THE FOURTH AMENDMENT AND DORMITORY SEARCHES

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INTRODUCTION

Despite being animated by several notable cases, contemporary search and seizure jurisprudence is hazy. In addition, the Supreme Court's recent decision in *Randolph v. Georgia*[1] further complicated the matter. In *Randolph*, the Court ruled that a third party's consent to a search could not supersede the refusal of the search's target if both parties are present and possess authority over the premises. The opinion attempted to clarify the extent of co-inhabitants' authority over shared property. The *Randolph* holding impacts public colleges and universities, where disciplinary policies routinely allow searches and seizures of dormitories and other forms of campus housing, often without, or even against, student consent.[2] Before *Randolph*, courts justified nonconsensual searches in three ways, emphasizing the relationship between the student and college or university, the importance of favorable learning environments, or the existence of emergency conditions. *Randolph*, however, calls into question these justifications by expanding the notion of reasonable expectations of privacy.

This note, focusing on public colleges and universities, applies timely search and seizure jurisprudence to the security needs of colleges and universities. It examines the history of search and seizure law, emphasizing the constitutional protection of privacy embodied in the Fourth Amendment. This note also analyzes public colleges' and universities' disciplinary power and policies in light of student rights; reviews students' reasonable expectations of privacy, personal dominion, and desirable learning environments; and concludes with policy recommendations, suggesting how colleges and universities can reconcile their on-campus housing policies with constitutional imperatives.

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1. 547 U.S. 103 (2006).
2. *See id.*

AN OVERVIEW OF SEARCH AND SEIZURE JURISPRUDENCE

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[3] The Amendment guards citizens' privacy rights. In furtherance of these rights, United States courts traditionally demonstrate a preference for searches performed with a warrant, but there are recognized exceptions to the warrant requirement.[4]

The Federal Rules of Criminal Procedure authorize warrants to search for contraband, fruits or instrumentalities of crime, or "property that constitutes evidence of the commission of a criminal offense." [5] The Supreme Court stated, "[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."[6] Therefore, the warrant requirement is "independent of, rather than ancillary to, arrest and arraignment."[7] Courts consider searches performed incident to arrest valid, but searches preceding arrest require a judge or magistrate's objective approval based on adequate proof. Warrants must identify the property and name or describe the person to be searched.[8] Furthermore,

> Probable cause for the warrant must be presented but there is nothing in the [law] indicating that the officers must be entitled to arrest the owner of the "place" to be searched before a search warrant may issue and the "property" may be searched for and seized. The Rule deals with warrants to search, and is unrelated to arrests.[9]

In criminal practice, warrants sustain this constitutional protection by requiring judges or magistrates to make a finding on the existence of probable cause that supports the authorization of a police search.[10] Accordingly, warrant requirements apply to public college and university dormitory rooms, which serve as personal dwelling-places. When college and university officials abide by formal criminal procedures, especially the procurement of warrants, the searches that they execute will be constitutionally valid.

The Supreme Court has clearly stated that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to few specifically

3. U.S. CONST. amend. IV. The protections incorporated into this amendment apply to the states through the Due Process clause of the Fourteenth Amendment. *See*, Ker v. California, 374 U.S. 23, 33 (1963).

4. Katz v. United States, 389 U.S. 347, 357 (1967).

5. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 558 (1978) (*quoting* United States v. Ventresca, 380 U.S. 102, 105 n.1 (1965)) .

6. Agnello v. United States, 269 U.S. 20, 32 (1925).

7. *Zurcher*, 436 U.S. at 559 (1978) (*quoting* ALI, A Model Code of Pre-Arraignment Procedure, Commntary 491 (Proposed Off. Draft 1975)).

8. *Id*. at 557.

9. *Id*. at 558.

10. *See* Illinois v. Gates, 462 U.S. 213, 239 (1983).

established and well-delineated exceptions."[11] Because the "[o]mission of [a magistrate's] authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment,'"[12] the threshold for exigent circumstances is high. The applicable test considers "whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant."[13] Specifically, one court stated, "[T]o establish exigent circumstances due to the possible destruction of evidence, the state must demonstrate probable cause to suspect that [said] evidence [is] present at [defendant's] residence."[14] As such, to qualify as exigent circumstances, the situation must be notably dangerous or grave.

One primary exception to the warrant requirement is the existence of exigent circumstances;[15] yet, searches are not readily performed pursuant to such circumstances because the risk of undermining well-established judicial safeguards is great. Courts have failed to articulate a clear definition of exigent circumstances, but the Supreme Court defines exigent circumstances as conditions which so gravely endanger lives that police officers can avoid the delay of obtaining a warrant.[16] Police must reasonably believe danger to themselves or others is imminent.[17] Additionally, if an officer believes an individual requires immediate aid, he is allowed to enter under the emergency aid doctrine.[18] The existence of exigent circumstances rests on a variety of factors, including the "gravity of the underlying offense,"[19] the potential for harm to property,[20] the threat to life or the threat of serious injury,[21] or the belief that a crime is in progress.[22] However, imminent destruction of evidence is not characterized as an exigent circumstance.[23]

Another delineated exception, in addition to the exigent circumstances exception to the warrant requirement, is a search conducted pursuant to consent.[24] In *United States v. Matlock*, the Supreme Court held that any individual who has common authority over the premises or effects can consent to a search.[25] In

11. Katz v. United States, 389 U.S. 347, 357 (1967).
12. *Id.* at 358 (*quoting* Beck v. Ohio, 379 U.S. 89, 96 (1964)).
13. United States v. Almonte, 952 F.2d 20, 22 (1st Cir. 1991) (quoting United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980)).
14. United States v. Impink, 728 F.2d 1228, 1231 (9th Cir. 1984).
15. United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980).
16. Warden v. Hayden, 387 U.S. 294 (1967).
17. *Id*.
18. *See* State v. Frankel, 847 A.2d 561 (2004), *cert. denied*, 543 U.S. 876 (2004).
19. Welsh v. Wisconsin, 466 U.S. 740, 753 (1984).
20. *See* People v. Smith, 525 N.Y.S.2d 244 (N.Y. App. Div.1988).
21. *See* United States v. Chipps, 410 F.3d 438 (8th Cir. 2005).
22. *See* Barcio v. State, 158 S.W.3d 498 (Tex. Crim. App. 2005).
23. *Welsh*, 466 U.S. at 754.
24. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).
25. United States v. Matlock, 415 U.S. 164, 170 (1974).

Matlock, the respondent was arrested in the front yard of his house and was not asked whether he would consent to a search of his leased home.[26] While officers detained the respondent in their police car, his co-tenant, who was not his wife, allowed the police officers to search their bedroom. [27] The officers found money that was tendered by the prosecution in respondent's trial.[28] The district court suppressed the evidence because the government failed to prove that the police officers had reason to believe the supposed co-tenant had authority to permit the search.[29] The Court of Appeals affirmed the district court's ruling because "a vicarious consent is sustained only when actual authority to consent is shown to have existed," and the burden of proving authority rested on the government.[30]

Disagreeing with both the district court and the Seventh Circuit, the Supreme Court ruled in favor of the government, saying that "the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom that authority is shared."[31] In doing so, the Court established the assumption of the risk doctrine, which upholds third party consent if the defendant is "held to have assumed the risk that [the third party sharing property with defendant] would allow someone else to look inside."[32] *Matlock* thus provided that "the authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes."[33] Accordingly, the right to consent to a search depends on mutual use of and joint access to the premises, both of which enable either party to admit people freely into the home or to limit the other's right of entry or use. Such considerations speak to the existence of apparent shared authority and, thus, the applicability of the assumption of the risk doctrine.

Building on *Matlock's* assumption of the risk doctrine, the Supreme Court's decision in *Illinois v. Rodriguez* narrowed the applicability of the common authority argument.[34] In *Rodriguez*, after the respondent was arrested for drug possession, Gail Fischer, his former roommate, gave police permission to search his apartment even though she no longer lived there.[35] The police found a cocaine substance, but the trial court suppressed this evidence because it found Fischer was not a frequent visitor to the apartment or a usual resident.[36] The court also denied the government's contention that, even if Fischer lacked common authority, as long as police reasonably believed that she did have authority to consent then there was no Fourth Amendment violation.[37] The appellate court affirmed the lower

26. *Id.* at 166.
27. *Id.*
28. *Id*.
29. *See id.* at 167–68.
30. United States v. Matlock, 476 F.2d 1083, 1087 (7th Cir. 1973).
31. United States v. Matlock, 415 U.S. 164, 170 (1974).
32. *Id.* at 171.
33. *Id.* at 171 n.7.
34. Illinois v. Rodriguez, 497 U.S. 177 (1990).
35. *Id.* at 179–80.
36. *Id.* at 180.
37. *Id.* at 184–85.

court's ruling, and the Supreme Court of Illinois denied the government's petition for leave to appeal.[38] The Supreme Court of the United States then granted certiorari to consider the extent of common authority and the assumption of the risk doctrine.[39]

Writing for the majority, Justice Scalia reversed the appellate court, holding that a reasonable belief held by law enforcement officials could validate a search, even if that belief later proved erroneous.[40] The Court said the objective standard test for reasonableness is whether "'the facts available . . . at the moment . . . warrant a [person] of reasonable caution in the belief' that the consenting party had authority."[41] Under the analysis used in *Rodriguez*, a judge must decide whether a police officer's acceptance of a third party's consent to a search improperly vests the third party with apparent authority over another's property.[42] In doing so, courts must pay special attention to particular expectations of privacy as well as to what was factually reasonable at the time.[43]

The Supreme Court revisited the reasonableness inquiry in *Georgia v. Randolph*.[44] Hearing the case thirty-two years after *Matlock* and sixteen years after *Rodriguez*, the Court held that, in the context of a warrantless search and seizure, the consent of one individual with common authority cannot override the refusal of the other who is present.[45] The case involved Scott Randolph's conviction for cocaine possession. Police found cocaine in his home during a warrantless search to which Randolph's wife consented but Randolph did not. [46] The Georgia Court of Appeals reversed the trial court's conviction of Randolph,[47] and the Georgia Supreme Court sustained the appellate court on the ground that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search."[48] Subsequently, the Supreme Court granted certiorari to resolve the split in authority on the issue of "whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search."[49]

In its holding, which invalidated the alleged third-party consent, the Supreme Court emphasized the reasonableness standard explicit in the Fourth

38. *Id.* at 180.
39. *Id.* at 181.
40. *Id.* at 189.
41. *Id.* at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).
42. *Id.*
43. *See* People v. Fry, 76 Cal. Rptr. 718 (Cal. Ct. App. 1969) (holding that a wife's consent was invalid because the defendant, who was not present at the time consent was sought, earlier advised his wife to refuse any search).
44. 126 S. Ct. 1515 (2006).
45. *Id*. at 1527.
46. *Id.* at 1519.
47. Randolph v. State, 590 S.E.2d 834 (Ga. Ct. App. 2003).
48. State v. Randolph, 604 S.E.2d 835, 836 (Ga. 2004).
49. *Randolph*, 126 S.Ct. at 1520.

Amendment.[50] By stressing whether "customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection," the Court put the focus of search and seizure jurisprudence on rational community expectations.[51] The majority carefully avoided overruling *Matlock* by integrating its assumption of the risk theory into its own holding: "the 'right' to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances."[52] Recognizing that it was drawing a "fine line" among *Randolph*, *Matlock*, and *Rodriguez*, the Court in *Randolph* pointed out, "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."[53] The holding further emphasized that police could not remove a potential objector from the home in order to obtain consent, but they did not have to take affirmative steps to ensure the authority of the consenting party.[54]

Because of this fine line, *Randolph's* impact on contemporary search and seizure jurisprudence is somewhat vague. The Supreme Court's repeated emphasis on reasonableness and social norms vests a great deal of discretion in law enforcement and the judiciary to settle what is "reasonable" or equitable under particular circumstances. Thus, while *Randolph* stands for the proposition that one party's consent to an on-site search cannot trump another party's refusal, the case also represents an upsurge in respect for Fourth Amendment rights as well as a sensible and evenhanded application of these rights. The Court focused on the "great significance given to widely shared social expectations"[55] and, thus, implicitly recognized the decisiveness of varying circumstances such that popular belief restrains the potential range of judicial and law enforcement activity. Therefore, the public's shared view of privacy should influence the discussion of protected Fourth Amendment rights.

Randolph's turn to situated practicality and fairness should influence searches performed on college and university campuses, particularly in student dormitories because what is reasonable to students may be at odds with what is reasonable to administrators. In other words, expectations of privacy and notions of common authority are hazy in on-campus living situations, and, accordingly, the case law reflects such discord.

50. *Id.* at 1527.
51. *Id.*
52. *Id.*
53. *Id. See infra* p. 120.
54. *Id.*
55. *Id.* at 1521.

In fact, few cases address the constitutionality of searches of dormitory rooms.[56] A California court of appeals, considering the legality of a dormitory search, stated that it uncovered only twenty-nine relevant cases, with fewer than half decided within the past twenty years.[57] The court's research appears accurate; the vast majority of cases involving a college or university and constitutional rights concern the First Amendment or the Equal Protection Clause.[58]

The few dormitory search cases are further divided by whether they entail searches performed by college and university officials or by state police. The relevant case law suggests that college and university authorities possess more leeway to perform nonconsensual searches than law enforcement officers. According to *Duarte v. Commonwealth*, "fourth amendment [sic] protections against unreasonable searches and seizures are 'wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.'"[59] Thus, controversy over the implication of the Fourth Amendment surrounds the degree to which a college or university official functions as a government official or involves the government, specifically law enforcement. The *Duarte* court concluded that "whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'"[60]

SEARCH AND SEIZURE POLICIES IN PUBLIC COLLEGES AND UNIVERSITIES

Public colleges and universities, as state actors, are bounded by the United States' Constitution, including the Fourth Amendment, but they also possess discretionary power to enforce rules furthering their educational objectives. Many courts confront cases in which students or student groups allege that a college or university entity deprived them of their First Amendment rights to free

56. *See* Alexander C. Black, Annotation, *Search Conducted by School Official or Teacher as Violation of Fourth Amendment or Equivalent State Constitutional Provision*, 31 A.L.R. 5th 229, 296–300 (1995).

57. People v. Superior Court, 49 Cal. Rptr. 3d 831, 844 n.10 (Cal. Ct. App. 2006).

58. *See e.g.,* Healy v. James, 408 U.S. 169 (1972); Shelton v. Tucker, 364 U.S. 479 (1960); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435 (3d Cir. 2000); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York, 443 F.Supp.2d 374 (E.D.N.Y. 2006).

59. Duarte v. Commonwealth, 407 S.E.2d 41, 42 (Va.App. 1991) (quoting United States v. Jacobson, 466 U.S. 109, 113 (1984)). *Duarte* involved a private school, Averett College, but the Virginia appellate court's decision is nevertheless valuable because it discusses the differences between private parties and agents or instruments of the government for Fourth Amendment purposes. *See also* State v. Kappes, 550 P.2d 121 (Ariz. 1976) (holding that a dormitory room search by college officials done as private persons did not implicate the Fourth Amendment and the evidence of drug possession).

60. *Duarte*, 407 S.E.2d at 42 (quoting Skinner v. Railway Labor Exec. Ass'n., 489 U.S. 602, 614–615 (1989)).

expression.[61] The Supreme Court, in *Healy v. James*, said that a school's refusal to grant a student group official campus recognition without justification, despite the group's conformity with the school's requirements, violated the students' associational rights protected by the First Amendment.[62] The Court stressed that "[a]t the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment."[63] The Court continued, "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[64]

While *Healy* and its progeny focus on freedom of expression, the Court's protection of First Amendment rights parallels its protection of other constitutional rights, including the Fourth Amendment. The extent to which the Fourth Amendment's prohibition of unreasonable searches protects a student's interest in a dormitory room at a public college or university is, like university speech protections,[65] controversial. For example, in *People v. Kelly*, a student at the California Institute of Technology, a public university, who was found guilty of burglary, contended that damaging evidence in his trial was obtained by an unlawful search of his dormitory room.[66] The court, upholding the conviction, maintained that the Dean was master of the residence halls, and, as such, his position involved "upholding the high disciplinary standards and integrity of the school" and, therefore, the right to enter student rooms in an emergency, even to perform a search.[67]

The *Kelly* case noted the relationship between a student resident and a college or university dean, or other official responsible for the housing facilities, differs from the relationship between a landlord and tenant.[68] In traditional landlord-tenant jurisprudence, the lessor does not have the right to permit police officers into rented premises.[69] Thus, consent from the landlord does not render a search constitutional: "The right of a landlord to inspect the leased premises does not include the right to 'permit' third persons, not shown to be his agents, to come and go over the premises on business other than the owner's."[70] Even hotel proprietors and employees lack the right to consent to the search of an absent guest's hotel room because such a search would violate the guest's constitutionally protected

61. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that a school's refusal to allow students to wear arm bands that demonstrated their disapproval of Vietnam hostilities was unconstitutional because the students had a constitutional right to express their opinions).

62. Healy v. James, 408 U.S. 169, 181 (1972).

63. *Id.* at 180.

64. *Id.*

65. *Id.*

66. 195 Cal.App.2d 669, 680 (1961).

67. *Id.* at 678.

68. *Id.* at 678.

69. Chapman v. United States, 365 U.S. 610 (1910). *See also* Klee v. United States, 53 F.2d 58, 61 (9th Cir. 1931).

70. *Klee*, 53 F.2d at 61.

right to be free from unreasonable searches and seizures.[71] The traditional law gives preference to tenant constitutional rights over the unfettered will of landlords and proprietors.

When considering college and university housing facilities, however, courts accord less protection to student "tenants." In a college or university setting, the need for an orderly learning environment, as well as safe premises, confers upon the administration an amount of authority and discretion sufficient to maintain and enforce disciplinary standards.[72] According to an Alabama district court, a public institution "has an 'affirmative obligation' to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process."[73] A New Hampshire district court assumed a similar position but on narrower grounds. The court held that a search of a student's dormitory room is unreasonable unless:

> [It] furthers [the college's or university's] functioning as an educational institution. The search must further an interest that is separate and distinct from that served by New Hampshire's criminal law. Obviously, administrative checks of the rooms for health hazards are permissible pursuant to the school's interest in the maintenance of its plant and the health of its students.[74]

Thus, much of the case law suggests that a college's or university's status as an educational facility enables its officials to take affirmative action to maintain an orderly and safe learning environment.

Some courts, however, are apt to condemn on-campus searches as exceeding college and university educational authority and find they are an encroachment upon student's constitutional rights. For example, a New York court suppressed evidence obtained during a warrantless search of a dormitory room because the search was not made pursuant to a lawful arrest.[75] The court said:

> It seems self-evident that the dormitory room of a college student is not open for entry at all times for all purposes . . . . University students are adults. The dorm is a home and it must be inviolate against unlawful search and seizure. 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.[76]

In other words, the court leaned towards traditional landlord-tenant law and, therefore, diminished the right of the college or university administration to conduct nonconsensual searches pursuant to its regulatory and advisory power.

71. Stoner v. California, 376 U.S. 483, 488 (1964).

72. *See* Moore v. Student Affairs Comm. of Troy State Univ., 284 F.Supp. 725, 729–30 (M.D.Ala. 1968).

73. *Id*.

74. Morale v. Grigel, 422 F.Supp 988, 998 (D. N.H. 1976).

75. People v. Cohen, 292 N.Y.S.2d 706, 709 (N.Y.App. Term 1968).

76. *Id.* at 713.

Thus, even a brief review of relevant cases shows that courts assume a variety of postures toward school-sanctioned searches of individual dormitory rooms. Regardless of its ultimate conclusion, each court acknowledges the college's or university's claim, or purported responsibility, to preserve a healthy, structured, and safe learning environment. However, the value judges place on safeguarding unabridged constitutional rights varies. The ultimate validity of a particular dormitory search amounts to an undefined balancing test weighing the student's right to privacy against the college's or university's right to maintain a desired campus environment.

DO STUDENTS WAIVE THEIR FOURTH AMENDMENT RIGHTS?

The applicability of traditional search and seizure law to students living in college and university dormitories often involves the question of whether students waived, set aside, or contracted away their Fourth Amendment rights.[77] Colleges and universities often require students living in dormitories to sign waivers, but the general belief is that such waivers do not independently determine whether a search was valid.[78] The relevant case law does not focus on the legality or significance of student housing waivers.[79] In *Moore v. Student Affairs Committee of Troy State University*, the Alabama district court decisively held:

> The validity of the regulation authorizing search of dormitories thus does not depend on whether a student "waives" his right to Fourth Amendment protection or on whether he has "contracted" it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty.[80]

The court further asserted that "a tax-supported public college may not compel a 'waiver' of [the Fourth Amendment] right as a condition precedent to admission."[81] Therefore, a public college or university may not require students to relinquish their Fourth Amendment protections, and, thus, the contractual relationship between a student and the administration should not be premised upon a constrained, and likely school-compelled, sacrifice of one's right to be free from unreasonable searches and seizures.[82]

77. *See Moore*, 284 F.Supp. at 729–30; State v. Hunter, 831 P.2d 1033, 1035 (Utah Ct.App. 1992).

78. *See* Joseph M. Smith & John L. Strope, *The Fourth Amendment: Dormitory Searches in Public Universities*, 97 WEST EDUC. L.R. 985, 987 (1995).

79. *Id.*

80. *Moore*, 284 F. Supp at 729.

81. *Id.*

82. The Fourth Amendment only limits governmental activity, and evidence obtained by a warrantless or nonconsensual search performed by a *private person*, "perhaps by illegal means," is not obligatorily excluded from evidence in a criminal trial. State v. Burroughs, 926 S.W.2d 243, 245 (Tenn. 1996). *See also* Burdeau v. McDowell, 256 U.S. 465 (1921) (holding that the Fourth Amendment limits actions of government agents); United States v. Walther, 652 F.2d 788 (9th Cir. 1981) (considering who or what is a governmental agent or instrument). Thus, searches performed in private college or university dormitories are most likely valid.

Nevertheless, many cases involving the validity of searches of dormitory rooms conducted without a warrant or the consent of a physically present student affirm the disciplinary policies of the college or university and thus uphold the search.[83] The courts' rationales for their rulings vary. Some courts emphasize the relationship or implicit agreements between the student and the school,[84] others stress the right of the school to take affirmative steps to provide appropriate learning environments,[85] and still others focus on the school's privileges in emergency situations.[86]

COLLEGE AND UNIVERSITY RIGHTS IN AN 'EMERGENCY' SITUATION

The first justification for upholding college- or university-sanctioned search and seizures relies upon the existence of an "emergency" situation. For example, in *People v. Kelly,* school officials suspected a student of stealing property, and the University master permitted the police to search the student's dormitory room. The student protested his arrest and the search, but the court permitted it. The *Kelly* court first found that the pre-search evidence constituted an adequate foundation for the arrest of the student.[87] Because both the officers and the University master believed the situation was an emergency, the court found that the police officers believed in good faith that the University master possessed authority to enter the student's room.[88] The court categorized the situation as an emergency because "the master might reasonably have concluded that any delay in ascertaining the facts regarding the use of the room would indicate condonation of wrongful acts and would reflect discredit on the school, and therefore the circumstances called for immediate action."[89] Significantly, the court rested its finding upon the goal of preserving the University's reputation. To give full credence to the court's reasoning, the holding is ostensibly contingent upon the good faith of the law enforcement officers as well as the college or university official.[90]

However, the court's discussion of an emergency appears to defer heavily to disciplinary policy and thus is quick to excuse the repudiation of student constitutional protections.[91] The *Kelly* court said, "A dictionary definition of emergency is 'an unforeseen combination of circumstances that calls for immediate action.' Of course, such a situation as that which confronted the master with respect to a student harboring stolen property in the room was an unexpected

83. *See, e.g.,* People v. Kelly, 195 Cal.App. 669 (Cal. Ct. App. 1961); *Moore*, 284 F.Supp. at 725.

84. *See Moore*, 284 F.Supp. at 729.

85. State v. Hunter, 831 P.2d 1033, 1036-37 (Utah Ct.App. 1992).

86. Kelly, 195 Cal.App.2d at 679–80.

87. *Id.*

88. *Id.*

89. *Id.* at 183–84.

90. *Id.*

91. *See id.* at 183.

or unforeseen combination of circumstances."[92] This holding raises the question of whether the existence of evidence pointing to student burglary in fact constituted an emergency condition. The court never discussed whether destruction of the evidence was likely or why the officers did not utilize judicial safeguards and procure a warrant. Nevertheless, the court easily found the search reasonable, and, thus, the case loosely construes probable cause and urgent conditions.

SPECIAL RELATIONSHIPS BETWEEN THE STUDENT AND THE COLLEGE OR UNIVERSITY

Moore v. Student Affairs Committee of Troy State University represents the second justification for college- or university-sanctioned searches and seizures. This justification relies upon the "special relationship" between the college or university and the student's implicit endorsement of school or police action.[93] In a frequently cited passage, the court stated:

> [The school–student relationship] does not depend on either a general theory of the right of privacy or on traditional property concepts. The college does not stand, strictly speaking, *in loco parentis* to its students, nor is their relationship purely contractual in the traditional sense. The relationship grows out of the peculiar and sometimes the seemingly competing interests of college and student. A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a 'waiver' of that right as a condition precedent to admission. The college, on the other hand, has an 'affirmative obligation' to promulgate and to enforce reasonable regulations . . . 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 reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students.[94]

In this regard, the *Moore* case furthers the *Kelly* precedent of upholding college and university regulatory conduct. However, the *Moore* court did not attempt to fashion the circumstances as an emergency; the court simply established a presumption in favor of college or university-sanctioned searches.[95]

Courts that affirm this special relationship often point to waivers, housing contracts, or other school policies that establish particular entitlements of the administration. For example, the University of Illinois undergraduate dormitory contract says:

92. *Id.*

93. Moore v. Student Affairs Comm. of Troy State Univ., 284 F.Supp. 725, 729 (M.D.Ala. 1968).

94. *Id.*

95. *Id.*

> The Student shall be responsible for maintaining her/his room in a reasonable condition at all times and to correct any abuse called to the Student's attention by University representatives. Room furnishings shall not be removed from student rooms without approval, and public area or lounge furnishings shall not be moved into the Student's room. The Student shall be responsible for all damage to University property in the Student's room during the term of occupancy. The Residence Hall staff reserve the right to enter the Student's room during the academic year, including vacation periods, for routine maintenance or for emergency purposes.[96]

This housing contract is similar to those of other public colleges and universities.[97] Additionally, the contract requires the student to obey University policies outlined in the student handbook and all state laws. Upon refusal to comply with the rules, the University can terminate the contract.[98] These contracts are considerably vague, but they allow nonconsensual and warrantless searches when performed in furtherance of maintenance, health, and safety reasons. Such searches are likely constitutional because colleges and universities are responsible for their students and the students allow the college or university to assume responsibility. As a result, courts should find that such searches are not unreasonable *per se*.

On the other hand, the applicability of such contractual provisions becomes hazier when college or university officials are allowed entry for "emergency purposes" or when they, while acting with authorization, seek police involvement. For example, in *Commonwealth v. Neilson*,[99] a maintenance worker heard a cat in a dormitory.[100] School officials, after giving notice to the students, searched rooms in the dormitory.[101] During the search of one room, officials found marijuana

96. Undergraduate Residence Halls Contract—Academic Year 2006–2007, University of Illinois, http://www.housing.uiuc.edu/online/fineprint/current_under.pdf (last visited Apr. 16, 2007).

97. *See also* Indiana University Residence Hall 2007–08 Contract Terms and Conditions, University of Indiana, http://www.rps.indiana.edu/documents/2007_08RHContract.pdf (last visited Jan. 25, 2007) (noting a "Room Entry" provision, "IU reserves the right to enter your unit according to the procedures set forth in Your Neighborhood from A to Z at http://www.rps.indiana.edu/ for law enforcement purposes, as well as for custodial services, safety inspections, unit repair and maintenance, pest control, and emergency situations. In general, in non-law enforcement and non-emergency situations, twenty- four (24) hour notice will be given prior to entry"); Guide to Residence Living—Housing Contract Information, Florida State University, http://www.housing.fsu.edu/housing/guide06/contract.html (stating that "[a]uthorized university personnel may enter student rooms for regular health and safety inspections and for maintenance purposes. Staff may also enter rooms when a reasonable belief exists that the room is being used for an illegal purpose or for a purpose that would interfere with discipline and/or personal safety").

98. Undergraduate Residence Halls Contract—Academic Year 2006–2007, University of Illinois, http://www.housing.uiuc.edu/online/fineprint/current_under.pdf (last visited May 15, 2007).

99. 666 N.E. 2d 984 (Mass. 1996).

100. *Id.*

101. *Id.*

plants in the closet and contacted campus police.[102] Police entered the room without a warrant and, shortly thereafter, removed evidence without the absentee student's consent.[103] The Massachusetts Supreme Court found the first search conducted by school officials valid because the student "consented to reasonable searches to enforce the college's health and safety regulations when he signed the residence contract."[104] However, the police entered "without a warrant, consent, or exigent circumstances," and their subsequent search was thus unreasonable and violated the student's Fourth Amendment rights.[105]

This suggests that a student's consent to a search by a college or university official in furtherance of health and safety concerns does not create consent for a subsequent search by law enforcement, even if illegal material was in plain view of the school officials. The court held that when police enter a room for the sole purpose of seizing contraband, their objective is not protected.[106] A warrant is required in such a situation.[107] The dicta in *Neilson* indicate that college and university housing officials may conduct warrantless and nonconsensual searches for health and safety purposes consistent with the terms of a housing contract, but law enforcement officials cannot engage in a subsequent search for illicit materials. As a result, if a college or university suspects illegal activity, it could presumably conduct a valid search and seizure for health and safety purposes within the terms of the housing contract. However, if illegal evidence emerges, the college or university should contact police, who must obtain a warrant or student consent before searching the room, absent an emergency.

Furthermore, in *People v. Kelly*,[108] the California appellate court found that a student's use of his dormitory room was conditional upon his acceptance of the school's housing regulations—specifically that it was "conditional upon his accepting the responsibility of practicing the school's traditional principle of personal honor and upon his agreeing to abide by the house rules."[109] The court examined the University's rules regarding general student conduct, not rules specifically involving the entry and search of dormitory rooms. The court concluded that "[i]t 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."[110] By pointing to the implied authority of administrators, the court, in effect, rewrote the housing contract to enlarge the power of school officials.[111] By such reasoning, the college or university acquires vast freedom to perform dormitory searches when it

102. *Id.*
103. *Id.*
104. *Id.* at 987.
105. *Id.*
106. *Id.*
107. *Id.*
108. 195 Cal. App. 2d 669 (Cal. Ct. App. 1961).
109. *Id.* at 677.
110. *Id*. at 677–78.
111. *See id.* at 678.

suspects, even vaguely, that a student violated the rules or sacrificed the reputation of the institution.

However, in *People v. Superior Court*,[112] the most recent case addressing the search of a public university student's dormitory room, a California appellate court subtly overruled *Kelly*. In the case, a Santa Clara University campus safety service officer observed the defendant smoking marijuana.[113] After the officer approached him, the student admitted using marijuana but claimed the use was for legal medicinal purposes.[114] The student then took the officer into his dormitory room and showed him a small amount of marijuana and marijuana paraphernalia.[115] The officer asked if this was all that he had, and the student said that there was no more.[116] However, the officer then checked the student's drawers and closet where he found a cooler filled with plastic bags containing marijuana and $18,000 in cash.[117] Two Santa Clara police department officers then arrived, continued searching the room, and found more marijuana.[118] The student moved to suppress any physical evidence, statements, or observations that were obtained as a result of any officer's, including campus security's, entry into his dormitory room because such evidence was the product of a warrantless and unreasonable search and seizure.[119] The court ultimately admitted the evidence under the inevitable discovery doctrine,[120] but significantly noted that the dormitory room was protected under the Fourth Amendment.[121] The court also said that the housing contract did not waive the student's constitutional rights,[122] and the safety officer did not have authority to consent to the search of the student's room.[123]

The court first pointed to the California Legislature's enactment of § 626.11,[124] which "gave express recognition to the constitutional rights of college students, including the right of privacy and the right to be free from unreasonable searches

112. 49 Cal.Rptr.3d 831 (6th Cir. 2006).
113. *Id*. at 836.
114. *Id*. at 837.
115. *Id*.
116. *Id*.
117. *Id*.
118. People v. Superior Court, 49 Cal. Rptr. 3d 831, 837 (2006).
119. *Id.* at 835.
120. *Id.* at 857. The inevitable discovery doctrine states:

> [I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. *Nix v. Williams*, 467 U.S. 431, 447 (1984).

121. *Id.* at 849.
122. *Id.* at 849–50.
123. *Id*. at 850.
124. CAL. EDUC. CODE § 626.11 (1975).

and seizures."[125] However, it then questioned whether "*Kelly's* reasoning—including its seemingly antiquated view that the college student had impliedly agreed that the house master could search the dorm room to uphold the disciplinary standards and integrity of the institution—would pass constitutional muster today."[126] Thus, the most contemporary case law on dormitory search and seizure moves away from a broad understanding of college and university administrative and disciplinary powers to a position much more sympathetic to student rights. As a result of this emphasis on constitutional protections, it is reasonable to assume courts will be less likely to expand the language of student-housing contracts and increase the authority of college and university administrators. Under *People v. Superior Court*, courts should not 'read in' what is implied in a housing contract but should instead focus on the plain language of the agreement.

THE RIGHT TO MAINTAIN AN APPROPRIATE LEARNING ENVIRONMENT

The third justification for college- or university-sanctioned dormitory searches corresponds with the other two but differs by heightening the responsibility of a college or university to maintain a safe and appropriate learning environment. According to this justification, the school's duty to promulgate and enforce reasonable regulations allows it to enact rules and regulations, even those which may abridge a student's rights, in order to preserve the welfare of the community as a whole.[127] As such, warrantless and nonconsensual searches and seizures may be permissible if they serve to sustain a suitable educational setting.[128] What constitutes a suitable educational setting or safe learning environment, however, is ambiguous. Also, it is difficult to distinguish between a violation of constitutional rights and an acceptable reduction in privileges for the good of the community.

The United States Supreme Court has noted the interests of colleges and universities in regulating student conduct: "This Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'"[129] Following the Supreme Court's line of reasoning, the Utah Court of Appeals pointed to this affirmation of school authority in *State v. Hunter*.[130] The *Hunter* court concluded that:

> [Students] require and are entitled to an atmosphere that is conducive to educational pursuits. In a dormitory situation, it is the university that accepts the responsibility of providing this atmosphere. Thus, it is incumbent upon the university to take whatever reasonable measures are necessary to provide a clean, safe, well-disciplined environment.[131]

125. People v. Superior Court, 49 Cal. Rptr. 3d 831, 852 (2006).

126. *Id.* at 852–53.

127. *See, e.g.,* State v. Hunter, 831 P.2d 1033 (Utah. App. 1992)

128. *Id*.

129. Healy v. James, 408 U.S. 169, 180 (1972) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)).

130. *Hunter*, 831 P.2d at 1036.

131. *Id.*

The court went on to suggest that by signing the housing contract the student "agreed to the university's right of reasonable inspection and waived any Fourth Amendment objections to the university's exercise of that right."[132] Nevertheless, the court suggested its ruling could be based on the school's general power to take affirmative measures that uphold a favorable learning environment.[133] Such a ruling, in the *Hunter* court's eyes, adhered to the Supreme Court's recognition of a college or university official's precarious role in preserving constitutional safeguards while ensuring an appropriate culture of learning.[134]

Although *State v. Hunter* permits infringement of student freedom for the sake of upholding an ideal learning environment, this case differs factually from most other dormitory search cases. The fact that school officials did not take "action at the behest of or as part of a joint investigation with the police" distinguishes *Hunter*.[135] Officials received multiple reports of vandalism in the dormitory, and the Director of Housing and Food Services accordingly conducted room-to-room searches without law enforcement or campus-police involvement.[136] A campus police officer was present during the search, but only to "provid[e] assistance in the event that [the Director] discovered any problems that he was not able to handle on his own."[137] While it is common for college or university administrators to attempt to delegate their powers to police, this was not the case in *Hunter*.[138] The case is factually distinct from circumstances in which a college or university readily involves law enforcement in the search and seizure. Nevertheless, *Hunter* epitomizes the importance of college and university officials' role in preserving a healthy and safe learning environment.

Despite the Supreme Court's affirmation of the need for colleges and universities to maintain a fit culture of learning, most courts deny that college and university officials possess boundless discretion when it comes to performing dormitory searches and seizures. In *Smyth v. Lubbers*,[139] two students sued school officials who were responsible for a nonconsensual and unwarranted search of their dormitory room that led to their expulsion based on marijuana possession.[140] The students asked the court to hold the search unconstitutional and to enjoin their expulsion.[141] The Michigan district court agreed with the students and reasoned that a dormitory room, for practical purposes, was a student's home that should be accorded full constitutional protections.[142] Accordingly, students possess a reasonable expectation of privacy akin to that which an adult expects in his

132. *Id.* at 1037.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1035.
138. *Id.* at 1037.
139. 398 F.Supp 777 (W.D. Mich. 1975).
140. *Id.* at 781.
141. *Id.*
142. *Id.* at 786.

residence.[143] The court specifically said that colleges and universities' need for order and discipline did not diminish the students' reasonable expectation of privacy.[144] The court further assumed the converse position of *Hunter*:

> This Court rejects the theory that College officials acting pursuant to regulations may infringe on the outer limits of an adult's constitutional rights . . . . The basic question is the extent of the College's supervisory power in relation to the Fourth Amendment. Conclusory statements about the College's need for order and discipline are not enough. There is no challenge to the substantive drug regulation; the issue is the means of enforcement. There are a variety of means, but each actually used must be consistent with constitutional limitations. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."[145]

Noting that the Fourth Amendment was directed at situations exactly like the one at issue, the *Smyth* court stressed the importance of acquiring a warrant and refused to exempt colleges and universities from the prudence inherent in such a requirement.[146]

Furthermore, in *Piazzola v. Watkins*,[147] the Fifth Circuit found that the Fourth Amendment unconditionally extends to students residing in dormitories.[148] The court noted that while the school "retains broad supervisory powers," its rules should never serve to "give consent to a search for evidence for the primary purpose of a criminal prosecution. Otherwise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room."[149] The court went on to hold that "[c]learly the University had no authority to consent to or join in a police search for evidence of a crime."[150] Thus, the Fifth Circuit agreed with the *Smyth* court that a college or university's interest in maintaining a safe, productive, and healthy learning environment does not overcome a student's Fourth Amendment rights.

The bulk of cases require colleges and universities to follow standard search procedures including securing a warrant based on adequate probable cause. The courts, while acknowledging the distinguishable characteristics of a college or university community, tend to err on the side of upholding constitutional rights as opposed to enlarging the authority of college and university administrators. However, courts assume a wide variety of postures on the permissibility of dormitory searches and thereby fail to reach total agreement.

143. *Id.*
144. *Id.* at 789.
145. *Id.* (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511(1969)).
146. *Id.* at 790.
147. 442 F.2d 284, 289 (5th Cir. 1971).
148. *Id.*
149. *Id.*
150. *Id.* at 290.

The remainder of this note addresses whether uniformity in this field is possible, or even desirable, and suggests what public colleges and universities might do in order to ensure an orderly learning environment without compromising the constitutional rights of their students. Because a great deal of search and seizure jurisprudence focuses on expectations of privacy and notions of reasonableness, the note especially considers what students believe about their own privacy.

PROCEEDING TOWARDS AGREEMENT

Students, police, and college and university administrators lack a judicial consensus of what constitutes valid warrantless entries and searches under the Fourth Amendment. When courts analyze the constitutionality of searches based on their reasonableness or accordance with popular understandings of privacy, the ambiguity increases. Courts, including the United States Supreme Court in *Georgia v. Randolph*,[151] recognize that one of the hallmarks of the Fourth Amendment is its reasonableness requirement.[152] Social norms and expectations necessarily contribute to any assessment of reasonableness.[153] Accordingly, the Supreme Court stated:

> [I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.[154]

Therefore particular social customs and habits create an understanding of reasonableness based upon the existence of particular facts and situations.

Because Fourth Amendment jurisprudence involving searches of college and university dormitories lacks significant common agreement, the process of determining reasonableness appears inevitably subjective due to a lack of social consensus of acceptable invasions of privacy. To avoid the imposition of wholly arbitrary rulings, courts should strive to establish a compelling and widely applicable precedent that will not only simplify search and seizure cases but also will produce, as well as be the product of, a popular understanding of a student's reasonable expectation of privacy. Uniformity in college and university law is attractive because it would facilitate a more equitable application of the reasonableness standard.

151. 126 S.Ct. 1515 (2006).
152. *See* United States v. Knights, 534 U.S. 112, 118 (2001).
153. *See id.* at 112–13.
154. *Randolph*, 126 S.Ct. at 1522–23.

Some critics, however, believe that uniformity in Fourth Amendment jurisprudence burdens the courts. One writer points out:

> The social gains from seizing a murder weapon, for example, far outweigh those from seizing a few ounces of marijuana. One would think, then—given the balance—that the Fourth Amendment's standards would be easier to satisfy in the murder case. But this is not so: the standard is identical regardless of the crime.[155]

The author argues that the law is "transsubstantive" and thus "encourages the Court to condone for all investigations tactics necessary only for some."[156] In other words, acceptable invasions of privacy should vary according to the seriousness of the crime and, perhaps, the necessity of the investigative or evidence-gathering technique. In regard to dormitory searches, it would follow that the acceptability of police and administrative conduct should depend on the severity of the suspected crime, as well as the necessity of immediate action. However, such changeability and indeterminacy bestows judges with excessive authority to decide the applicability of the Constitution. This not only detracts from the legitimacy of the judiciary's decisions, but it also prevents colleges and universities from creating consistent search policies and ensuring the protection of students' Fourth Amendment rights.

USING *RANDOLPH* AS A MEANS OF REACHING UNIFORMITY IN DORMITORY SEARCH JURISPRUDENCE

Fourth Amendment interpretation in light of the particularities of colleges and universities remains vague. *Georgia v. Randolph*, decided by the Supreme Court in 2006, provides an adequate means of simplifying the issues presented by this constitutional question. *Randolph* advocates three tangible rules. First, "if a potential defendant with self-interest in objecting [to a search] is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."[157] In other words, if two parties exercising authority over the premises are both present and one consents while the other, the likely target of the search, refuses, the refusal, not the consent, "wins." Second, police do not have to "take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, . . . [since such action] would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field."[158] Third, as the *Matlock* rule states: "a solitary co-habitant may sometimes consent to a search of shared premises" and "the reasonableness of such a search is in significant part a function of commonly held understanding about the authority

155. Note, "*Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*," 119 HARV. L.REV. 2530, 2537 (2006).

156. *Id.* at 2538.

157. *Randolph*, 126 S.Ct. at 1527. *See supra* p. 105-06.

158. *Randolph*, 126 S.Ct. at 1527–28.

that co-inhabitants may exercise in ways that affect each other's interests."[159]

At first glance, these rules alone do not appear to have a fundamental bearing on the constitutionality of dormitory searches, but *Randolph* provides an ideal paradigm for viewing such cases. If police want to search a student's dormitory room without a warrant, the college or university administration functions as the relevant third party, whose authority is uncertain, and notions of reasonableness govern the legality of the search. The relevant considerations include the student's physical presence and ability to object, the third party's authority over the premises, and the justifications for the actions and beliefs of the police. Under the *Randolph* paradigm, courts should not ask whether a dormitory room is a constitutionally protected space;[160] rather they should ask whether a particular search is in accord with existing expectations of privacy. In *Jones v. United States*,[161] Justice Frankfurter, speaking for the majority, clearly stated that the Fourth Amendment does not protect "arcane property interests," but protects the right of privacy.[162] In *Jones*, the Supreme Court upheld the right of an apartment guest to challenge an unlawful search and seizure.[163] The Court reasoned that the petitioner's legitimate presence in the apartment gave him a reasonable expectation of privacy.[164] Therefore, the emphasis on privacy, as opposed to property, expands the scope of Fourth Amendment protections. This expansion benefits the student residents of college and university dormitories. A student's right to be free from searches and seizures does not derive from his or her ownership or leasing of premises, but it proceeds from his or her legitimate expectation of privacy in a particular setting.

The reasonableness of a student's expectation of privacy depends not only on the setting but on the worth or significance of the privacy right. Accordingly, legal scholars repeatedly conclude that "what privacy legitimately protects will vary."[165] In this light, college and university administrators will likely argue that the expectation of privacy is necessarily reduced in a dormitory setting.[166] The student, however, will argue that his or her privacy right remains complete while living on campus. If courts accept these arguments at face value, the college or university mandate to maintain a favorable learning environment automatically trumps a student's desire for freedom from intrusion. If the analysis goes only far enough to consider safety considerations without a more thorough reflection on what is at the heart of the Fourth Amendment, then what constitutes a reasonable search is inevitably more inclusive. Thus, because society values safety as well as opportunities for education, college and university campuses should reduce a

159. *Id.* at 1521.

160. *See* Katz v. United States, 389 U.S. 347, 361 (1967).

161. 362 U.S. 257 (1960).

162. *Id*. at 261.

163. *Id.* at 262.

164. *Id.* at 266.

165. *See* FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM 113 (1992).

166. *See, e.g.,* State v. Hunter, 831 P.2d 1033, 1037 (Utah Ct. App. 1992); People v. Superior Court, 49 Cal. Rptr. 3d at 848–49; People v. Kelly, 195 Cal.App.2d 669, 677 (Cal. Ct. App. 1961).

student's zone of privacy. However, this reduction appears reasonable only if society as a whole values the specific goals of colleges and universities over a desire for individual autonomy.

The social value of individual autonomy, including student autonomy, ultimately depends on the function of the autonomy, and, in this case, privacy. If privacy serves only to allow a student to conduct illegal activities or to prevent him or her from being captured by police, then the social value of privacy is low, even though the criminal student highly values it. However, privacy's purpose does not include concealment and suppression of illegality. For example, "one important function of privacy is to help maintain the integrity of different spheres of life. Privacy helps maintain both the integrity of intimate spheres as against more public spheres and the integrity of various public spheres in relation to one another."[167] Social organization fundamentally depends on "practices that presumptively preclude access" to other individuals' ideas, property, and living environments,[168] which are particularly apt in college and university situations. To conceptualize the idea of property, Charles Reich suggested that ownership forms "a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his action, and show his authority. Within, he is master, and the state must explain and justify any interference."[169] Radhika Rao, quoting this passage, said that Reich's explanation of property could extend to the right of privacy.[170] She contends that privacy connotes a decision-making power that allows its holder to navigate "the fragile boundary between individual autonomy and government authority."[171]

While many people value the right to privacy because it conveys a sense of autonomy and self-sovereignty against government intervention, privacy, in and of itself, is valuable because it empowers the individual to make personal, self-determining decisions. Because *Randolph v. Georgia* exposes the importance of carefully considering what is 'reasonable,' or widely accepted by most people, the implications of social customs and norms are significant. The subsequent section will examine various ways individuals understand their privacy and right to be free from unreasonable searches.

WHAT REALLY IS REASONABLE*?*

According to the Supreme Court, reasonableness, "the touchstone of the Fourth Amendment," requires "assessing, on the one hand, the degree to which it intrudes on an individual's privacy and, on the other, the degree to which it is needed for legitimate governmental interests.'"[172] *United States v. Knights* involved a drug

167. SCHOEMAN, *supra* note 165, at 157.

168. *Id.*

169. Charles Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

170. Radhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359, 421–26 (2000).

171. *Id.* at 426.

172. United States v. Knights, 534 U.S. 112, 118–19 (2001) (quoting Wyoming. v.

offender released on the condition that he submit to a search at any time with or without a warrant, arrest, or other reasonable cause.[173] A law enforcement agent accordingly searched the respondent's apartment based on reasonable suspicion and found incriminating materials later used to indict respondent for conspiracy to commit arson, possession of an unregistered destructive device, and felony possession of ammunition.[174] The trial court, which the Ninth Circuit affirmed, suppressed this evidence because the judge believed that the search was conducted for investigatory purposes, as opposed to probationary purposes.[175] Since nothing in respondent's probation agreement limited searches to those with probationary purposes, the Supreme Court granted certiorari to decide whether the Fourth Amendment itself imposed a limitation on the types of searches that could be performed.[176] The Court concluded that the search was "reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance."[177]

The Supreme Court explained probation as a form of criminal punishment which necessarily "curtails an offender's freedoms" such that he does not enjoy the same liberties as the general citizenry.[178] In other words, Knights' criminal status validated the warrantless search of his apartment. This argument suggested that criminal standing is a unique circumstance, unlike any other categorization, that allows the state to deprive an individual of specific freedoms.[179] The Supreme Court said that Knights' probationary status diminished his reasonable expectation of privacy because anyone on probation, or even previously punished through the criminal law, will more likely engage in criminal conduct than an ordinary member of the community.[180] Significantly, any other categorization, such as that of being a student living in a dormitory, would not impute such restrictions on liberty. The relevant circumstance that weighed in favor of allowing the warrantless search in *Knights* was the respondent's own past criminal actions that placed him on probation. Accordingly, the government never took affirmative steps to strip him of his full constitutional rights until he agreed to a probation agreement that purposefully reduced his expectation of privacy. Thus, the reasonableness test hinged on what the respondent himself did to cause a decreased realm of privacy and not on the authority of any other institution, including the government, to strip him of Fourth Amendment protections.

Knights applies to dormitory searches because it suggests that the power to reduce privacy rights does not stem from the broad power of an entity, whether it

Houghton, 526 U.S. 295, 300 (1999)).

173. *Id.* at 114.

174. *Id.* at 116.

175. *Id.*

176. *Id.* at 116–17.

177. *Id.* at 118 (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)).

178. *Id.* at 119.

179. *Id.*

180. *Id.* at 119–20, 121.

be a college, university, or the government, to establish rules that are more conducive to maintaining order and protecting the public. Instead, courts allow privacy infringements because of something that an individual did to acquire a state-sanctioned criminal status. The Fourth Amendment cannot be minimized merely because an authority believes such action would be reasonable. The reasonableness balancing test rather underscores a strong presumption in favor of an individual's reasonable expectation of privacy that cannot be haphazardly expanded and contracted.

When colleges and universities establish policies that affect students' expectations of privacy and then inform students of these policies, such notification does not automatically sanction their validity. For example, "if the Government announced that all telephone lines would henceforth be tapped, it is apparent that, nevertheless, the public would not lose its expectation of privacy in using the telephone."[181] Analogously, if a college or university administrator announced to students that he would authorize a police search of their dormitory rooms, the very existence of the announcement does not make the searches legitimate. The prior warning does not make the searches, even if mandatory for all students living in the dormitories, any more reasonable.[182] The Fourth Amendment serves to prevent blanket invasions of the privacy of individuals,[183] and, thus, some degree of specificity is desired when performing searches. An announced, widespread campus search contradicts the very basis of the Fourth Amendment and, as such, cannot be regarded as reasonable or circumstantially valid. Thus, all-encompassing, broadcast, and indiscriminate searches are not reasonable *per se*, and the existence of such factors rather point to unconstitutionality.

Furthermore, existing public policies show that the reasonableness of searches often depends on law enforcement officials possessing a concrete basis for subjecting a particular person to a search. For instance, the Supreme Court has long held that police may not stop and search every individual present at a certain location because of a broad suspicion that someone may possess illegal materials.[184] Additionally, even in regard to border patrols, searches performed by moving patrols without tangible evidence of wrongdoing are unreasonable.[185] Indeed in *United States v. Knights*, the Supreme Court noted that the existence of a probation condition authorizing law enforcement officials to perform warrantless searches did not completely eliminate the individual's reasonable expectation of privacy "without any individualized suspicion" on the part of the law enforcement.[186] In other words, the Fourth Amendment requires some distinct

181. Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223, 234 (D. Tex. 1980).

182. *See id.*

183. *See* David v. Mississippi., 394 U.S. 721, 726 (1969).

184. *See* Carroll v. United States, 267 U.S. 132, 153–54 (1925).

185. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The Court did allow brief stops of all vehicles passing through border checkpoints. This allowance was only because the Court found the need compelling, the intrusion minimal, and no other realistic way of inspection. United States v. Martinez-Fuerte, 428 U.S. 543 (1975).

186. *See* United States v. Knights, 534 U.S. 112, 120 n.6 (2001).

form of suspicion for a warrantless and nonconsensual search to be valid, even if the subject of the search is on probation. The emphasis on material suspicion informs the principle that warrantless searches are unreasonable *per se*, absent few well recognized exceptions. Thus, for a search to be deemed reasonable it must have an adequate foundation; law enforcement's suspicion must be reasonable and adequate if the Fourth Amendment constitutes a substantive safeguard on privacy rights.

In light of these considerations, two express guidelines for colleges and universities to ensure the preservation of students' Fourth Amendment rights while accounting for the unique obligations and conditions of even a large, multifaceted learning institution should be implemented. First, college and university officials may perform dormitory examinations and searches explicitly for maintenance and safety. The critical factor in this recommendation is that the un-consented entry to the room be perceptibly premised on a matter involving room upkeep, repair, and avoidance of physical risks and hazards. For example, maintenance workers may enter in order to remove a forbidden animal or other objectionable property such as candles and electronic appliances or to repair broken window screens or other school property. Additionally, college and university officials possess the right to inspect rooms for violations of institutional rules designed to ensure adequate physical safety. This right of entry, however, does not translate into an ability of the college or university to consent to police searches on the part of the student.

College and university administrators enjoy limited access to students' dormitory rooms because such access does not immediately challenge students' reasonable expectations of privacy. A student living on college or university property likely assumes that the housing conditions will be in good repair and adequately suited to safety and maintenance needs.[187] This expectation parallels what an ordinary tenant would expect from a landlord: the assurance of safe conditions.[188] Due to the large number of student tenants and the relatively small spaces allotted to each, the need for occasional safety inspections as well as regular maintenance increases. Furthermore, the prospects of tort liability are high for colleges and universities.[189] Such legal responsibilities further the argument for

187. *See* Bell v. N.Y. State Dormitory Auth., 584 N.Y.S.2d 3 (N.Y.Sup.Ct. 1992). *See also* Kelly W. Bhirdo, Note, *The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students*, 16 J.C. & U.L. 119, 123–30 (1989).

188. "The bare minimum standard for an implied warranty of habitability should require a landlord to provide a reasonably safe premises at the inception of a lease, and to exercise reasonable care to repair dangerous defective conditions *upon notice of their existence by the tenant*." Dulin v. Sowell, 919 So.2d 1010, 1012 (Miss.App. Ct. 2005) (quoting, O'Cain v. Harvey Freeman and Sons, Inc., 603 So.2d 824, 833 (Miss. 1991)).

189. *See* Grover v. San Mateo Junior Coll. Dist. 303 P.2d 602 (Cal.App. 1956) (involving a junior college student injured in airplane crash in connection with course in aeronautics); Nero v. Kansas State Univ., 861 P.2d 768 (Kan. 1993) (holding a university liable for a student's sexual assault); Lloyd v. Alpha Phi Alpha Fraternity, 1999 WL 47153 (N.D.N.Y. 1999) (holding university responsible for fraternity hazing); Waugh v. Univ. of Hawaii, 621 P.2d 957 (Haw. Ct. App. 1980) (holding the university liable for damage to professor's research materials); Morrison v. Kappa Alpha PSI Fraternity, 738 So. 2d 1105 (La. Ct. App. 2d Cir. 1999) (holding a state university liable for hazing of student); Knoll v. Bd. of Regents of Univ. of Nebraska, 601

allowing nonconsensual searches, inspections, or other entries of dormitory rooms. Constitutional concerns limit the maintenance privilege so that college and university officials may not veil disciplinary or otherwise punitive reasons for entry by incorrectly identifying its true reasons as "health and safety concerns." Therefore, *Piazzola v. Watkins* accurately likened a dormitory room to an apartment or hotel room and said that "[a]s in most rental situations, the lessor, [the college or university], reserved the right to check the room for damages, wear and unauthorized appliances. Such right of the lessor, however, does not mean [the student] was not entitled to have a 'reasonable expectation of freedom from governmental intrusion.'"[190] Accordingly, the appropriate test for college and university officers determining whether to proceed with a nonconsensual search of a room mimics that of a hotel clerk or apartment landlord while considering the uniqueness of a college or university environment. The relevant questions involve whether the planned entry truly functions to correct maintenance or safety problems and if such access would generally be accepted in other rental situations.

Stemming from this limited allowance, the second guideline maintains that if a college or university official uncovers, or even suspects, illegal or otherwise incriminating material in the dormitory room, the college or university does *not* have the authority to invoke law enforcement to perform their own search to seize contraband. The college or university should not waive the student's ability to refuse the search, nor should it input its consent in the place of the student. Courts emphasize that voluntary consent must be proven by clear and positive evidence.[191] Moreover, they traditionally agree that if doubt surrounds the validity of a warrantless search, officers should resolve such doubt in favor of the petitioner whose property was searched.[192] As such, courts should accept student objections to warrantless searches and deny the notion that colleges and universities have the capacity to consent to a search of the student's property and dormitory room. Such deference holds college and university officials as well as law enforcement officers accountable for their actions while sustaining constitutional safeguards. Nothing in a college or university's broad supervisory powers should be construed to give consent to a search whose primary purpose is a criminal investigation.

College and university officials who suspect the existence of or even come across criminal contraband should inform the proper police authorities, who then should use the college or university official's testimony to obtain a lawful search warrant. To do otherwise, especially over the student's explicit objection, would epitomize blunt disregard for the Fourth Amendment's protections. As repeatedly emphasized by the Supreme Court, "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable

N.W.2d 757, (Neb. 1999) (holding that the university could have foreseen student fraternity hazing); Heminway v. State University of New York, 665 N.Y.S.2d 493 (N.Y. Sup. Ct. 1997) (saying that a student injured while sledding on school property could sue the state university).

190. Piazzola v. Watkins, 442 F.2d 284, 288 (5th Cir. 1971) (quoting Commonwealth v. McCloskey, 272 A.2d 271, 273 (1970)).

191. United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962).

192. Miller v. State, 13 So.2d 21, 25 (Fla. 1962).

under the Fourth Amendment."[193] Failing to validly secure a warrant "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the search, [which is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."[194] Colleges and universities should affirm the importance of obeying judicial mandates, particularly in acquiring magistrate approval of a search, because it prevents an over-expansion of their supervisory and authoritative powers.

CONCLUSION

If public colleges and universities only allow warrantless searches consistent with regulatory maintenance, extreme emergency conditions, or explicit student consent, then they will likely maintain a favorable learning environment while complying with Fourth Amendment imperatives. Courts should not construe the Constitution to safeguard the reasonable privacy rights of all citizens except students. While students may sign housing contracts, these contracts cannot, and should not, expect students to waive their constitutional entitlement to privacy. Search and seizure jurisprudence is reconcilable with the needs of college and university security. A legitimate judicial warrant facilitates an effective and lawful police search even in a college or university setting, without intruding upon the reasonable expectation of privacy embodied in the Fourth Amendment.

193. Katz v. United States, 389 U.S. 347, 357 (1967).

194. *Id.* at 358.