy discussion of the pertinent circumstances that would contribute to the "reasonableness" of the search, similar to its discussion in *T.L.O.*, ultimately finding that in these circumstances the search was not reasonable.[111] In reaffirming *T.L.O.*, the Court

> [made] it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.[112]

Fourth Amendment cases fall into a wide variety of headings, including "consent," "exigent circumstances," "special needs," and "school searches." Courts inevitably create shorthand for common cases, a practice

104. *Id.* at 343.
105. 515 U.S. at 646.
106. *Id.*
107. *Id.* at 657.
108. 129 S. Ct. 2633 (2009).
109. *Id.* at 2638.
110. *Id.*
111. *Id.* at 2641–43.
112. *Id.* at 2643.

that risks obscuring the true focus of the analysis. It is therefore extremely important to keep in mind that at the heart of each of these categories is a common balancing test, weighing the reasonableness of the individual's expectation of privacy against the reasonableness and necessity of the government action in light of all the surrounding circumstances. Courts may use a variety of tests and rules in common cases, however supporting each approach is the overall reasonableness of the conduct and the reasonableness of the expectation. The individual elements of the analysis are especially important to keep in mind when applying the Fourth Amendment in less common scenarios, such as searches on college campuses.

II. THE STUDENT-UNIVERSITY RELATIONSHIP

The early period of American higher education, prior to the 1960s, was exclusively associated with the doctrine of *in loco parentis*.[113] *In loco parentis* is a simple legal premise, though it is often misconstrued and misapplied. *In loco parentis* was applied in the early period of higher education law to prevent courts or legislatures from intervening in the student-university relationship, thus insulating the institution from criminal or civil liability or regulation. The doctrine is made up of "three indelible features": first, the power of the institution is "one to discipline, control and regulate" students; second, the power is "paternal"; and third, the power is a "contractual delegation" of authority from the parents of a student to the college or university.[114] Importantly, *in loco parentis* is not a rule forcing the college or university to act as a parent would; rather, as applied, it prevents the court from intervening into the student-university relationship, just as the court would not intervene into the parent-child relationship.[115]

Two early twentieth century cases help explain the doctrine. In *Gott v. Berea College*, the court refused to intervene when a student brought suit against the college challenging a rule prohibiting students from going to certain off-campus locations.[116] Specifically citing the doctrine, the court held that "[c]ollege authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of pupils, and . . . to that end [may make] any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose."[117] In *Stetson*

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113. Case law employing *in loco parentis* extends well into the mid-nineteenth century. *See* Pratt v. Wheaton Coll., 40 Ill. 186 (1866); Hill v. McCauley, 3 Pa. C. 77 (Pa. County Ct. 1887).

114. ROBERT BICKEL & PETER LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISK OF COLLEGE LIFE? 23 (1999) [hereinafter BICKEL & LAKE].

115. *See* Peters, *supra* note 13, at 434–35.

116. 161 S.W. 204 (Ky. 1913).

117. *Id.* at 206.

University v. Hunt, the university suspended a student for "[o]ffensive habits that interfere with the comforts of others . . . ."[118] Without discussing the details of the offense, the court deferred to the authority and rules of the university, however vaguely they were written or however inconsistently they were applied.[119] *Gott* and *Hunt* show that *in loco parentis* "was not about university *duties* towards students but about university rights and *powers* over students."[120]

Courts began to shift away from *in loco parentis* beginning in the civil rights era of the 1960s through a number of cases addressing student claims for constitutional rights, in particular due process rights and free speech.[121] The change came first at public colleges and universities, where students prevailed in challenging the procedures used to discipline students. *Dixon v. Alabama State Board of Education* is a critical decision in this transition period.[122] In *Dixon*, six black students were expelled from Alabama State College for what was described as "[c]onduct [p]rejudicial to the [s]chool" shortly after the students participated in a civil rights demonstration.[123] The students were not provided a hearing or more specific justification.[124] The Fifth Circuit reviewed only the issue of whether the students were entitled to any form of due process, overturning the "longstanding protections against judicial review of university action that deprived students of their right to attend the university."[125] The Fifth Circuit concluded that students at public colleges and universities were entitled to "at least fundamental due process" because "education is so basic and vital in modern society" that a student could not be expelled without, at the very least, fair notice and some form of a disciplinary hearing.[126] Other cases followed in which students prevailed on similar arguments claiming a variety of constitutional rights.[127]

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118. 102 So. 637 (Fla. 1924).

119. *Id.* at 640.

120. BICKEL & LAKE, *supra* note 114, at 23.

121. *See* Peters, *supra* note 13, at 436 ("Unwilling to accept a system of paternalistic control and a lack of civil rights, [] students successfully challenged the insularity of the *in loco parentis* college, winning their own fundamental civil rights and subjecting college decisions to judicial review and basic legal standards.").

122. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

123. *Id.* at 152.

124. *Id.* at 154.

125. BICKEL & LAKE, *supra* note 114, at 38.

126. *Id.*

127. *See, e.g.*, Healey v. James, 408 U.S. 169 (1972) (public university cannot deny recognition of a student organization based solely on disagreement with political views); Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667 (1973) (public university cannot censor editorial content of student-run

The reasoning in *Dixon* is critical to understanding how the doctrine of *in loco parentis* was unraveled. The Court subtly recognized that the contractual arrangement was not between the parents and the state, wherein the parents delegated the "parental" authority over the student to the college or university. Instead, the arrangement was between the college or university and the students *themselves*. Later cases would make this point even clearer in holding private colleges and universities to a similar standard. In *Corso v. Creighton University*, for instance, the Eighth Circuit upheld a student's challenge to his expulsion on the grounds that the university had failed to provide the level of due process it had promised to the student.[128] The court concluded that a "contract" had been formed between the university and the student, based on the student handbook and other publications the university had provided students, and the university had promised to follow an established procedure before disciplining the student.[129] Because the student was a party to the agreement, not simply a beneficiary as under *in loco parentis*, the court and the state may fairly intervene to protect each party's legal rights.[130]

With the demise of *in loco parentis*, courts addressing student suits against colleges and universities were faced with the task of determining what duty the institution owed the student. Many courts answered this question simply: colleges and universities were, by and large, merely "bystanders" to student life and therefore owed no duty.[131] "Bystander era" courts responded to the fall of *in loco parentis* by concluding that if colleges and universities did not stand in the place of the parent because students were, at least constitutionally, adults, then the student-university relationship should be no different than any other commercial transaction. Colleges and universities "sold" an education and students paid for that commodity: as such, the college or university owed the student no special duty extending beyond that commercial transaction.[132]

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newspaper); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) ("misconduct" as standard for disciplinary action is unconstitutionally vague).

128. 731 F.2d 529 (8th Cir. 1984).

129. *Id.* at 530.

130. *Id.* at 531.

131. Bickel and Lake discuss at length the four most noteworthy cases of the "bystander era," wherein the court held that a college or university could not be liable because it owed no duty to the student bringing suit. *See* BICKEL & LAKE, *supra* note 114, at 49–65. These cases (Bradshaw v, Rawlings, 612 F. 2d 135 (3d Cir. 1979), Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981), Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986), and Rabel v. Illinois Wesleyan Univ., 514 N.E. 2d 552 (Ill. App. Ct. 1987)) involve a variety of fact patterns but are similar in their analysis.

132. *See* BICKEL & LAKE, *supra* note 114, at 82. *See also* Peters, *supra* note 13, at 444.

Though the "bystander era" cases were the most prominent and notable to arise out of the post-*in loco parentis* era,[133] there were several cross-current cases which employed the same duty analysis to conclude that a college or university *did* owe students a special duty and therefore could be held liable. For example, in *Mullins v. Pine Manor College*, a female student was attacked in her dormitory by a non-student.[134] The court found the college could be held liable because it stood in a "special relationship" to residential students, thus creating a duty to use reasonable care to protect the students from foreseeable harms.[135] In *Mintz v. State of New York*, though the university was deemed not liable for injuries suffered by the student on a sponsored camping trip, the court relied on the fact that the university had taken "all reasonable and necessary precautions" to protect the student, not on the argument that the university did not owe the student any duty in the first place.[136] Many commentators mistakenly viewed these cross-current cases as a return to *in loco parentis.*[137] The cross-current cases were actually quite similar to the "bystander era" cases, however, in that both strains focused on the issue of what duty the institution owed to the students. The two approaches merely came to different answers to this question.

Thus, moving into the twenty-first century, the question "what is the nature of the student-university relationship?" remains far from settled. While the post-*in loco parentis* cases have agreed that the focus is on the question of duty, there has been no consensus on what exact duty is owed. Courts have employed a variety of analogies and models based on the particular facts of a case,[138] including business-consumer, parent-child, bystander-stranger, landlord-tenant, fiduciary, and employer-employee

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133. Bickel and Lake argue that the "bystander era" cases, and the four mentioned *supra* note 131 in particular, gained prominence in the college and university law community largely because of the "politics" of college and university litigation. Because college and university lawyers tend to take "the long view," whereas student-side attorneys are more interested in their client's immediate interests, college and university lawyers have been able to have a far greater impact on how the law of higher education is shaped. *See* BICKEL & LAKE, *supra* note 114, at 89–91.

134. 449 N.E. 2d 331 (Mass. 1983).

135. *Id.* at 335–36 (discussing two theories on the duty of care owed to students).

136. 362 N.Y.S.2d 619 (N.Y. App. Div. 1975).

137. *See* James J. Szablewicz & Annette Gibbs, *College's Increasing Exposure to Liability: The New* In Loco Parentis, 16 J.L. & EDUC. 453 (1987). *See also* Perry Zirkel & Henry F. Reichner, *Is the* In Loco Parentis *Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986).

138. *See* Peters, *supra* note 13, at 444; Oren R. Griffin, *The Evolving Safety and Security Challenge at Colleges and Universities*, 5 PIERCE L. REV. 413, 418 (2007).

analogies.[139] This uncertainty has left college and university administrators in the unenviable position of having to guess how a court will respond in a given situation. The result is that colleges and universities have become *reactive* rather than *proactive* to issues of student safety and look to insulate themselves from liability, rather than actively constructing a safe environment for students and staff.

Robert Bickel and Peter Lake have proposed an alternative approach called the "facilitator university" model, in which the institution "balances rights and responsibilities—it is neither extremely authoritarian nor over solicitous of student *freedom*."[140] The "facilitator" model splits the difference between a controlling *in loco parentis* model and a hands-off "bystander" model by recognizing that while the college or university is not a substitute for a parent, it nonetheless stands in a unique relationship to its students.[141] Moreover, this unique relationship is a product of the unique circumstances and characteristics of the college or university. As pointed out above, no two colleges or universities are exactly alike.[142] Therefore, it makes little sense to hold them all to the same standard. Nor should the duty owed by one college or university be determined based upon the duty owed by another institution. The duty a particular college or university owes to its students depends on the many qualities that make that institution unique and that led the student to enroll there in the first place. Bickel and Lake point out that a crucial difference between institutions of higher education and many other organizations are that the former "have a strong flavor . . . of being voluntary associations."[143] As Kristen Peters suggests, modern-day colleges and universities represent "Athenian city-states" in many ways: students, professors, administrators and staff choose to work or study at a particular institution for any number of factors, including size, location, convenience, focus of study, and cost.[144]

These and many other factors will no doubt impact what a student expects from the institution as well as what the institution expects from its students. These factors should also guide the courts in determining what duty is appropriate, thus allowing colleges and universities to be proactive towards campus safety and use what "reasonable care" is appropriate. The "facilitator" model takes a step forward by "imagin[ing] law . . . as a positive tool of empowerment in its efforts to increase safety and promote an educational environment"[145] and should be a model for approaching the student-university relationship.

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139. *See* BICKEL & LAKE, *supra* note 114, at 161–63, tbl.1.
140. *Id.* at 192.
141. *Id.*
142. *See supra* notes 1–132 and accompanying text.
143. BICKEL & LAKE, *supra* note 114, at 199.
144. Peters, *supra* note 13, at 431–32.
145. BICKEL & LAKE, *supra* note 114, at 212.

III. SEARCH AND SEIZURES ON CAMPUS

Case law involving searches and seizures of college and university dormitories did not begin turning up until after the "student revolution" of the 1960s secured basic constitutional rights for students. Several of the earliest decisions involving on-campus searches paralleled the "bystander era" approach for college and university liability: since colleges and universities were only "bystanders" to the college and university student beyond the classroom, they could not be held liable for injuries suffered by students. It also meant that colleges and universities could not assert any special authority to enforce rules and regulations.

In *Smyth v. Lubbers*, several students brought suit against Grand Valley State College, challenging the institution's search of the students' dormitories without a warrant as unconstitutional.[146] The College had established a "room entry" policy notifying students of the circumstances under which the College may enter a student's room with or without consent.[147] Pursuant to this policy, three college officials, assisted by two campus police officers, conducted searches of student dorm rooms and uncovered drugs and drug paraphernalia.[148] The students in question were arrested for drug offenses. In finding for the students and excluding the evidence from the criminal prosecution, the court analogized a dorm room to a home and found the College's rules against drug possession "track[ed] federal and state laws."[149] Thus, since the campus rules served the same purpose as criminal laws, rather than any academic or educational purpose, the court analogized the students to "person[s] suspected of a criminal offense, and [thus] the search and seizure in question [was] as hostile and intrusive as the typical policeman's search for a seizure of the instrumentalities of crime in a person's home."[150] The campus rules against drug possession, in the court's view, could only serve as an internalized alternative to criminal proceedings; therefore the College was required to fully abide by the Fourth Amendment.[151]

The "college as mere educator" argument was also employed in *Morale v. Grigel*.[152] There, school officials of a public technical college responded to a report of stolen goods by searching student dorm rooms.[153] The officials searched plaintiff's room without prior notice or consent and found drugs, but not the stolen items.[154] The college then brought

146. 398 F. Supp. 777 (W.D. Mich. 1975).
147. *Id.* at 782.
148. *Id.* at 781.
149. *Id.* at 787.
150. *Id.* at 788.
151. *Smyth*, 398 F. Supp at 787.
152. 422 F. Supp. 988 (D.N.H. 1976).
153. *Id.* at 992–93.
154. *Id.*

disciplinary action against the plaintiff.[155] Though the court balanced "the need to search against the invasion which the search entails," the court concluded "[a] college cannot, in this day and age, protect students under the aegis of *in loco parentis* authority from the rigors of society's rules and law, just as it cannot, under the same aegis, deprive students of their constitutional rights."[156]

Smyth and *Morale* point out the double-sided nature of the "bystander era" model. An institution cannot avoid liability by claiming it owed no special duty to a student, then turn around and claim special authority to restrict student's rights when it comes to searching dorm rooms. Thus, because the school failed to establish "a clearly distinguishable and separate *educational* interest . . . [t]he presence or absence of stealing on a campus does not disrupt or disturb the operation of its *academic* function"[157] and the college could not claim the authority to conduct a search for stolen property without a warrant. The institution served only an educational function and bore no other "special relationship" with its students.

As in the "bystander era" of tort liability, however, there were also several cross-current cases. In *People v. Haskins*, a college official at a private college conducted a search for drugs in a student's dorm room.[158] Upholding the validity of the search, the court found it "unnecessary to decide whether the [private] college is a governmental agency"; rather, "because of the unique circumstances of cases resulting from searches by school officials, they should be all judged by the same standards."[159] All colleges and universities, public or private, have a substantiated interest in enforcing their rules in order to maintain a safe and secure campus that is inherent in their academic nature. The court saw no reason why the outcome of a search by a college or university official in order to enforce a campus rule or regulation should have a different outcome merely because the institution was public as opposed to private. Therefore, colleges and universities, both public and private, should be provided the authority and leniency to enforce these rules for purposes other than criminality.[160]

Subsequent case law has failed to generate a clear consensus and, just as in the tort liability context, has left colleges and universities guessing how a

155. *Id.* at 994.

156. *Id.* at 997.

157. *Morale*, 422 F. Supp. at 998 (emphasis added).

158. 48 A.D.2d 480 (N.Y. App. Div. 1975).

159. *Id.* at 481–83.

160. *See also* State v. Kappes, 550 P.2d 121 (Ariz. App. Div. 1976) (search of campus dorms by resident assistants for 'safety and maintenance' purposes that uncovered evidence of drug use "served the internal requirements of the university" and thus did not implicate the Fourth Amendment).

court will rule in any given case. The cases, fairly limited in number, turn on a wide variety of justifications, leaving institutions with little guidance.

Some courts focused only on whether the individual conducting the search was a private citizen or whether he or she was charged with state authority. In *State v. Keadle*, a public university resident assistant (RA) was conducting standard maintenance inspections of the lighting of all dorm rooms when he discovered what he believed to be a stolen stereo in the defendant's room.[161] The RA contacted his supervisor, who confirmed that the stereo was stolen, and Keadle was arrested on theft charges.[162] The court held the evidence admissible in criminal proceedings against the defendant since the RA was a private actor not performing a state function or a college or university function, even though he was ostensibly in the room to conduct his official duties as a university representative.[163] The court reasoned that the RA was "motivated by reasons independent of a desire to secure evidence to be used in a criminal conviction," and that excluding the evidence would serve no useful deterrent function against illegal government searches under the Fourth Amendment.[164]

In *Commonwealth v. Neilson*, public college officials discovered drugs and drug paraphernalia in the defendant's room during a routine maintenance inspection.[165] The officials summoned campus police who documented the evidence and contacted local police.[166] The court held the initial search by campus officials and campus police proper, but the involvement of local police improper. Even though it occurred well after the drugs were discovered and documented, the dorm room search raised a Fourth Amendment issue.[167] Since "the sole purpose of the warrantless police entry into the dormitory room was to confiscate contraband for purposes of a criminal proceeding," the entry of local police was improper.[168]

In *State v. Sinclair*, on the other hand, the defendant's room was searched by private college campus police in pursuit of an alleged campus

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161. 277 S.E.2d 456 (N.C. 1981).

162. *Id.* at 457.

163. *Id.* at 459, n.11.

164. *Id.* at 460. *See also* Duarte v. Commonwealth, 407 S.E.2d 41 (Va. App. Ct. 1991) (dean of private college conducted search as a private individual, even though she had been in contact with local law enforcement and turned over evidence of drug use to local police).

165. 666 N.E.2d 984 (Mass. App. Ct. 1996).

166. *Id.* at 985.

167. *Id.* at 986.

168. *Id.* at 987. *See also* State v. Ellis, 2006 WL 827376 (Ohio Ct. App. 2006) (initial search by resident assistant was proper as a search by a private citizen but subsequent local police involvement in seizing uncovered evidence was improper).

rule violation.[169] The campus officers uncovered evidence of drug use and contacted local law officials, who obtained a warrant prior to seizing the evidence.[170] The court distinguished private campus police from local law enforcement, stating the former were not bound by the Fourth Amendment.[171] *Sinclair*, *Ellis*, *Keadle*, *Duarte*, and *Neilson* turned on a single factor: the identity of the person conducting the search.

Other recent cases turned on whether the student whose dormitory was being searched had given consent through a housing agreement. In *Grubbs v. State*, a resident assistant at a public university responded to complaints of drug use by plaintiff.[172] With the assistance of campus police the RA entered plaintiff's dorm room and discovered evidence of drug use.[173] The court rejected plaintiff's motion to exclude the evidence, pointing out that the housing agreement the plaintiff had signed provided "ample authority for the RA's entry" in order to "fulfill [his] daily duties . . . or in cases of reasonable suspicion of activity endangering the individual or the community."[174] In *State v. Jordan*, a private university campus official provided access to the defendant's dorm room to a police detective during the investigation of an alleged rape.[175] The police had narrowed their investigation to two possible dorm rooms and received permission from the university dean to look inside and photograph from the hallway, but not enter, the defendant's dorm room.[176] The court held that the police conduct violated the Fourth Amendment based on the conclusion that there was no evidence that the defendant had agreed in any way to give the university permission to allow such access.[177] Had there been evidence that the defendant had agreed to give the university permission to grant access, such as through a housing agreement as in *Grubbs*, the conduct may well have been permitted.

Still other cases retained the idea that a college or university served only the role of educator and therefore bore no additional relationship with students, even with regards to other services that the college or university provided. In *State v. Houvener*, public university campus police responded to a report of a theft in a campus dormitory.[178] The officers were walking down the hall on the defendant's floor when they overheard loud music and voices in the defendant's room that led the officers to believe the defendant

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169. 2005 WL 2077942 (Ohio Ct. App. 2005).

170. *Id.* at *1.

171. *Id.* at *2.

172. 177 S.W.3d 313 (Tx. App. Ct. 2005).

173. *Id.* at 316.

174. *Id.* at 319 (citation omitted).

175. 225 P.3d 1211, 2010 WL 921144 (Kan. App. Ct. 2010) (unpublished table decision).

176. *Id.* at *1.

177. *Id.* at *2.

178. 186 P.3d 370 (Wash. App. Div. 2008).

was the culprit.[179] The officers knocked on the defendant's door, who upon questioning admitted he was in possession of the stolen goods.[180] The officers had the defendant retrieve the stolen goods then arrested him; at no point did the officers enter the defendant's room. Despite this, the court held the arrest and seizure of evidence was improper because the defendant had a reasonable expectation of privacy in the *hallway* of his dormitory, in addition to his room.[181] The court reasoned that, absent a valid warrant, the campus police had no greater right than a private citizen to be present on the defendant's dormitory floor, regardless of the fact that the university supplied campus police with all-access keys.[182] This conclusion likens the college or university to an ordinary landlord, denying any special relationship between the institution and its residential students.

The various outcomes of these cases leave colleges and universities guessing as to how a court will approach a given situation. In order to allow and encourage colleges and universities to take a proactive stance on campus safety, they must first have a clear idea of the standards and rules courts will apply. The courts, therefore, should adopt a new approach that offers guidance to institutions of higher education while at the same time remaining flexible enough to adapt to the unique circumstances and characteristics of each institution.

IV. APPLYING THE "FACILITATOR" RELATIONSHIP TO ON-CAMPUS SEARCHES

Colleges and universities are facing a major period of transition along with grave uncertainty in the legal framework of higher education. Student demographics are changing dramatically, with increasing numbers of "non-traditional" students including older first-time students and online and distance-learning students, and institutions must adapt quickly. At the same time, colleges and universities are confronted with an uncertain legal framework regarding questions of institutional liability for student injuries and the authority of the institution to enforce rules and regulations. Bickel and Lake's proposed "facilitator model"[183] provides a more stable framework to address the former issue. What remains, then, is a parallel framework that responds to the latter issue and gives colleges and universities the authority and ability to create and sustain a safe, secure campus.

179. *Id.* at 371.
180. *Id.*
181. *Id.* at 373.
182. *Id.* at 375.
183. BICKEL & LAKE, *supra* note 114, at 163.

A. The Insufficiency of a Contract-Based Theory of the Student-University Relationship

Following the Civil Rights era, the doctrine of *in loco parentis* quickly wore away. Students demanded that colleges and universities recognize their rights. They would not allow these institutions to act as parents, treating them like children, when in the eyes of the law they were adults.[184] As a result, the relationship between colleges and universities and their students swung dramatically in the other direction. Instead of colleges and universities having a parental relationship with students, the relationship was transformed into a set of mere contractual duties and obligations by each party.[185]

A 1981 article entitled *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship* outlined the contract theory which contemporary courts were developing as an alternative to the *in loco parentis* doctrine.[186] The contract-based theory developed because the student-university relationship, at its most basic, is a contractual one. If *in loco parentis* was stripped away, what is left is an agreement by the college or university to grant a degree to students, provided they meet the agreed-upon requirements. However, Nordin was keenly aware that modern colleges and universities did more than simply grant degrees. Still, she argued that the contract theory provided a system of accountability of the college or university to the student that courts could review.[187] Nordin's contract-based theory emphasized maximizing the value a student received and holding both parties to the promises made.

The shortcoming of the contract-based theory is that no single express contract exists between the student and the college or university. Instead, the contract "is an implied, or quasi-contract with the relationship being contractual in nature even without an express contract."[188] Instead of a single contract, or even a series of related documents, spelling out the duties of the college or university to the student and the student to the

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184. *Id.* at 160. This is especially true following the ratification of the twenty-first Amendment in 1971, lowering the voting age from twenty-one to eighteen, thus granting most college-aged persons the right to vote. *Id.* at 49–51.

185. *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984) (expulsion of student reversed because university failed to provide the student the level of due process it had contractually agreed to); *Grubbs*, 177 S.W. 3d at 313 (university allowing local police to look inside student's dorm room because the housing contract did not provide such authority to the university).

186. Virginia D. Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141 (1981).

187. *Id.* at 149. "Modern universities cannot confine themselves to classroom teaching, research and the discipline of students. Their size alone . . . dictates the need for a greater and greater proportion of purely administrative activity." *Id.*

188. *Id.* at 156.

college or university, the "quasi-contract" is made up of a myriad of written requirements, oral representations, advertising materials, and other reasonable expectations of the two parties.[189] This model puts the onus on a student seeking to enforce the bargain by producing evidence that he or she had reasonably relied on representations of the college or university as having created a contractual duty.[190]

The contract-based theory is valued not because it creates a universally applicable standard of duty between the college or university and the student, but rather because it creates an evidentiary standard for students bringing claims of liability against the college or university. Instead of creating the system of accountability that Nordin envisioned, the contract-based theory encouraged colleges and universities to *minimize* their duty to students in order to avoid liability and accountability. As Nordin notes in her conclusion,

> [t]his [contractual] approach means that both the parties and the courts must pay more attention to the development of a meaningful, realistic description of the mutual obligations of universities and students. . . . [Several opinions] have noted that the student-university relationship is fundamentally a major power imbalance, one of the most imbalanced situations left in society.[191]

The fundamental error of the contract-based theory of the student-university relationship is that this relationship is *not* akin to an ordinary arms-length consumer-producer relationship. Indeed, the exact opposite of what Nordin suggests should happen will happen: colleges and universities are encouraged to minimize their accountability by making even written statements of duties vague, rather than explicitly spelling out what duty they owe to students.

B. Alternatives to the Contract-Based Theory

The most compelling argument against the contract-based theory to the student-university relationship is that it oversimplifies the relationship and ignores the reality that students do have a unique relationship with their college or university, especially in the modern era. In an early post *in loco parentis* case, *Moore v. Troy State University*, the Court struggled with defining the student-university relationship.[192] "The college does not stand, strictly speaking, *in loco parentis* to its students, nor is their relationship

189. *See id.* at 156 n.63.

190. Nordin emphasizes the need for the student to hold the university accountable: "When substantial sums of money are paid out, some measure of accountability does seem appropriate, particularly when matters of scholarly expertise are not involved." Nordin, *supra* note 186, at 150.

191. *Id.* at 180.

192. 284 F. Supp. 725 (M.D. Ala. 1968).

purely contractual . . . [instead,] *[t]he relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student*."[193] For example, the Court noted that while the student has a right to privacy, which cannot be expressly waived through a housing contract, the university nonetheless has an "affirmative obligation" to create a safe, healthy, secure environment for its students pursuant to the overarching goal of providing an education.[194] These "competing interests" must be balanced differently from the way in which they might be balanced in other contexts beyond the quad. Similarly in *People v. Haskins*, the Court recognized that while the student-university relationship was not exactly the same as the relationship between a student and an elementary or secondary school, the two surely shared many characteristics; thus it was logical to consider the latter relationship when developing the former.[195]

A contract-based theory of the student-university relationship fails to adequately consider the unique circumstances of the college and university campus. College and university students living in dormitories are not the same as individuals living in an apartment complex. They live where they do for a very specific purpose and have different expectations of their "landlord." The college or university is not merely providing a room for rent; it is expected to create a very specific and complex community. Students require a safe, secure, and healthy atmosphere where they can pursue their studies, build a community, mature as adults, and explore their independence.[196]

In *Protecting the Millennial College Student*, Kristen Peters proposed an alternative to the contact-based theory of the student-university relationship.[197] Peters argued that "the [contract] model . . . devalues the college-student relationship by analogizing the relationship to that of a common business and consumer."[198] This analogy is simply misplaced, and to continue operating a system of law that tries to mold the college and university experience to fit the law, rather than the other way around, accomplishes nothing. Peters proposed what she called the "Millennial Model."[199] Under this model, the mutual reliance under contract theory is retained on the understanding that each party to the relationship is involved with the other partially out of self-interest.[200] The model, however, sheds

193. *Id.* at 729 (emphasis added).

194. *Id.*

195. 48 A.D.2d 480, 483 (N.Y. App. Div. 1975).

196. *See* Peters, *supra* note 13, at 431 (*citing* Anne Matthews, *The Campus Crime Wave*, N.Y. TIMES, Mar. 7, 1993, at SM38) (comparing the college and university campus to a "modern day Athenian city-state" or an "intellectual resort").

197. Peters, *supra* note 13, at 431.

198. *Id.* at 462.

199. *Id.*

200. *Id.*

the false belief that this mutual reliance means that the parties are equal. Instead, the "Millennial Model" recognizes a power imbalance in the institution's favor and uses it to justify a heightened responsibility for the institution.[201] Under the "Millennial Model," the college or university acts similarly to a fiduciary or a guardian and owes a non-contract based duty to the students in terms of providing a safe, secure, and conducive-to-study environment where students may learn and mature into responsible, independent adults, without harming themselves or, more importantly, their peers.[202]

Peters' "Millennial Model" shares several attributes with Bickel and Lake's "Facilitator Model." She dismisses the Bickel and Lake model because it retains a consumer-oriented basis, thinking of a college or university as "a bundle of services."[203] Peters is wrong to do this. The "Facilitator Model" shares a great deal with Peters' own model. The "Facilitator Model" neatly splits the difference between *in loco parentis* and a contract-based theory. It attempts to place the student-university relationship as a middle point between the student-elementary/secondary school relationships evoked in *T.L.O.* and *Redding*,[204] and the relationship between homeowners or apartment dwellers and police.

C. The Student-University Relationship as a Critical Factor in the "Reasonableness" of Campus Searches

The three Supreme Court school search cases are a good starting point for applying the "Facilitator Model" to issues of on-campus searches and seizures. In *T.L.O.*, a high school principal searched a student's purse on a report that the student was smoking on school grounds.[205] In *Acton*, the school district required high school athletes to submit to random drug testing as a prerequisite to participation.[206] Most recently in *Redding*, a high school principal ordered a female student to be searched following reports that the student was giving prescription pain killers to other students.[207] In each of these cases the Supreme Court recognized that the inquiry into the "reasonableness" of a search in the secondary school

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201. *Id.* at 465 n.235. Peters adopts as a definition for "special relationship doctrine": "The theory that if a state has assumed control over an individual sufficient to trigger an affirmative duty to protect that individual . . . then the state may be liable for the harm inflicted on the individual by a third party." Peters, *supra* note 13, at 465 n.235 (*quoting* BLACK'S LAW DICTIONARY 1422 (8th ed. 2004)).

202. Peters, *supra* note 13, at 432.

203. *Id.* at 464.

204. *See supra* notes 98–112 and accompanying text.

205. 469 U.S. at 335.

206. 515 U.S. at 657.

207. 129 S. Ct. at 2633.

context hinged on factors and circumstances unique to that setting and therefore required a more lenient standard than would apply outside of the school.[208] Searches in the elementary and secondary school context fall into the "special needs" category the Supreme Court discussed in cases such as *City of Ontario v. Quon*[209] and *Skinner v. Railway Labor Executives' Association*.[210] Where "'special needs, *beyond the normal need for law enforcement*,' make the warrant and probable-cause requirement impracticable," the court must pay special attention to the "reasonableness" of the interest of the entity conducting the search.[211]

The characteristics of the modern institution of higher education are not identical to those of elementary and secondary schools, but surely they are not so different as to wholly ignore the analogy. Rather, the relationship between students and colleges and universities should serve as a "stepping stone" from the schoolyard to the real world and should be balanced appropriately. The college or university experience is more than just a contract between student and institution for a degree. It is a period of transition from the closely supervised period of childhood to the full independence of adulthood for many students. Increasingly, it serves as a similar transitional period for "non-traditional" students, including returning veterans and "second career" young adults. To ignore this reality and adopt a contract-based theory of the student-university relationship, with its unprecedented imbalance of power,[212] forces colleges and universities to adapt to a legal framework that is inconsistent with what colleges and universities have become. Instead, the law must adapt to the modern institution, the many roles it plays for its students beyond just an educator, and the evolving demographics of the student population.

Bickel and Lake, with their "Facilitator Model," and Peters, with her "Millennial Model," have put forth alternatives that focus on the responsibility of colleges and universities to provide safe and secure campuses and environments for students based upon the unique relationship between the two parties. These models must also supply institutions of higher education with the authority and autonomy needed to construct safe campuses. It does little good to give colleges and universities greater duties and responsibilities to students without also

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208. *See, e.g.*, *T.L.O.*, 469 U.S. at 341 ("By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense.").

209. 130 S. Ct. at 2619 (government conducted searches in its role as employer).

210. 489 U.S. at 602 (government conducted searches in "closely regulated industries").

211. *City of Ontario*, 130 S. Ct. at 2628 (emphasis added).

212. *See* Nordin, *supra* note 186.

equipping them with the means necessary to meet these demands. The principles of the "Facilitator Model," which "balances rights and responsibilities . . . [being] neither extremely authoritarian nor overly solicitous of student *freedom*,"[213] can easily be adapted to the Fourth Amendment "special needs" framework. The college and university setting and the unique nature of the student-university relationship are critical factors that must be given special consideration in balancing the "reasonableness" of students' expectations of privacy and the interests of the institution in conducting searches and seizures to ensure a safe campus and a secure environment that promotes education.

Applying the "Facilitator Model" would result in different results for a number of the cases cited above. In *State v. Houvener*,[214] for example, where campus police in the hallway of a dormitory overheard the defendant's comments suggesting his involvement in campus burglaries, the questioning of the defendant and seizure of evidence of a burglary were deemed improper because the defendant had a reasonable expectation of privacy in the dormitory hallway. Under the "Facilitator Model," however, the court would be encouraged to consider the responsibility of the university to provide a safe and secure campus environment, which explains the university's rationale in providing campus security with unfettered access to campus buildings, including dormitories. The university gave campus police building access cards so they could provide surveillance and investigate complaints and reports.[215] By ignoring the college or university's role here, the *Houvener* court failed to balance the interests of both the student and the college or university. Application of the "Facilitator Model" in other cases would similarly encourage courts to explicitly balance the divergent interests of the student and the college or university.

CONCLUSION

The "Facilitator Model" places significant emphasis on the university's duty to students separate and distinct from any contractual obligation, creating a duty that accounts for the unique and special relationship between the college and university and its students. Bickel and Lake argue for the application of their model in order to address issues of college and university liability for injuries suffered by students. The "Facilitator Model" would impose non-contract based duties on the institution, therefore making it subject to liability if it failed to perform those duties. This approach, they argue, would allow and encourage colleges and universities to use the law "as a positive tool of empowerment in its efforts

213. BICKEL & LAKE, *supra* note 114, at 192.

214. 186 P.3d at 370. *See supra* notes 178–82 and accompanying text.

215. *Houvener*, 186 P.3d at 372–73.

to increase safety and promote an educational environment."[216] This article argues that this model should be applied to endow colleges and universities with the tools and authority necessary to fulfill the duties imposed on them when applying the Fourth Amendment "special needs" analysis to on-campus searches and seizures. As in the elementary and secondary school settings, on-campus searches and seizures are conducted for reasons "beyond the normal need for law enforcement."[217] Thus, these searches should be analyzed under a "reasonableness" standard.

The "Facilitator Model" finds a middle ground between an impractical "universal duty" that every college and university owes to every student and the unpredictable system established by contract theory, where the duties and responsibilities of the college and university to the student depend upon countless express and implied contracts. This model also allows colleges and universities to adapt to their particular circumstances, such that an urban campus can respond differently than a rural campus, and a community college can respond differently than a research university. Above all else, the focus on "reasonableness" provides consistency to institutions. When a college or university understands what is expected of it and how a court will judge its conduct, the institution can establish proper codes of conduct containing procedures to ensure it meets the duty it owes to its students. The modern college or university is far from its early roots and is experiencing a period of transition in uncertain legal times. Contract-based theories of the student-university relationship have held back institutions' efforts to adapt too long. The "Facilitator Model" and the idea that a college or university owes a special duty to students should be reconsidered and adopted by the courts to assist institutional transition into the new era of higher education.

216. BICKEL & LAKE, *supra* note 114, at 212.
217. *City of Ontario*, 130 S. Ct. at 2628.