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I. INTRODUCTION

The student revolt of the 1960's was instrumental in the change of the relationship between students and institutions of higher education. The traditional institutional philosophy of *in loco parentis* was transformed into the reality that students are individuals who possess constitutional rights that are to be respected. While the justification for the development of student rights is found in the constitutional areas of due process, equal protection, and the freedoms of speech, assembly and religion, the recognition of student rights in the area of search and seizure has been minimal. This article will explore the development of the law relating to search and seizure and its effect on students in higher education. It is hoped that the article will be of assistance to practicing college and university counsel, administrators and trustees. With that emphasis in mind, it will attempt to show the administrative implications for university officials associated with this legal issue.

II. SEARCH AND SEIZURE: CONSTITUTIONAL JUSTIFICATIONS

The law of search and seizure is grounded in the fourth amendment to the United States Constitution.[1] This provision is the basis of all the statutory and constitutional rules that have been developed in this area. The constitutional protection afforded does not forbid all searches and seizures, but only those which are unreasonable.[2]

In the event that there is a violation of fourth amendment rights, two sanctions are available. The first possible sanction is that illegally seized evidence may be excluded from the subsequent

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1. U.S. CONST. amend. IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Terry v. Ohio, 392 U.S. 1 (1968); Elkins v. United States, 364 U.S. 206 (1960).

criminal trial.[3] The second is that a civil action for damages may be instituted against the offending officer by the person who suffered the unreasonable search and seizure.[4]

With few exceptions, which will be discussed, the courts have preferred that searches be conducted with a search warrant.[5] The mechanics of obtaining a search warrant are set forth in the rules of criminal procedure in each jurisdiction. A search warrant is usually obtained by a prosecuting attorney or law enforcement officer. The warrant is issued by a judge of a court of record where the person or property to be searched and seized is located. The person or property must be within the court's jurisdiction.

The rules of criminal procedure usually specify the types of property that may be searched and seized; for example, contraband or other items criminally possessed, or property considered the "fruits" or results of a crime. Before a search warrant is issued, an affidavit sworn to before a judge of a court of record must be presented. The affidavit is specific in that it must name or describe the person to be searched, name or describe the property to be searched and seized, and state substantially the offense related to the request for the warrant. In addition, it must state the factual basis underlying the affiant's belief that such property is located where the affidavit describes. The warrant must be executed by a timely search and should usually be made in the daytime. Once the warrant is executed, the officer must give a receipt for the property seized and file an inventory with the court. The affidavit's sufficiency has been the focus of most cases involving search warrants.

It is fundamental that warrants authorizing the search of private residences may not be issued except upon probable cause based upon the facts presented to the judge or magistrate, under oath or affirmation.[6] The requirement of probable cause is satisfied where the issuing officer has knowledge, derived from a reasonably trustworthy source, of facts and circumstances which in themselves would cause a reasonable man to believe that there is a factual basis for the information furnished.[7] The warrant requirement is designed

3. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

4. 42 U.S.C. § 1983 (1970); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

5. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Beck v. Ohio, 379 U.S. 89 (1964). *See also* Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967) (requiring warrants for administrative searches).

6. U.S. CONST. amend. IV; Nathanson v. United States, 290 U.S. 41 (1933).

7. *See* Draper v. United States, 358 U.S. 307 (1959); Carroll v. United States, 267 U.S. 132 (1925).

to protect the individual's privacy from police intrusion unless, in the independent judgment of a neutral and detached magistrate, there is sufficient information indicating the individual's involvement in criminal activity. Where the affidavit is based in whole or in part on hearsay, there must also be a substantial basis presented for believing the source of the hearsay to be credible; conclusions on behalf of the officers are not acceptable.[8]

III. WARRANTLESS SEARCHES AND THE FOURTH AMENDMENT

The general rule is that all warrantless searches are unreasonable unless they are justified under one of the recognized exceptions to the constitutional requirements of the fourth amendment.[9] In some limited instances involving exigent circumstances, probable cause has been held sufficient to justify a warrantless search;[10] *i.e.*, a search that is incident to a lawful arrest. However, if there is an absence of exigent circumstances or a recognized exception to the general rule, probable cause must be determined by a detached, neutral magistrate, not the police officer on the beat.[11]

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8. The test governing hearsay was enunciated in Aguilar v. Texas, 378 U.S. 108 (1964), where a two-pronged approach was established. The first prong, also known as the veracity test, concerns the trustworthiness of the informant and requires the affiant to set forth the reasons why the informant was credible. The second prong is the basis of knowledge test where the affiant must delineate the facts and circumstances relied upon by the informant in reaching his conclusions. Also, in Spinelli v. United States, 393 U.S. 410 (1969) where the *Aguilar* formula was applied, additional methods of satisfying the test were suggested, e.g., by using independent information, such as the previous accuracy of the informant. *See also* United States v. Harris, 403 U.S. 573 (1971); Jones v. United States, 362 U.S. 257 (1960); United States v. Ventresca, 380 U.S. 102 (1965).

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

10. Chambers v. Maroney, 399 U.S. 42 (1970); Warden v. Hayden, 387 U.S. 294 (1967); Vale v. Louisiana, 399 U.S. 30 (1970) (if search of house is to be upheld as incident to arrest, arrest must take place inside house).

11. Terry v. Ohio, 392 U.S. 1 (1968); Johnson v. United States, 333 U.S. 10 (1948). There is authority holding that a search of the defendant's person may be incident to an arrest although the arrest is made after the search, rather than before, if at the time of the search there was probable cause to arrest. *See* United States v. Riggs, 474 F.2d 699 (2nd Cir.), *cert. denied*, 414 U.S. 820 (1973) (police could validly search camera case within reach of defendant when they had reasonable suspicion defendant might be armed and probable cause to arrest even though arrest had not yet been made); United States v. Brown, 463 F.2d 949 (D.C. Cir. 1972) (even though suspect has not formally been placed under arrest, a search of his person can be justified as incident to arrest, if arrest is made immediately after search, and if at time of search there was probable cause to arrest); United States v. Thomas, 432 F.2d 120 (9th Cir.) *cert. denied*, 400 U.S. 1022 (1970) (fact that defendant was searched immediately before, rather than after arrest, does not invalidate search where fruits of search were not necessary to establish probable cause for arrest); Cupp v. Murphy, 412 U.S. 291 (1973) (probable cause to believe defendant had committed strangulation murder under investigation, even though defendant had not been arrested and defendant refused police request to

The warrantless search exceptions are founded on the rationale that a warrant would be impossible to obtain in order to seize weapons or other things used to assault an officer, or to effect an escape or prevent destruction of evidence. The justifications fail where the search that is conducted is remote in time or place from the arrest.[12] The warrantless search privilege ceases if the person searched is not arrested, for the reasons justifying the warrantless search are wholly dependent upon the arrest. Without a valid arrest there can be no valid search without a warrant.[13] Therefore, the courts cannot lightly excuse the failure to obtain a search warrant.[14] Exceptions stem from exigencies of law enforcement or if compliance with the search warrant rule would be a "mere ritual."[15] The burden is on the police to justify the warrantless search.[16] Contraband seized in illegal searches is usually suppressed because it is considered "fruit from a poisonous tree."[17]

The plain view exception to the search warrant requirement means that a police officer may seize any contraband which he plainly observed, provided he was in a lawful place to observe the evidence.[18] For this doctrine to apply, the police must be searching under another exception to the warrant requirement or with a search warrant, and the subsequent discovery of contraband must be inadvertent. If the police knew in advance that contraband would be

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take sample of scrapings from fingernails, were circumstances justifying police, under protest and without warrant, to proceed to take scraping sample). However, a warrantless search which is incidental to arrest, whether made before or after arrest, must be contemporaneous with the arrest, and confined to the immediate vicinity of the arrest. *See* Stoner v. California, 376 U.S. 483 (1964), *following* Agnello v. United States, 269 U.S. 20 (1925). As to incidental searches, *see* Preston v. United States, 376 U.S. 364 (1964) (justifying contemporaneous searches by the need to seize weapons and other things which might be used to assault on officer or effect escape, as well as by the need to prevent destruction of evidence of the crime).

12. Agnello v. United States, 269 U.S. 20 (1925); Coolidge v. New Hampshire 403 U.S. 443 (1971); *but see* United States v. Edwards, 415 U.S. 800 (1974) (once lawfully arrested and in custody, effects in accused's possession at place of detention that were subject to search at time and place of arrest may lawfully be searched and seized without warrant even after a substantial time lapse following the arrest and later administrative processing).

13. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973) (fact that search is custodial gives rise to the authority to search); Beck v. Ohio, 379 U.S. 89 (1964) (constitutional validity of search depends on constitutional validity of arrest).

14. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971), and Chimel v. California, 395 U.S. 752, *rehearing denied*, 396 U.S. 869 (1969).

15. People v. Abruzzi, 52 App. Div. 2d 499, 501, 385 N.Y.S. 2d 94, 96 (Sup. Ct. App. Div. 1976), *quoting* Ker v. California, 374 U.S. 23, 38-41 (1963).

16. United States v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. United States, 335 U.S. 451 (1948).

17. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

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

found, the plain view doctrine does not apply.[19]

A person affected by a search by the police may waive his fourth amendment rights and give consent to a search. The consent must be free, voluntary and not coerced.[20] A fraudulent representation of a coercive act, express or implied, will make any consent invalid.[21]

The United States Supreme Court has held that there are limited circumstances in which a police officer may stop a person on the street and conduct a limited "pat-down" search of the outer clothing to determine whether or not the suspect is carrying a weapon.[22] Before that procedure can be implemented, the officer must have a reasonable belief that the person under investigation is armed and presently dangerous. Hearsay can be the basis of the determination.[23]

The development of the law of search and seizure concerning what is expected of law enforcement authorities when the adult population is involved is equally relevant when the exploration of the fourth amendment rights of students attending institutions of higher education is addressed. Thus, the ramifications of applying the exceptions to the warrant requirement in an institutional setting require further scrutiny.

IV. Search & Seizure: The College or University Student

The warrantless search can jeopardize the entire future of a student studying in an institution of higher education. The evidence seized in such a search can be used against the student in two possible ways: for college or university disciplinary purposes or for the purpose of criminal or juvenile prosecution. Besides the obvious dormitory, library or bookstore search, there are several other physical areas that are relevant to the problem of college searches and seizures. Problems in these other areas concern students who do not live or reside in a dormitory or on campus, and students who attend functions at a sports stadium or fieldhouse.[24]

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19. *Id.* See also Ohio Municipal League, Municipal Prosecutors Training 15 (1976).
20. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
21. Bumper v. North Carolina, 391 U.S. 543 (1968).
22. Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968).
23. Adams v. Williams, 407 U.S. 143 (1972).
24. Beyond the scope of this article are searches occuring in the elementary and secondary schools. These are treated as a separate category. When applying the Constitution to the public school setting, courts are confronted by unique governmental and personal interests in an unusual environment. A rule regulating student conduct may be unreasonable in the college or university setting but reasonable in the public school setting. There is also the traditional distinction between children and adults. *See* Ginsberg v. New York, 390 U.S. 629

A. *Warrantless Searches on Campus*

It appears that earlier cases involving student areas, which included dormitory rooms and lockers, interpreted the Constitution as placing few restrictions on a school's ability to inspect them.[25] However, the thrust of the fourth amendment is to maintain inviolate the privacy and sanctity of the places an individual uses and upon which the individual relies as being limited to his use.[26] The fact that a dormitory room is owned by a state university should not

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(1968); *In re* Gault, 387 U.S. 1 (1967); Prince v. Massachusetts, 321 U.S. 158 (1944). The public school student is less mature, is required to attend school because of compulsory education laws, has little choice regarding curriculum or teachers, and is subject to the doctrine of *in loco parentis*. The daily decisions by school officials to search a student's locker, desk, person, purse or automobile occur more frequently than not. The school official stands *in loco parentis* to the student and therefore the official is given broad powers and discretion regarding searches. The searches are usually upheld whether the fruits of the search are introduced at a disciplinary, juvenile or criminal proceeding, and even if the search is outside the school premises. *See* Overton v. Rieger, 311 F. Supp. 1035 (S.D.N.Y. 1970); *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (Ct. App. 1969) (leading case holding that school officials act as private individuals, not as state officials, in ordering search); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971) (holding search under doctrine of *in loco parentis* reasonable as weighed against the fourth amendment); State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970) (school official permitted to authorize search of locker without students' consent); People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969); People v. Jackson, 65 Misc.2d 909, 319 N.Y.S.2d 731 (App. Term 1971), *aff'd* 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972) (search conducted off school premises upheld); Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970) (principal may, while acting *in loco parentis*, demand that student disclose contents of his pockets, and any contraband seized thereby may be used in a delinquency proceeding). The law governing public school searches and seizures is still confused.

Most warrantless searches are justified by exigent circumstances inherent in the school atmosphere and enhanced by the doctrine of *in loco parentis*. This combination usually allows the search, and the evidence is introduced with motions to suppress usually failing. *See, New Directions in School Law*, NOLPE SCHOOL L.J. (1976); Phay and Rogister, *Searches of Students and the Fourth Amendment*, 5 J. OF LAW AND EDUC. 57 (1976); Note, *Public School Searches and Seizures*, 45 FORD. L. REV. 202 (1976). *But see* State v. Mora, 307 So.2d 317 (La. 1975) (according full fourth amendment protection to student as against school official). *See also* Note, *Search and Seizure in the Public Schools*, 36 LA. L. REV. 1067 (1976) (discussing *Mora*).

25. *See* Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968) (state officer entered dormitory room with the permission of the dean but without warrant or consent of the student and found marijuana); People v. Kelly, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (Ct. App. 1961) (police entering dormitory room with permission of college to enforce discipline); People v. Overton, 20 N.Y.2d 729, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *rehearing denied*, 393 U.S. 992 (1968) (school official permitting police to search a junior high school locker); Note, *College Searches and Seizures: Privacy and Due Process Problems on Campus*, 3 GA. L. REV. 426 (1969); Comment, *Public Universities and Due Process of Law: Students' Protection Against Unreasonable Search and Seizure*, 17 U. KAN. L. REV. 512 (1969).

26. *See* Mapp v. Ohio, 367 U.S. 643 (1961) and Camara v. Municipal Court, 387 U.S. 523 (1967).

preclude the application of the fourth amendment.[27] The right of privacy and the protection afforded that right is of great concern to the student and his family, even if the invasion is couched in an *in loco parentis* philosophy.[28] The *in loco parentis* theory is just one of several theories advanced against the student's reasonable expectation of privacy.[29] As was pointed out in *People v. Cohen*,[30] it seems illogical that a student residing in a dormitory should have no reasonable expectation of privacy and in addition waive his fourth amendment rights, while his fellow student residing off-campus is protected.

As indicated in the first part of this article, the general rule regarding search and seizure requires the obtaining of a search warrant although there are exceptions to this general rule. Many dormitory search and seizure cases have held that a search warrant was not required because of the necessity of the situation. This was the principle in the leading case of *Moore v. Student Affairs Committee*,[31] where the court held that the warrantless search was necessary to maintain discipline.

The facts of the *Moore* case are not atypical. Mr. Moore was a student at Troy State University who resided in a dormitory. His room was searched by the local police who had the consent of the university administration, but not the consent of Mr. Moore. The implied consent by Moore to the search was based on a school regulation and resulted in the discovery and seizure of marijuana. The

27. Van Alystyne, *The Student as University Resident*, 45 DENVER L.J. 582 (1968).

28. *See* Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643 (1966).

29. *See* Bacigal, *Warrantless Search of a College Dormitory*, 7 AKRON L. REV. 422 (1974). This author discusses the following theories among others: absence of property rights (student should still have the right of privacy accorded an ordinary lodger); consent-waiver (was there consent to authority to waive, i.e., rules and regulations and was the consent voluntary); *in loco parentis* (this is faulty because not only is university discipline of importance, but a secondary issue of criminal or juvenile prosecution may be a negative force that affects the student for the rest of his life); and the public interest (it is in the public interest to allow warrantless searches). The author arrives at the conclusion that there is a reasonable expectation for privacy for a dormitory student attending a public post-secondary institution. He further explains procedures to ensure that privacy.

30. 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1968) (involving a private college).

31. 284 F. Supp. 725 (M.D. Ala. 1968). Students, it is argued, agree to abide by rules and regulations of the college or university. It is not, therefore, inconsistent with the school's welfare to cause a warrantless search. This issue, "by whom?" is not totally addressed. *See also* Schmerber v. California, 284 U.S. 757 (1966) and Carroll v. United States, 267 U.S. 132 (1925).

evidence was introduced at a disciplinary hearing which resulted in Moore's indefinite suspension from the university. Moore sued the university for reinstatement alleging that the evidence obtained was in violation of the fourth amendment. The court denied the claim reasoning that the rule allowing the action by the college authorities was necessary as an aid in maintaining discipline in an educational environment. In light of that rationale the search is presumed reasonable even though it may infringe on the student's fourth amendment rights. The right of the college administration to exercise its authority must be based on a reasonable belief that the student was using the dormitory room for an illegal purpose that was interfering with the maintenance of institutional discipline. This lower standard of belief, as contrasted with the probable cause discussed initially in this article, was justified because of the special necessities of the college-student relationship. In the *Moore* case, two reliable informants provided the necessary reasonable belief to conduct the search of the dormitory room. In contrast, it is interesting to note *Piazzola v. Watkins* which also emanated from actions by Troy State administrators although arriving at a contrary result.[32]

The case of *People v. Cohen*[33] also provides an interesting contrast to the *Moore* case. On the basis of information supplied by an unidentified informant, and the presence of an odor in the hallway similar to marijuana, the local police and college authorities, without a search warrant, entered the unoccupied dormitory room of

32. Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971). This case also involved Troy State University where Piazzola and another Troy State student were convicted of possession of marijuana after law enforcement officers searched their dormitory rooms without their consent. Piazzola's room was searched twice. The second search, at which time the incriminating evidence was found, was conducted by city and state police officers. No university officials were present at the second search. The court ruled in favor of the students holding that the students had a reasonable expectation of privacy in a dormitory room even if the college regulation acted as an implied consent by the students to the search. Additionally, the consent to the search was given to the university officials and not the police officials. The university officials could not share or delegate that consent. Note also that the result was a criminal prosecution, not a university disciplinary proceeding. *See also* United States v. Coles, 302 F. Supp. 99 (N.D. Me. 1969) (warrantless search allowed by administrative officer to maintain proper standards and discipline held to be a reasonable search and seizure and therefore not violative of the fourth amendment); Keene v. Rodgers, 316 F. Supp. 217 (N.D. Me. 1970) (authorities at Maritime Academy ordered opening of locked automobile for purpose of determining whether disciplinary rules had been breached found to be a reasonable exercise of supervisory authority to maintain order and discipline among the cadets and did not violate student's fourth amendment rights). This case relied upon the authority of the *Coles* case.

33. 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1st Dist. 1968).

student Cohen. The authorities proceeded to search the room and discovered marijuana. In a criminal proceeding brought against the student the defense attorney successfully moved to exclude the evidence by means of a motion to suppress. The court ruled that a suspicion is not a substitute for probable cause that a crime is being committed. Absent probable cause, neither the search nor the evidence it yields can be sustained. The court reasoned that the dormitory room is not open for entry at all times for all purposes. It is interesting that the court recognized the adult status of a college student, and the fact that the room is indeed the adult student's home. The *Cohen* case showed that where the search cannot be justified by school officials on the grounds of maintaining discipline over young students, it will not succeed. The court also stated that even if implied consent is given to school authorities to search dormitory rooms, that consent cannot be delegated to the police. While the facts are somewhat different than *Moore*, it is curious that *Moore* was not cited in the *Cohen* case.[34] It may be because *Moore* involved a state supported institution while the *Cohen* case involved a private college.

Private colleges and universities may also be held to the limitations imposed upon public colleges and universities through the doctrine of "state action."[35] This doctrine is based on the idea that

34. *See* D. P. YOUNG & D. D. GEHRING, THE COLLEGE STUDENT AND THE COURTS (1973). *See also* Bible, *The College Dormitory Student and the Fourth Amendment—A Sham or a Safeguard?*, 4 U. OF S.F.L. REV. 49 (1969), (relating to the student locked into an adhesion contract).

35. Generally, private colleges and universities are distinguished by courts from public colleges and universities on the basis of a contract theory. The student, it is theorized, has more of a choice in selecting a private college to attend than he or she would with a public college. Therefore, when the student contracts to enroll in the private college, there is an implied agreement to submit to restrictions on his constitutional rights. *See* Kwiatkowski v. Ithaca College, 82 Misc. 2d 43, 368 N.Y.S.2d 973 (1975), where the court found that even if the contract standard is applied when reviewing private educational institutions' disciplinary proceedings it is imperative that procedures be fair and reasonable; Miller v. Long Island Univ., 85 Misc. 2d 393, 380 N.Y.S.2d 917 (1976).

Students may use 42 U.S.C. § 1983 (1970) to institute action against colleges, universities and administrators for expulsion or suspension in violation of due process rights or institutional action that was in retaliation for the exercise of first amendment rights. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974); Comment, *Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards*, 56 CORNELL L. REV. 507 (1971) (how to find state action regarding private colleges through funding and state contracts); Hendrickson, *"State Action" and Private Higher Education*, 2 J. OF LAW AND EDUC. 53 (1973); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974).

the state is so involved with the operation of the private institution that the institution should be subject to the same constitutional requirements made applicable to the state by the fourteenth amendment. As it pertains to private post-secondary institutions, this state involvement could be based on financial aid, state agents acting as administrators, state regulation of the college or university, or a combination of these and other factors.

While courts have held on the basis of maintaining standards of conduct that there is implied consent by a student allowing college officials to conduct a warrantless search where reasonable, it must be emphasized that this authority cannot be delegated to law enforcement officials. *Piazzola*[36] appears to be the leading case for this rule, for both private and public post-secondary institutions, especially if a criminal prosecution motivates the search rather than a college rule or regulation.[37]

Thus it is evident that the typical dormitory search is conducted without a warrant by a college official who may derive his authority from various sources. The authority to search may arise through the implied consent or waiver by the student based on rules, regulations, or a previous contract. The implied consent or waiver of student rights allowing school officials to proceed with the search and obtain the evidence is part of the standard enforcement of educational activities of the institution in these instances.

However, there are also occasions where confusion has developed over the issue of express consent, that is, whether or not the student expressly consented to the warrantless search of the dormitory room. The case of *State v. Wingerd* is illustrative of this issue.[38] A resident advisor in a private college was notified that drugs were being sold in a particular room. The advisor requested the student-resident to respond as to whether or not he possessed drugs, and if he did, whether the student would give the resident advisor the

36. Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

37. *See* Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970) (police must identify themselves and have search warrant unless there are exigent circumstances). *See also* People v. Boettner, 80 Misc.2d 3, 362 N.Y.S.2d 365 (1974). Although police advised private college official of possible marijuana possession by student and such was found by college official and turned over to the police, the court found that the official acted as private person. Therefore the official did not violate the fourth amendment when he turned the marijuana over to the police even though the action resulted in a criminal conviction for the student.

38. 40 Ohio App. 2d 236, 318 N.E.2d 866 (1974). Note the dissenting opinion for nexus that can be used as to local or campus police to conclude that state action is involved.

drugs. The student complied with the request and was convicted in a subsequent criminal proceeding. The court held that the student freely and intelligently agreed to the search of the dorm room. It also noted that the dorm advisor was a private person and was not held accountable to fourth amendment restraints.

B. In Plain View

State v. Kappes[39] represents another situation that arises in dormitory warrantless search situations when evidence is seized that was in the "plain view" of the college investigator. For example, two student advisors were making routine inspections of dormitory rooms as provided in campus regulations. Without disturbing anything in the room, they observed a quantity of marijuana. The police were called and the student-occupant was arrested and subsequently convicted of possession of marijuana. The court affirmed the notion that a private person is not restrained by the fourth amendment and indicated that the routine inspection was not a governmental intrusion. Once lawfully inside the room, the advisors were justified in allowing entry to the police and the plain view of the marijuana did not abridge a fourth amendment protection. The court further stated that even if the entry was a governmental intrusion, it was reasonable because it insured that the room was to be maintained in accordance with university standards of health and safety.

A variation of the "plain view" doctrine can be found in inventory searches illustrated by *State v. Johnson.*[40] In that case a student left her purse in a classroom. It was found by a custodian who turned it over to the campus police. The police conducted an inventory search and found amphetamines in an inner compartment. The student was subsequently convicted of a crime. The court held that the search was made in good faith and was reasonable. The requirements of a general inventory search made by the police of property legitimately in their possession were followed. The requirements cited by the court were: lawful custody by the police; good faith action on behalf of the police in seeking an inventory of the contents; and, not using that procedure as a subterfuge for a warrantless search. Such a search is not limited to articles in plain view

39. 26 Ariz. App. 567, 550 P.2d 121 (1976). *See also* Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970) ("plain view" doctrine applies to warrantless search of a van on campus. An extensive review of search and siezure cases is accomplished in this case.).

40. 23 Ariz. App. 64, 530 P.2d 910 (1975).

because the rationale for conducting the inventory search is to safeguard valuables which are most likely to be out of plain view.[41]

C. *The Search Warrant*

Some searches may be initiated with search warrants but wind up in the category of warrantless searches. In *City of Athens v. Wolf*,[42] while executing a search warrant in a college dormitory room, a police officer walked through a common bathroom into another room that the warrant did not cover. Upon entering he observed a student attempting to conceal an object behind his back. The policeman ordered the student to turn over the object, which turned out to be marijuana. The appeals court held that the entrance by the policeman into the room constituted a warrantless search and seizure. The "plain view" doctrine did not apply because the policeman observed the actions only after he entered the room, and entry was not justified either for purposes of security or self-protection.

V. Future Considerations

While most searches, even warrantless searches, appear to be upheld by courts and the fruits of these searches usually not excluded from college or university hearings or criminal proceedings, a recent case, *Smyth v. Lobbers*,[43] may indicate a trend towards greater privacy for the student. The case seeks to ensure fourth amendment rights for college and university students similar to the protection afforded students in first, fifth, and fourteenth amendment cases. In *Smyth*, upon reasonable belief that illegal drugs were used in the state supported college student's dormitory room, campus administrators and city police officials conducted a warrantless search pursuant to a college regulation authorizing such entry upon "reasonable cause to believe" a violative act was occurring. The student, after a disciplinary hearing, was suspended from school for one term.

The issues presented to the court in an action to prevent the

41. *See also* People v. Lanthier, 5 Cal. 3d 751, 97 Cal. Rptr. 297, 488 P.2d 625 (1971) (after receiving complaints of noxious odors in library locker, security police opened locker and then opened briefcase containing marijuana found in locker. The court upheld the search under the emergency doctrine.); Collier v. Miller, 414 F. Supp. 1357 (S.D. Tex. 1976) (random searches of students entering stadium or pavillion to find cans, bottles and such held to be violative of fourth amendment rights).

42. 38 Ohio St. 2d 237, 313 N.E.2d 405 (1974). *See also* State v. Boudreaux, 304 So. 2d 343 (Sup.Ct.La.1974) (search warrant for dormitory room was validly issued based on affidavit containing information from a reliable informant).

43. 398 F. Supp. 777 (W.D. Mich. 1975).

implementation of the suspension by the college were traditional fourth amendment issues: (1) did the regulations constitute a waiver of fourth amendment protections or provide for the student's consent to a search by the college administration; (2) what standard of probable cause should have applied; (3) should the search have been made without a warrant; and, (4) if the search was illegal, should the evidence have been used at the disciplinary proceeding. The court concluded that adult college students had the same interest in the privacy of their rooms as any adult has an interest in the privacy of his home for fourth amendment purposes.[44] The court held the blanket authorization contained in the rental contract did not waive the student's fourth amendment rights. In addition, a warrantless search of the room must be based on probable cause, absent exigent circumstances. The court also held that the seized evidence should not have been introduced at the disciplinary hearing. Likewise, where an adult student is charged with an act that may also be in violation of a criminal statute, due process requires more than "substantial evidence" as a standard of proof. In deciding that the evidence should not have been used at the hearing, the court reasoned that the omission of illegally obtained evidence used in disciplinary hearings would have the same deterrent effect on college officials as it has on the police. The court reasoned that in this instance the officials focused the search on discovering criminal rather than disciplinary evidence. It was noted that the one term suspension was even harsher than a criminal conviction which would probably have only led to one year's probation. Thus, the importance of the *Smyth* holding is its movement away from the advocacy of warrantless searches upheld in *Moore*.

Whether the *Smyth* case is indicative of things to come will not be known for sometime, especially since the United States Supreme Court's recent decisions seem to relax the implementation of the exclusionary rule.[45] Whether or not this case is followed by later cases, it is a signal to administrators regarding their conduct toward the college student, especially the dormitory resident.

Administrators may not be able to rely on a college regulation

44. *See* Delgado, *College Searches and Seizures: Students, Privacy, and the Fourth Amendment*, 26 HASTINGS L.J. 57 (1974) (cannot compromise students' substantive rights).

45. *See* United States v. Janis, 428 U.S. 433 (1976) (fourth amendment's exclusionary rule does not forbid use in federal civil proceeding of evidence seized illegally, but in good faith, by police officer). See an excellent analysis as to the constricting of individual liberties regarding search and seizure in Miles, *The Ailing Fourth Amendment: A Suggested Cure*, 63 A.B.A.J. 365 (March, 1977).

for unsubstantiated warrantless searches and seizures. Mere suspicion of misconduct may indeed be replaced by the community standard of probable cause, especially in light of the many non-traditional students now on campus. If the search and seizure is not upheld by a court, then the institution and administration hold themselves out for possible tort action and civil liability, even if the search and seizure is used in an internal college disciplinary proceeding. Thus the traditional doctrine of *in loco parentis* has eroded even in this last area of maintaining internal disciplinary controls which had previously prevented students from enjoying their right to privacy under the fourth amendment.[46]

The student must be treated as an adult, a person whose right to privacy is not only respected, but guaranteed by the courts. This right of privacy must keep abreast with his other constitutional rights, such as due process. Without this right to fourth amendment protection, due process hearings will be hollow, in both public and private colleges and universities.[47]

VI. Administrative Implications

The policy regarding search and seizure procedures in a college or university, public or private, should be written in concise and unambiguous terms and applied equally to all students. The considerations outlined in the following discussion should be contained in that written policy.

The first consideration is that the fourth amendment requirements, which have been interpreted to allow warrantless searches and seizures, generally do not pertain to college administrators because they are considered private persons and not public law en-

46. *But see* Ekelund v. Secretary of Commerce, 418 F. Supp. 102 (E.D.N.Y. 1976) (where court held police had probable cause to go to Merchant Marine Academy and secure college officials' cooperation in search, concluding that midshipmen had little expectation of privacy).

47. *See* Delgado, *College Searches and Seizures: Students, Privacy and the Fourth Amendment*, 26 Hastings L.J. 57 (1974) (the author gives a fine background analysis of what he believes is a distortion of the landlord-tenant relationship and adhesion contracts, with a comprehensive guideline list for searches and seizures in university-owned housing at p.88); Note, *College Searches and Seizures: Privacy and Due Process Problems on Campus*, 3 Ga. L. Rev. 426 (1969) (questioning, in addition to the due process proceeding if illegally seized evidence is admitted, the warrantless search and seizure of a dormitory room in a private college). To substantiate the position that there really is "state action" involvement even at a private college the author cites Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965) and Guillory v. Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962) and Donoghoe, *Emerging First and Fourth Amendment Rights of the Student*, 1 J. L. Educ. 449 (1972) (where the author advocates students' input to privacy, a right that should not be left at the doorstep of the college, or waived as a condition for entrance).

forcement officials. Therefore, to allow a warrantless search and seizure to be conducted by a college official, it must be through the authority of a written college rule or regulation that promotes the safety, welfare, health or discipline of the institution and fosters the educational mission of the institution.

For example, routine inspections of rooms to ensure that they are clean and free of vermin would be allowed, while an inspection to search out criminal activity would be illegal. In the same vein, the authority for a warrantless search remains with the college official and cannot be delegated to most persons within the institution, especially the campus security force. It is an absolute necessity that the authority to search cannot be delegated to a non-university official, such as a member of the local police force.[48]

Caution must be exercised in any search of the student's room or possessions. Courts have held in many instances that the college official was also an agent of the state, and subject to fourth amendment restrictions. This caution extends to the area of civil liability for the conduct of an illegal search, even if there is a waiver in a contract (which may be an example of the classic adhesion contract) or a waiver executed as a condition of admission to the college.

In this day and age, colleges and universities, even if there is no staff attorney, should have access to counsel almost on a daily basis. Administrators should consult with an attorney about proposed rules and regulations, especially rules regarding search and seizure, to prevent abuses that end up in liability suits.

One problem that this article has not addressed is the situation in which the college or university administrator rents or leases facilities to non-university connected organizations. Examples are the renting of dormitory space, especially during the summer, to transient students who are attending a non-university sponsored activity; and, the leasing of a convention-hall type of structure to a private or public organization that is sponsoring a concert. Are the participants and spectators at these events guaranteed fourth amendment protection or are those rights waived upon entering the

48. *See also* Jones v. Wittenberg Univ., 534 F.2d 1203 (6th Cir. 1976). In this case, while security officers at a private college sought the administrator for a decision as to whether or not to arrest a student, the student escaped from their custody. The security officer fired two shots, one of which struck and killed the student. The court held that both the officer and the university were liable because the officer was acting within the scope of his employment. This case emphasizes another point relating to the hiring and training needs of a college or university security force.

campus? Probably the former, but each event and situation has to be assessed on its own merits. A consultation with legal counsel is essential prior to the signing of any contract. Preventive advice will minimize law suits or deter situations not anticipated by the insurance coverage of the institution.

VII. Conclusion

The development of student rights is predominantly found in the constitutional realms of due process, equal protection and the freedoms of speech, assembly and religion. While the rights regarding search and seizure are also grounded in the Constitution of the United States, they have been accorded minimal recognition.

The search of the person or property of a student, illegally conducted but condoned by the courts, and the seizure of evidence that could be used in civil, criminal, and administrative proceedings, can jeopardize his entire future. Earlier cases placed few restrictions on college and university officials relating to search and seizure. The rationalization of this attitude was couched in an *in loco parentis* philosophy which was advanced against the students' reasonable expectation of privacy. This philosophy gave rise to many instances of abusive warrantless searches conducted by these officials who were often accompanied by the local police.

Recent decisions indicate a curtailment of these activities. They have voided warrantless searches by school officials that were not justified on the ground of maintaining discipline. In addition, the decisions note that if implied consent to a search is given by a student to the college or university authorities, that consent cannot be delegated to the police.

The trend is towards greater privacy for the student by insuring fourth amendment rights which was the approach used to secure the rights of students in first, fifth, and fourteenth amendment cases. By excluding illegally obtained evidence from a disciplinary hearing, the desired deterrent effect on college and university administrators is analogous to the effect that excluded criminal evidence has had on the police. Thus a positive trend is emerging that will establish a more just and mature relationship between the institution and the student.