

NACUANOTE

TOPIC:

DORMITORY ROOM SEARCHES

INTRODUCTION:

College and university students have strong expectations of privacy about their dormitory rooms, which they perceive – and courts have come to recognize – as the student’s “home away from home.”¹ At the same time, however, colleges and universities frequently have legitimate reasons to enter and search a student’s room – for example, to confirm that students are complying with health and safety rules prohibiting pets, fire hazards, and the like, or when campus officials have credible information that a student possesses a weapon or is dealing drugs from the room in violation of college policy or the law.

This Note discusses the circumstances in which college and university employees lawfully can enter and search a student’s room. It addresses both private and public institutions, as well as searches conducted by campus police and non-police employees. Ultimately, nearly all of the legal questions relating to such searches revolve around two fundamental issues: whether the search involves some form of “state action,” such that Fourth Amendment considerations apply, and whether the student effectively has consented to the search – either directly at the time of the search, or indirectly through the school’s housing agreement or housing policies.

DISCUSSION:

I. Public Institutions

A. Constitutional constraints

Virtually all room searches at public institutions are governed by the Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment.² The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and provides that no search 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.” To be “reasonable” and thus lawful under the Fourth Amendment, a search must normally be conducted pursuant to a search warrant supported by probable cause. However, there are a few narrowly construed circumstances in which a search may reasonably proceed in the absence of a warrant, including:

- exigent circumstances, where an imminent risk of harm makes obtaining a warrant impossible;
- a search incident to a lawful arrest;

¹ *Morale v. Grigel*, 422 F. Supp. 988, 997 (D.N.H. 1976).

² In rare instances, usually involving searches by *student* resident advisors at a public university, courts have held that the search was conducted by “private persons” and thus Fourth Amendment constraints did not apply. See, e.g., *State v. Kappes*, 550 P.2d 121, 124 (Ariz. Ct. App. 1976).

- a “plain view” search conducted incident to a lawful entry of the premises; and
- a search conducted with the consent of a person who occupies the premises.³

Conducting a search in violation of a student’s Fourth Amendment rights can render public university employees, and potentially the university itself, liable for damages under 42 U.S.C. § 1983.⁴ In addition, any evidence of criminal activity obtained in the search likely will be suppressed in ensuing criminal proceedings, and any subsequent investigation of criminal activity may be tainted as “fruit of the poisonous tree.”⁵

Public institutions also may be subject to a state constitution’s analogous “search and seizure” provisions. These state constitutional provisions sometimes provide even greater protections against warrantless searches and seizures than does the Fourth Amendment.⁶

B. Student Housing Agreements

The exception to the warrant requirement that generally is most relevant in the college and university context is consent – sometimes, and ideally, in the form of a student’s express, in-person consent to a particular search, but more frequently in the form of a housing agreement or housing policy which states that college and university officials have the right to enter and search a student’s room for specific, institutionally vital purposes. Many courts and commentators refer to these searches as “health and safety” searches. We use in this Note the broader term, “institutional-purpose search,” because that term better encompasses many of the searches that college officials conduct – such as searches for violations of college drug, alcohol or weapons policies.

On the one hand, courts will not uphold provisions in housing agreements that require a student to broadly waive all of his or her Fourth Amendment rights as a condition of campus housing.⁷ On the other hand, courts almost uniformly uphold narrower provisions that grant the college or university the right to conduct institutional-purpose searches, provided the underlying purposes are reasonable.

The Massachusetts Supreme Judicial Court’s decision in *Commonwealth v. Neilson*,⁸ which is frequently cited in student room search decisions, nicely illustrates not only the general validity of such a housing agreement for Fourth Amendment purposes, but also the limits to which searches conducted under such policies may lawfully extend. *Neilson* involved the criminal prosecution of a student at Fitchburg State College for illegal possession, cultivation and distribution of marijuana. The student had signed the college’s standard residence hall contract, which provided that “[r]esidence life staff members will enter student rooms to inspect for hazards to health or personal safety.” After a maintenance worker heard a cat inside a dormitory suite containing four bedrooms, including this student’s, college officials posted notices on all four bedroom doors informing the students of a possible violation of the college’s health and

³ For a general overview of warrantless searches and seizures, see WAYNE R. LAFAVE, SEARCH & SEIZURE § 4.1(b) (4th ed. 2004).

⁴ See, e.g., *Smyth v. Lubbers*, 398 F. Supp. 777, 784 (W.D. Mich. 1975).

⁵ See LAFAVE, SEARCH & SEIZURE §§ 1.1, 1.6, 11.4.

⁶ See, e.g., *Commonwealth v. Catanzaro*, 803 N.E.2d 287, 294-95 (Mass. 2004).

⁷ *Piazzola v. Watkins*, 442 F.2d 284, 289 (5th Cir. 1971) (noting that blanket Fourth Amendment waivers represent an unconstitutional condition that cannot be enforced); *Devers v. Southern Univ.*, 712 So.2d 199, 206 (La. Ct. App. 1998) (holding that a state “cannot condition attendance at one of its schools on [a] student’s renunciation of his constitutional rights”).

⁸ 666 N.E.2d 984 (Mass. 1996).

safety policy, and alerting them that a “door to door check” would be conducted by 10 p.m. that night to ensure that the cat had been removed. When school officials returned to search the student’s bedroom later that night, the student was not present. After the officials entered and started searching the student’s bedroom, they noticed a light coming from his closet. Fearing a fire hazard, they opened the closet door and found two large marijuana plants along with lights, fertilizer, and other materials for cultivating and using marijuana. The officials notified campus police who, without obtaining a warrant, came to the student’s room, photographed the relevant evidence, and – with the help of the college officials – removed the evidence from the room.

The Supreme Judicial Court concluded that college officials did not violate the Fourth Amendment when they initially entered the room without a warrant, because that entry “was intended to enforce a legitimate health and safety rule that related to the college’s function as an educational institution.” Moreover, once the officials lawfully had entered the room and noticed a light coming from the closet, their concerns for possible fire hazards also permitted them to open the closet door without a warrant. However, the subsequent search of the student’s room by campus police *did* violate his Fourth Amendment rights, the court held, because that search was undertaken solely for law enforcement purposes and no exception to the Fourth Amendment’s warrant requirement applied: no exigent circumstances existed because college officials had found no cat to remove and no fire hazard to extinguish; the only express consent the student had given was for the university officials to conduct a health and safety inspection, not for the university’s state-sanctioned police officers to confiscate contraband or search for evidence of a crime; and the plain view doctrine did not apply because the police officers were not lawfully present in the room when they made their plain view observations. Thus, the court concluded, while college officials properly conducted their initial search, the campus police should have used the information obtained from that initial search to obtain a warrant before they searched the room and seized the relevant evidence.

The decision in *Neilson* of course is not directly controlling in other jurisdictions. But it has been widely cited elsewhere, and it illustrates a number of general points regarding dormitory searches on which most state and federal courts agree:

- Students enjoy a reasonable expectation of privacy in their dorm rooms, equivalent to that of renters or owners of homes or apartments.⁹
- The fact that a university enjoys landlord status with respect to its resident students and their rooms does not license university officials to circumvent Fourth Amendment requirements. In particular, a university cannot bootstrap its status as landlord to consent to searches on behalf of its students.¹⁰
- Students may consent to searches of their own dormitory rooms – and thus waive their Fourth Amendment protections – by agreeing to written campus policies. However, such waivers must be limited in scope. They will be upheld only with respect to the enforcement of specific campus rules and regulations by university officials, i.e., only for the protection of the university’s institutional interests, not for law enforcement purposes.¹¹

⁹ See *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007); *Piazzola*, 442 F.2d at 289; *Smyth*, 398 F. Supp. at 786; *Limpuangthip v. United States*, 932 A.2d 1137, 1142 (D.C. 2007); *People v. Walker*, 143 Cal. Rptr. 3d 831, 848-49 (Cal. Ct. App. 2006), *Beauchamp v. State*, 742 So.2d 431, 432 (Fla. Dist. Ct. App. 1999); *Devers*, 712 So.2d at 204-05; *Commonwealth v. McCloskey*, 272 A.2d 271, 273 (Pa. Super. Ct. 1970).

¹⁰ See *Piazzola*, 442 F.2d at 288 (quoting *McCloskey*, 272 A.2d at 273).

¹¹ See *Walker*, 143 Cal. Rptr. 3d at 849 (“[Housing contract] terms of occupancy, while constituting consent to the *University’s* entry into defendant’s dorm room under certain circumstances, cannot be reasonably construed as defendant having given consent to *others*.” (emphasis in original)).

- Courts typically draw a distinction between searches necessary to a college's internal function as an educational institution and searches for evidence of a crime, to be used in external criminal proceedings.¹² This distinction appears to be recognized even in those few jurisdictions in which courts have found that students have reduced privacy rights in their dormitory rooms.¹³
- Even at public institutions, where all employees are "state actors" for Fourth Amendment purposes, courts draw distinctions between the actions of college law-enforcement personnel and those of college officials without primary law enforcement responsibilities, such as deans or residence hall directors. As a general rule, non-law-enforcement officials enjoy greater license to conduct warrantless searches, provided such searches are supported by a valid institutional purpose as specified in a residential housing contract or some other similarly narrow contractual provision. Campus police may conduct these institutional-purpose searches as well, but if their actions go beyond mere enforcement of the terms of the residence contract and instead appear to be have a law enforcement purpose (as was the case in *Neilson*), then courts likely will require them to have obtained a valid search warrant, absent exigent circumstances or the express consent of the targeted student at the time of the search.

The critical point is that a college have in place a written housing agreement, signed by all resident students, in which students acknowledge that the college may enter and search student rooms to enforce housing rules or for other institutional purposes. While courts may take slightly different doctrinal positions as to the effect of such a document (some viewing the agreement as a limited form of "consent," and others simply viewing it as evidence that the search was "reasonable"), the end result is effectively the same: a college need not be unduly handcuffed in entering student rooms for the purpose of protecting the health and safety of its students or any other vital institutional interest.

II. Private Institutions

A. Fourth Amendment considerations

The Fourth Amendment's protections against unreasonable searches and seizures apply only to "state action" – conduct by state employees or other persons who are acting as "state agents."¹⁴ Moreover, private institutions and their employees do not become "state actors" merely by virtue of their engagement in public contracts, or the fact that they are subject to state regulation, or even where they are found in certain respects to be performing a "public function."¹⁵ Thus, employees of private colleges and universities generally are not subject to Fourth Amendment constraints. In particular, if a search is conducted by campus officials other than campus law enforcement, such as a dean or a residence hall director, and if the search is being conducted to advance valid institutional purposes, then no state action

¹² See *Devers*, 712 So.2d at 206 ("The [dormitory] search must further an interest that is separate and distinct from that served by Louisiana criminal law."); *Morale*, 422 F. Supp. at 998 ("Defendants have not convinced this court that [the university] has a clearly distinguishable and separate educational interest [in the search], nor one that is not already served by the penal statutes of this state.").

¹³ See, e.g., *State v. Hunter*, 831 P.2d 1033, 1037-38 (Utah Ct. App. 1992) (distinguishing between searches conducted on the authority of college officials to "maintain an educational atmosphere" and searches conducted "at the behest of or as part of a joint investigation with the police").

¹⁴ See, e.g., *State v. Nemser*, 807 A.2d 1289, 1291 (N.H. 2002).

¹⁵ *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) (finding that a private school specializing in the education of students with substance abuse and behavioral difficulties was not a "state actor," even though its students were referred by public agencies, the school received nearly all of its funding from public sources, it was subject to considerable public regulation, and it was performing a public function).

will be found.¹⁶

However, the Fourth Amendment can come into play where campus police at a private college or university have been granted, and are exercising, state police powers, or where police or non-police employees are acting as the agents of public law enforcement authorities. “[A]cts by a nominally private entity may comprise state action” if, among other things, the private entity is “entwined” with the government, is “subject to governmental coercion or encouragement,” or is “willingly engaged in joint action with” the government.¹⁷

A number of states have enacted statutes that permit security personnel at colleges and universities to be licensed as “special” state police officers who have arrest and other powers, but typically not all the powers, of a municipal or state police officer.¹⁸ Whether these personnel are engaging in state action when they enter or search a student’s room will depend on the purpose for which they do so. If the officer conducts the search for the purpose of enforcing campus housing policies, not to obtain evidence for law enforcement purposes, it is unlikely that a court will rule that he acted as an agent of the state merely by virtue of his special title.¹⁹ Likewise, if the officer is merely “accompanying” a college administrator at the administrator’s request, and plays an entirely passive role in the administrator’s search, it is unlikely that state action will lie.²⁰ However, if the officer takes an active role in the search or exercises any of his heightened powers, such as the power of arrest, a court may consider the officer’s involvement to constitute state action.

B. Contract and other state law considerations

Private institutions of course must keep in mind that even where their actions are not subject to Fourth Amendment or state constitutional constraints, this does not mean that they can enter and search student rooms with impunity. A student whose room is searched in contravention of the institution’s housing agreement or housing policies may have a claim for breach of contract. Students whose rooms are

¹⁶ See, e.g., *State v. Burroughs*, 926 S.W.2d 243, 246 (Tenn. 1996); *Duarte v. Commonwealth*, 407 S.E.2d 41, 42-43 (Va. Ct. App. 1991).

¹⁷ *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002). Other jurisdictions employ similar formulations of the “state action” test. See, e.g., *Nemser*, 807 A.2d at 1291-93 (finding no agency relationship between campus and local police because there was no “inducement” or “agreement” that campus police conduct drug searches on behalf of local police); *People v. Boettner*, 362 N.Y.S.2d 365, 368-69 (N.Y. Sup. Ct. 1974), *affirmed*, 376 N.Y.S.2d 50 (N.Y. App. Div. 1975) (finding no agency relationship where state police “neither expressly nor impliedly requested” that campus police conduct a search of defendants’ rooms, and where there was no “close and continuing relationship” between campus police and local/state law enforcement).

¹⁸ See, e.g., MASS. GEN. LAWS ch. 22C, § 23 (imbuing employees at educational institutions who have been appointed “special state police officers” with “the same power to make arrests as regular police officers for any criminal offense committed in or upon lands or structures owned, used or occupied by such college, university, or other institution”); MICH. COMP. LAWS § 338.1079 (similar); D.C. CODE §§ 5-129.2, 23-582(a) (similar).

¹⁹ Cf. *Harvard Crimson, Inc. v. President & Fellows of Harvard Coll.*, 840 N.E.2d 518, 524-25 (Mass. 2006) (“The fact that some individual [Harvard University Police Department] officers have been appointed deputy sheriffs, or special State police officers, does not transform the [University Police Department], itself, into an agency of the Commonwealth”).

²⁰ *Limpuangthip*, 932 A.2d at 1145-46 (“While the fact that [a special police officer] wore a uniform and carried a baton and a radio, as occurred here, may be a relevant factor, it does not of itself amount to an assertion of state authority. More is required.”).

searched in an arbitrary and capricious manner, or otherwise without a legitimate basis, also may have statutory or common law claims for invasion of privacy.

CONCLUSION:

With limited exception, courts support the rights of college and university officials to enter and search rooms in order to serve institutional purposes, which include protecting the health and safety of students and enforcing college rules and regulations. The courts accept housing agreements and other express contractual arrangements with students as prior consent for such searches, or else as justification that the searches were reasonable. However, courts also recognize limits on the use of advance consent when law enforcement personnel are involved and when the material obtained through a search is used in criminal proceedings. In cases where law enforcement interests outweigh institutional interests, the institution may want to defer to the police rather than conduct its own search.

RESOURCES FOR COUNSEL:

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Jan A. Neiger, *An Overview of Search and Seizure Law on Campus*, *SYNTHESIS: LAW & POLICY IN HIGHER EDUCATION*, Vol. 12, no. 4 (Spring 2001).

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