The Fourth Amendment and Dormitory Searches—A New Truce

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Commentators have noted that approximately fifteen years ago, a tentative truce existed on college and university campuses between administrative officials and campus police; administrative officials possessed discretion not to enforce regulations concerning activity viewed as “relatively harmless” and “commonly and socially acceptable,” and conducted “privately and quietly.”¹ Today, however, colleges and universities are recognizing a need for stricter enforcement of drug and alcohol regulations.² Increasingly, they are turning to the use of dormitory searches to enforce such prohibitions.

For example, in 1996, Appalachian State University (“ASU”) implemented a search policy authorizing campus officials, including campus police officers, to enter a student’s room without a search warrant if they had “reasonable cause” to believe a regulation was being violated. Under the policy, evidence obtained could be used only in school disciplinary proceedings and not in criminal prosecutions unless a warrant or the student’s consent had been obtained.³ Several factors prompted ASU to initiate its search policy: the national trend of increasing marijuana use since the 1980s, the sharp increase in the number of reported drug violations on ASU’s campus, and the difficulty in obtaining search warrants in time to apprehend students who were violat-

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¹ See Michael A. Olivas and Kathleen McCartan Denison, *Legalization in the Academy: Higher Education and the Supreme Court*, 11 J Coll & Univ L 1, 28-29 (1984) (noting the tentative truce). See also Richard Delgado, *College Searches and Seizures: Students, Privacy, and the Fourth Amendment*, 26 Hastings L J 57, 76-77 (1974) (noting that Berkeley campus police expressed reluctance to conduct dormitory searches).

² See, for example, *Drug Search Sparks College Protest*, Buffalo News A16 (May 1, 1994). Following an upswing in drug use on campus, employees at Siena College in Albany, New York searched dorm rooms over two days. *Id.* See also Michael Corkery, *Alcohol Awareness Week ‘Passed Out’: The Grim Look of Binge Drinking*, Providence J-Bull A1 (Oct 23, 1997) (quoting director of student life at Roger Williams University, “While student’s [sic] attitudes might be changing, their behavior has not. We need education, and tighter enforcement of campus drinking rules”); Dele Olojede and Eric Nagourney, *Limits Send College Drinking Covert*, Newsday O3 (Nov 13, 1988) (noting series of alcohol-related deaths at various colleges and universities in recent years).

³ See Thomas Healy, *New Drug Search Policy Angers ASU Students*, News-Observer A3 (Mar 14, 1996).

ing the law.⁴ Another example of a dormitory search policy is Snow College's attempt to deter drug use by requesting that municipal police officers and state corrections officials walk through dormitory halls with drug-sniffing dogs.⁵ An Oklahoma state legislator has even proposed a bill permitting college and university officials to search dormitory rooms.⁶

In the face of such measures, the truce of fifteen years ago appears to be breaking down. The new policies align the goals of administrative officials and campus police toward enforcement of drug, alcohol, and contraband prohibitions against students, which may result in infringement upon students' privacy rights.⁷ The need for a "new truce" is clear—this time between the officials attempting to enforce stricter prohibitions and the students whose privacy rights may be invaded.⁸

This Comment provides a framework to aid courts in evaluating the constitutionality of dormitory searches. It analyzes the competing educational and law enforcement interests at stake and suggests Fourth Amendment standards that balance the privacy interests of students and the interest of the colleges and universities in maintaining an environment consistent with their educational mission. Part I analyzes the current state of the dormitory search caselaw according to the issues of state action, consent, administrative searches, and the exclusionary rule. Part II presents the proposed framework in two steps: first, it establishes a threshold determination used to place the dormitory search into one of three categories; and second, it sets forth the appropriate Fourth Amendment standard for each of the three categories.

⁴ Id.

⁵ See Joan O'Brien, *College Uses Dogs to Search Dorms for Drugs Dogs Fail to Sniff out Dorm Drugs*, Salt Lake Trib C1 (June 9, 1995) (quoting Snow College student life vice president as stating, "Our intent is more preventive than anything, wanting to send a definite signal that drugs aren't a welcome thing on our campus").

⁶ See Kim Alyce Marks, *Bill Would Permit Dorm Searches*, Tulsa Trib 1A (Feb 8, 1989). The bill directs the state's higher educational system to adopt a policy requiring any contract, rental or lease agreement entered into by a student and the institution to contain a clause stating that a search of the student's room could be conducted by school officials upon "reasonable suspicion." The bill shields higher educational institutions against civil lawsuits by students whose rooms are searched.

⁷ See, for example, *Drug Search*, Buffalo News at A16 (cited in note 2) (reporting that students at Siena College demonstrated against a search, saying that their privacy was invaded).

⁸ See Olojede and Nagourney, *Limits*, Newsday at O3 (cited in note 2) ("When it comes to patrolling dormitories in search of illegal alcohol use, administrators must walk the line between enforcing the rules and invading students' privacy.").

I. CURRENT LAW: THE FOURTH AMENDMENT ISSUES

A. State Action

The Fourth Amendment guarantees that a person's right to be "secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause"⁹ The Fourth Amendment protects persons against invasions of privacy by governmental actors, not private actors.¹⁰ The need for governmental action is commonly known as the "state action" requirement.¹¹ However, a private actor can be held accountable for violations of constitutional prohibitions if he is acting as an "instrument or agent" of the government.¹² This Part will examine whether or not there is sufficient state action to violate the Fourth Amendment when dormitory searches are conducted by public colleges and universities or, alternatively, by private colleges and universities.

1. Public colleges and universities.

Lower courts have held that the Fourth Amendment applies to public colleges and universities because they are state actors.¹³ The courts have relied on a variety of grounds to find state action, such as state statutes creating the institution¹⁴ and public financing and general supervision of a Board of Control.¹⁵ Although the Supreme Court has not explicitly held that the Fourth Amendment applies to public colleges and universities, given the opportunity, the Court will likely conclude that it does. The Court has already held that public colleges and universities are bound by the strictures of the First Amendment.¹⁶ Furthermore, in *New Jersey v T.L.O.*,¹⁷ the Court applied the Fourth Amendment to

⁹ US Const, Amend IV.

¹⁰ See *Walter v United States*, 447 US 649, 656 (1980); *Burdeau v McDowell*, 256 US 465, 475 (1921).

¹¹ The idea of state action is not restricted to actions by state officials; it exists for federal searches as well.

¹² See *Coolidge v New Hampshire*, 403 US 443, 487 (1971).

¹³ See, for example, *Morale v Grigel*, 422 F Supp 988, 996 (D NH 1976); *Smyth v Lubbers*, 398 F Supp 777, 783 (W D Mich 1975).

¹⁴ See *Morale*, 422 F Supp at 996 ("[The New Hampshire Technical Institute] is a state institution . . .").

¹⁵ See *Lubbers*, 398 F Supp at 783 ("Grand Valley State Colleges is a publicly created and publicly financed institution of higher education under the general supervision of a Board of Control.").

¹⁶ See *Healy v James*, 408 US 169, 180 (1972) (stating that state colleges and universities are not enclaves immune from the sweep of the First Amendment), citing *Tinker v Des Moines Independent Community School District*, 393 US 503, 506 (1969).

¹⁷ 469 US 325, 336-37 (1985). *T.L.O.* is discussed in text accompanying notes 77-83.

public elementary and secondary schools. This decision is especially noteworthy, because the Court rejected the traditionally strong immunity afforded by the *in loco parentis* or "in the place of a parent" doctrine.¹⁸ Because the *in loco parentis* notion is weaker still at the university level,¹⁹ the Court is likely to hold that the Fourth Amendment also applies to public colleges and universities.

It is less certain, however, whether all university officials who might engage in a search of a dormitory room should be considered state actors. Courts have found campus police²⁰ and other full-time employees of the university, such as head residents²¹ and directors of housing,²² to be state actors. However, courts disagree about whether to treat as state actors Resident Assistants ("RAs"),²³ who typically are upperclassmen²⁴ hired by the college to live in the dormitory and handle various problems as they arise.²⁵

¹⁸ For an explanation of the doctrine, see, for example, Note, *The Lessons of DeShaney: Special Relationships, Schools & The Fifth Circuit*, 35 BC L Rev 97, 108 (1993) (noting that under the *in loco parentis* doctrine, schools were to act on behalf of students' welfare and, like parents, were free from constitutional restraints in providing that welfare).

¹⁹ For an excellent discussion of the rejection of *in loco parentis* in the college setting, see *Bradshaw v Rawlings*, 612 F2d 135, 138-40 (3d Cir 1979). See also Comment, *Obscuring the Issue: The Inappropriate Application of In Loco Parentis to the Campus Crime Victim Duty Question*, 39 Wayne L Rev 1335, 1337 (1993) (noting that the doctrine of *in loco parentis* in higher educational settings fell into disfavor in the 1960s, primarily because the age of majority was lowered to eighteen and thus most students who attended college were considered adults).

²⁰ See *Lubbers*, 398 F Supp at 784. In two other cases, this result was implicit in the courts' analyses. *Commonwealth v Neilson*, 423 Mass 75, 666 NE2d 984, 987 n 6 (1996); *State v Hunter*, 831 P2d 1033, 1035 (Utah 1992). Campus police are arguably state actors either because they are employed by a public college or university or because they have been delegated police powers by the state itself, or both. See, for example, *Neilson*, 666 NE2d at 985 (noting that Fitchburg State College campus police had powers of arrest). See also *Henderson v Fisher*, 631 F2d 1115, 1118 (3d Cir 1980) (deciding a 42 USC § 1983 due process claim and stating that the Pennsylvania legislature had delegated to campus police at the University of Pittsburgh the very powers that the municipal police force of Pittsburgh possessed, thus buttressing the conclusion that campus police act under state authority).

²¹ See *Morale*, 422 F Supp at 996; *Lubbers*, 398 F Supp at 782, 784.

²² See *Lubbers*, 398 F Supp at 782, 784; *Hunter*, 831 P2d at 1034-35.

²³ Some schools might use a different title for the same type of position. See Delgado, 26 Hastings L J at 78 (cited in note 1) (using term "Resident").

²⁴ See, for example, *Morale*, 422 F Supp at 991 (noting that defendant RA was a second-year student).

²⁵ RAs may conduct routine inspections for cleanliness, safety, or need for repairs and maintenance. See *State v Kappes*, 26 Ariz App 567, 550 P2d 121, 122-23 (1976). RAs may or may not have the master key to student rooms. Compare *Kappes*, 550 P2d at 122-23 (RAs had master key), with *Morale*, 422 F Supp at 996 (RA was not issued a passkey). Some RAs are paid a small salary in addition to receiving room and board. See Delgado, 26 Hastings L J at 78 (cited in note 1).

One federal district court concluded that RAs are state actors.²⁶ It reasoned that an RA was an employee of the university because, though not paid in the usual manner, the RA received compensation in the form of room and board.²⁷ A state court, however, has concluded that RAs are not state actors when they are conducting routine searches for health and safety.²⁸ The court reasoned that in such a capacity an RA serves only the internal requirements of the university and is not tainted with the degree of governmental authority needed to implicate the Fourth Amendment. According to the court, the purpose of the room inspection was not to collect evidence for criminal proceedings against the student, but to ensure that the rooms were used and maintained in compliance with university regulations.²⁹

Courts should follow the lead of the federal district court and find RAs to be state actors for purposes of the Fourth Amendment. Regardless of how they are paid, RAs have an employment relationship with the university. Moreover, RAs frequently engage in conduct that is not limited to health and safety inspections. In practice, RAs are often intricately involved in searches conducted for a variety of university violations. For example, RAs have initiated searches for stolen items³⁰ and have set into motion a chain of events that led security officers to a student's dormitory room because drugs were found by RAs.³¹ In fact, the very position of RAs in the university's overall administrative enforcement scheme may require them to contact their superiors, who in turn may contact the police.³² Some states may even require that drugs found be forfeited to the state.³³ Therefore, RAs should be considered state actors.

²⁶ *Morale*, 422 F Supp at 991-92, 996.

²⁷ *Id* at 996.

²⁸ *Kappes*, 550 P2d at 123-24.

²⁹ *Id*.

³⁰ See *Morale*, 422 F Supp at 991-92.

³¹ See *Kappes*, 550 P2d at 123.

³² See *id* (When RAs found marijuana in dormitory room during routine health and safety inspection, they contacted their supervisor who summoned campus security officers to the room.).

³³ See, for example, *Lubbers*, 398 F Supp at 787 (noting that the college's resort to its own internal proceedings could not insulate either the college from the intrusion of civil authorities into its affairs or the student from the potential institution of formal criminal proceedings against the student, because a state statute provided that marijuana "shall be seized and summarily forfeited to the state" and the Attorney General could bring an action against the college for recovery of marijuana).

2. Private colleges and universities.

Because the factors of public creation and financing are absent, the question of whether private colleges and universities are state actors is more complicated. In this context, courts have focused on whether the official conducting the search can be considered a state actor.

Caselaw suggests that, if campus police at private universities are delegated all the powers of municipal, county, or state police, then they are state actors. For example, a federal district court has held that police on the premises of a private university hospital were state actors for alleged Fourth Amendment violations, because the city had delegated all police powers to them for their limited area.³⁴ In another case, the North Carolina Supreme Court recognized that campus police at a private university were state actors for First Amendment purposes. In doing so, it noted that a statute delegated to the campus police all powers of municipal and county police to make arrests for felonies and misdemeanors.³⁵

More generally, a finding of state action usually entails looking at factors that imply an agency relationship.³⁶ In the dormitory search context, these factors might include: knowledge and participation by state police, directly or indirectly, in the search conducted by the university officials; a request by state police that the university official conduct a search; and a close and continuing relationship with local law enforcement officers.³⁷ When these factors are absent, there is no state action. For example, in *People v Boettner*,³⁸ the New York Supreme Court held that there was no state action where state officers supplied information to university officials but did not participate in the search, and where the officials had an independent university-

³⁴ See *Stokes v Northwestern Memorial Hospital*, 1989 US Dist LEXIS 8543, *1-11 (N D Ill).

³⁵ *State v Pendleton*, 339 NC 379, 451 SE2d 274, 281 (1994). In *Pendleton*, the court held that a state statute authorizing the Attorney General to commission campus police at private universities was unconstitutional as applied to a private religious university, because it would foster excessive entanglement of the government with religion, thereby violating the First Amendment's Establishment clause. In reaching the holding, the court had to reason implicitly that the police so commissioned were state actors. 451 SE2d at 278-79, 281.

³⁶ See, for example, *People v Boettner*, 80 Misc 2d 3, 362 NYS2d 365, 368-69 (1974), citing Note, *Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards*, 56 Cornell L Rev 507 (1971).

³⁷ See *Boettner*, 362 NYS2d at 368-69.

³⁸ *Id* (noting that the university viewed the presence of a large amount of marijuana on campus when the Winter Weekend was about to begin as an emergency situation).

related reason for the search. Similarly, in *State v Burroughs*,³⁹ the Tennessee Supreme Court held that state action was lacking in a search initiated by a college official pursuant to an established college regulation where the police did not become involved until after the search was completed.

B. Consent

In dormitory search cases it is important to determine whether the student either directly or indirectly consented to the search because the Fourth Amendment requirements of warrant and probable cause do not apply where voluntary consent has been obtained.⁴⁰ This Part examines two consent issues that often arise in the dormitory search context: (1) whether a student has consented to a search by signing a housing contract; and (2) whether a university official may consent to a third-party search by police.

1. Student consent through signing of a dormitory contract.

Students generally sign contracts when they enter university-supplied housing.⁴¹ Many of these contracts require students to agree to abide by the regulations of the university set forth in a catalog and/or student handbook.⁴² The regulations found in the student handbooks, in turn, reserve to university officials the right to enter a student's room for a variety of purposes. Some regulations permit university officials to enter only for health or safety inspections,⁴³ while others allow university officials to en-

³⁹ 926 SW2d 243, 246 (Tenn 1996), citing *United States v Walther*, 652 F2d 788, 791 (9th Cir 1981). *Burroughs* adopted a two-pronged "legitimate independent motivation" test developed by federal courts for finding state action. The test considered: (1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search. *Burroughs* based its decision on the second prong and found that the director of a dormitory conducted the search not as the agent of the state, but in carrying out college policy.

⁴⁰ *Illinois v Rodriguez*, 497 US 177, 181 (1990), citing *Schneckloth v Bustamonte*, 412 US 218 (1973).

⁴¹ See, for example, *Morale*, 422 F Supp at 999; *Lubbers*, 398 F Supp at 782; *Neilson*, 666 NE2d at 987; *Hunter*, 831 P2d at 1034; *Kappes*, 550 P2d at 122; *Commonwealth v McCloskey*, 272 A2d 271, 274 (Pa Super Ct 1970).

⁴² See, for example, *Lubbers*, 398 F Supp at 782 ("The undersigned, in consideration for the board and room provided . . . agree[s] as follows: . . . To abide by the terms and conditions of residence of Grand Valley State College residence halls as stated in the current housing handbook, which terms and conditions are specifically made a part thereof."); *McCloskey*, 272 A2d at 274-75 ("I, the undersigned, agree to take the room . . . in accordance with the rules of the University . . ."); *Hunter*, 831 P2d at 1034 ("Students are required to abide by University and University Housing regulations as outlined in the University publications . . .").

⁴³ See, for example, *Morale*, 422 F Supp at 999.

ter "whenever necessary to aid in the basic responsibility of the University regarding discipline and maintenance of an educational atmosphere."⁴⁴ Still others allow entry if "[c]ollege officials have reasonable cause to believe that students are continuing to violate federal, state, or local laws or College regulations."⁴⁵

In claims of unlawful searches, universities have at times invoked the defense that a particular student consented to the search or waived the right to object to the search because, when he signed the contract, he gave the university permission to enter his room.⁴⁶ Even where no contract apparently existed, courts have evaluated whether a student's knowledge of regulations in the student handbook constituted waiver of the right to object to the searches.⁴⁷ In both scenarios, the analysis by courts has not proceeded strictly on contract grounds, but rather on the doctrine of unconstitutional conditions.⁴⁸ This doctrine provides that a state may not extend public benefits on the condition that the recipient agree to forfeit a constitutionally protected right or interest⁴⁹ and has been applied to school-related cases.⁵⁰

Under the doctrine of unconstitutional conditions in the dormitory context, then, students can only be required to agree to a search that would not infringe upon their Fourth Amendment rights. While the courts agree that health and safety inspections by university officials without a warrant and probable cause do not violate a student's Fourth Amendment rights,⁵¹ they disagree about the constitutionality of drug or contraband searches without a warrant and probable cause—some require both a search

⁴⁴ *Hunter*, 831 P2d at 1034.

⁴⁵ *Lubbers*, 398 F Supp at 782.

⁴⁶ See, for example, *Morale*, 422 F Supp at 998-99; *Lubbers*, 398 F Supp at 788.

⁴⁷ See, for example, *Piazzola v Watkins*, 442 F2d 284, 286 (5th Cir 1971); *Moore v Student Affairs Committee of Troy State University*, 284 F Supp 725, 728 (M D Ala 1968).

⁴⁸ See, for example, *Piazzola*, 442 F2d at 289 ("[T]he 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."); *Morale*, 422 F Supp at 999 ("[T]he school certainly cannot condition attendance . . . upon waiver of constitutional rights."); *Lubbers*, 398 F Supp at 788 ("This problem really belongs to the law of unconstitutional conditions.").

⁴⁹ See *Delgado*, 26 Hastings L J at 71 n 85 (cited in note 1), citing *Spevak v Klein*, 385 US 511 (1967).

⁵⁰ See *West Virginia v Barnette*, 319 US 624, 638 (1943) (holding that state cannot condition access to publicly mandated education on compliance with a resolution requiring all students to salute the flag). Although public higher education is not mandated, it has been recognized as a necessity. See *Moore*, 284 F Supp at 731.

⁵¹ See, for example, *Lubbers*, 398 F Supp at 785 (finding that, inter alia, the university needs to protect its property); *Hunter*, 831 P2d at 1036 (deciding on grounds that university needs to provide safe studious environment for those in attendance); *Kappes*, 550 P2d at 124 (same).

warrant and probable cause while others require only "reasonable cause."⁵² Thus, until the Supreme Court rules on the Fourth Amendment standards for a search of a student's dormitory room,⁵³ searches for reasons other than health and safety will continue to receive scrutiny by the lower courts under the doctrine of unconstitutional conditions.

2. University consent to a search of a dormitory room conducted by police.

Courts have also considered whether a university may consent to police involvement in a dormitory search. The Fourth Amendment's prohibition of warrantless entry does not apply to situations in which voluntary consent is obtained from a third party who possesses common authority over the premises.⁵⁴ Courts have agreed, however, that mere ownership of the dormitory does not give a university the right to delegate its authority to police where the primary purpose of the search is criminal prosecution.⁵⁵ Courts have found that searches were conducted "primarily for criminal prosecution" when police officers *initiated* the search and evidence was used in criminal proceedings,⁵⁶ and also when police officers performed the search at the university's behest.⁵⁷

However, the federal district court in *Moore v Student Affairs Committee of Troy State University*⁵⁸ held that university officials could consent to a search even where it was initiated by municipal police because, as it reasoned, a search for drugs could serve

⁵² Compare *Lubbers*, 398 F Supp at 788-91 (holding regulation unconstitutional that permitted searches for drugs without warrant and probable cause), with *Moore*, 284 F Supp at 730 (holding warrantless search for drugs constitutional because there was "reasonable belief" on the part of the college authorities that student was using dormitory room for purpose that was illegal).

⁵³ The Supreme Court left open a similar problem, in the high school setting, of a student's expectation of privacy in school-provided property and the Fourth Amendment standards that should govern searches of that property. See *T.L.O.*, 469 US at 337 n 5.

⁵⁴ *United States v Matlock*, 415 US 164, 169-71 (1974).

⁵⁵ See, for example, *Piazzola*, 442 F2d at 288 (noting that many other cases have held that lessor cannot consent to a police search of a tenant's premises); *McCloskey*, 272 A2d at 273 (same); *People v Cohen*, 57 Misc 2d 366, 292 NYS2d 706, 709 (NY Dist Ct 1968) (noting that a university cannot delegate consent).

⁵⁶ See, for example, *Piazzola*, 442 F2d at 286 (noting that the police contacted the university to discuss its "drug problem" and indicated that the police desired the cooperation of university officials in searching for drugs); *McCloskey*, 272 A2d at 272 (noting that narcotics agent and state trooper armed with warrant to search dormitory room met with the dean).

⁵⁷ See *Cohen*, 292 NYS2d at 708 (university authorities arranged with police to survey dormitory premises).

⁵⁸ 284 F Supp 725, 729-30 (M D Ala 1968).

an educational purpose and the evidence was only used in disciplinary proceedings. The federal district court in *Smyth v Lubbers*⁵⁹ disagreed with this reasoning and held that a search for drugs had no educational purpose. Moreover, the fact that evidence would only be used in disciplinary proceedings did not convince the *Lubbers* court to find that a search by municipal police was not "primarily for criminal prosecution." As it reasoned, resort to its internal proceedings did not insulate a student from institution of formal proceedings against him.⁶⁰

This Comment agrees with the *Lubbers* court that where federal, state, or municipal police initiate the search, it is a search for the purpose of criminal prosecution regardless of whether the end result may turn out to be only disciplinary proceedings; thus, the university's consent cannot obviate the need for police to obtain a search warrant based upon probable cause.⁶¹ However, as argued in Part II, searches by a university for drugs or contraband may serve an educational purpose. Thus, campus police acting pursuant to the university's regulatory or enforcement scheme should be entitled to initiate a search under the same Fourth Amendment standards applicable to university administrators.

A somewhat tangential third-party consent problem arises with "plain view" discoveries of evidence by university officials—that is, where university officials conduct searches for health and safety purposes and happen upon drugs in plain view. In such a case, the issue is not whether university officials may consent to police entry into a room to make an initial search for evidence, but rather whether they may request police entry into the room to collect and document evidence. For example, the Supreme Judicial Court of Massachusetts held in *Commonwealth v Neilson*⁶² that when university officials conducted a search to retrieve a cat and came upon marijuana plants in plain view, they could not let police enter to take pictures of the plants unless the police first obtained a search warrant. The *Neilson* court viewed the presence of police to take pictures as a separate search—the purpose of which was to confiscate contraband for criminal proceedings. Thus, it reasoned that the "plain view" doctrine did not apply because the police were not lawfully (with a search warrant) in the room when they made their observations.⁶³ Moreover, it reasoned

⁵⁹ 398 F Supp 777, 787 (W D Mich 1975).

⁶⁰ *Id.*

⁶¹ See Part II.A.

⁶² 423 Mass 75, 666 NE2d 984, 985-86 (1996).

⁶³ *Id.*

that although university officials were lawfully in the student's room pursuant to the student's consent to a health and safety inspection, the university officials could not delegate that consent to police officials.⁶⁴

However, two other state courts have held that permitting campus police to enter a room and seize evidence after it was discovered during a health and safety inspection did not violate the Fourth Amendment, even if the evidence was subsequently used in criminal proceedings.⁶⁵ As one court reasoned, in such situations university officials do not attempt to delegate their right to inspect rooms to the police, which would result in the circumvention of traditional restrictions on police activity.⁶⁶

C. Administrative and Other Noncriminal Law Enforcement Searches

A court must next determine what Fourth Amendment standards to apply to the search. The Fourth Amendment traditionally requires that the state actor performing the search have probable cause and a warrant.⁶⁷ Probable cause traditionally requires individualized suspicion.⁶⁸ In addition, the state actor must knock and announce himself before entry.⁶⁹ However, the Court has employed a "balancing test" in administrative and regulatory contexts.⁷⁰ This test results in reduced Fourth Amendment standards in order to accommodate "special needs" beyond those present in the typical law enforcement context.⁷¹ This Part examines

⁶⁴ Id, citing *Piazzola*, 442 F2d at 290.

⁶⁵ See *Hunter*, 831 P2d at 1034, 1036-38 (noting that housing director who searched rooms to find the cause of vandalism requested the accompaniment of campus police officer in case of trouble and upon observing stolen university property in one room had police officer seize it); *Kappes*, 550 P2d at 122-24 (noting that RAs were conducting a routine room inspection for cleanliness, safety, and maintenance when they observed a pipe and marijuana butts on the desk and summoned the supervisor who in turn called campus security officers to the room).

⁶⁶ *Hunter*, 831 P2d at 1037-38.

⁶⁷ See *Katz v United States*, 389 US 347, 356 (1967) (noting Fourth Amendment's "usual requirements of advance authorization by a magistrate upon a showing of probable cause").

⁶⁸ See *Illinois v Gates*, 462 US 213, 230 (1983) (noting "commonsense practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place") (emphasis added).

⁶⁹ See *Richards v Wisconsin*, 117 S Ct 1416, 1421 (1997).

⁷⁰ The balancing test weighs various factors to determine whether the Fourth Amendment requirements should be reduced. See generally *Camara v Municipal Court*, 387 US 523, 536-57 (1967) (holding that factors include the extent to which the administrative purpose would be frustrated by traditional Fourth Amendment standards and the nature of the intrusion into an individual's privacy interests).

⁷¹ See Yale Kamisar, Wayne R. LaFave, and Jerold H. Israel, *Modern Criminal Procedure* 339 (West 8th ed 1994).

the Supreme Court balancing test in both residential and educational settings and then examines the lower courts' utilization of a balancing test in the dormitory setting.

1. Supreme Court Fourth Amendment cases.

The Supreme Court has yet to extend the balancing test that it has employed in the administrative search context to searches of dormitories. Administrative searches are those conducted by a state actor to assure that the individual is complying with some civil code, usually health or safety, rather than to obtain evidence for use in a criminal prosecution.⁷² In one of its first administrative search cases, *Camara v Municipal Court*,⁷³ the Court applied its balancing test to inspections of residential housing by municipal officials. The Court reasoned that, on balance, a search warrant was needed to protect the tenant's privacy interest from "the possibility of criminal entry under the guise of official sanction."⁷⁴ It noted, however, that a requirement of probable cause based upon individualized suspicion of the condition of the particular dwelling would frustrate the city's interest in securing universal compliance with minimum safety standards.⁷⁵ Moreover, the Court reasoned that the inspections entailed limited intrusion into tenants' privacy because, although a violation of the housing code could result in a criminal complaint against the tenant, the inspections were neither personal nor aimed at discovery of crime, and there was a history of judicial and public acceptance of area-wide inspections.⁷⁶

In the later case of *T.L.O.*, the Court applied its balancing test to a search of a high school student. In that case, a principal conducted a search of a student's purse based on his suspicion that cigarettes, the possession of which violated school rules, would be found there.⁷⁷ The Court reasoned that students do not waive all rights to privacy when they bring personal property to

⁷² See, for example, *Camara*, 387 US at 525 (analyzing annual inspections of residential units for possible violation of city's housing code); *See v City of Seattle*, 387 US 541, 541-44 (1967) (analyzing routine, periodic city-wide inspections of business premises to obtain compliance with municipal fire code).

⁷³ 387 US 523, 536-37 (1967).

⁷⁴ Id at 526 n 1, 532-33 (holding that occupant needed to verify the need for and lawful limits of the inspection and that a warrant would not frustrate the governmental purpose behind the search).

⁷⁵ Id at 538 (Probable cause for area-wide inspections would exist if reasonable legislative or administrative standards were satisfied.).

⁷⁶ Id at 531, 536-37.

⁷⁷ 469 US at 328-29 (finding search to be reasonable).

school.⁷⁸ Nevertheless, it noted that the school had a interest in maintaining order and a proper learning environment, especially in light of the drug and violence problems in some schools.⁷⁹ The Court recognized that enforcement of what are traditional criminal laws can serve educational goals when it stated that: "The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by the school authorities."⁸⁰ The Court also stated that the promulgation of a rule forbidding some conduct reflects a judgment that such conduct is destructive of school order or a proper educational environment to which the Court would defer unless it violated substantive constitutional guarantees.⁸¹

In striking a balance between the interests of the school and the student, the Court reasoned that a search warrant would interfere with the swift and informal disciplinary procedures needed in the educational setting and that a probable cause requirement would force teachers and administrators to learn what actually constitutes probable cause. Thus, the Court concluded that the Fourth Amendment would be satisfied if: (1) the search was justified at its inception—there were reasonable grounds for suspecting that the student had violated or was violating either the law or the rules of the school, and (2) the scope was reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.⁸² The Court found constitutional the search, which ultimately revealed marijuana that the principal turned over to police for use in juvenile delinquency proceedings against the student.⁸³

Although searches of students in public schools are not strictly "administrative" searches aimed at creating compliance with health and safety codes, both kinds of searches have non-criminal law enforcement purposes that serve important public goals, despite potential criminal consequences for the individual searched.

⁷⁸ *Id.* at 338-39.

⁷⁹ *Id.* at 339-40.

⁸⁰ *Id.* at 342 n 9.

⁸¹ *Id.*

⁸² *Id.* at 341-42.

⁸³ *Id.* at 347-48.

2. Lower court dormitory search cases.

Most of the dormitory search cases were decided after *Camara* but before *T.L.O.* The lower courts recognize that a dormitory room search is an appropriate context in which to apply a balancing inquiry.⁸⁴ However, as noted earlier, courts are split over how the balance is struck when searches to enforce university regulations prohibiting drugs are conducted.⁸⁵

Prior to *T.L.O.*, the majority of courts concluded that both a search warrant and probable cause were required in a search for drugs.⁸⁶ *Lubbers* expounded upon the rationale for these requirements by stating that a student's expectation of privacy is analogous to that of a citizen in society generally.⁸⁷ The court noted that the state recognized students' rooms as their residences for voting purposes; students resided in their rooms full-time during the school year except for short vacations; and, unlike licensed business establishments, students attached psychological importance to their rooms.⁸⁸ The *Lubbers* court distinguished *Camara*, reasoning that the focused search of the room of a specific student who was suspected of criminal activity was unlike *Camara's* routine inspections for housing violations, and therefore traditional Fourth Amendment rights should be applied.⁸⁹

While acknowledging a university's supervisory powers, the federal district court in *Lubbers* reasoned that there was no evidence to show that the enforcement of drug laws and regulations served distinctly educational purposes or that the enforcement of drug regulations was so crucial to the performance of the educational function as to justify a warrantless search.⁹⁰ Rather, as it

⁸⁴ See, for example, *Lubbers*, 398 F Supp at 785 (The Fourth Amendment "requires a careful identification and weighing of the respective interests of the plaintiff and the College . . . since the specific content and incidents of the Fourth Amendment right of privacy are shaped by the context in which the right is asserted.") (citations omitted); *Morale*, 422 F Supp at 997 ("In order to test the 'reasonableness' of the search conducted . . . , I must balance 'the need to search against the invasion which the search entails.'"), citing *Camara*, 387 US at 537.

⁸⁵ See text accompanying notes 51-53.

⁸⁶ See, for example, *Piazzola*, 442 F2d at 289 (holding that a student who occupies a college dormitory room enjoys Fourth Amendment protection); *Morale*, 422 F Supp at 997 (holding that the Fourth Amendment guarantees that a student may reasonably expect that his or her solitude will not be disturbed by a governmental intrusion without at least permission, if not invitation); *Lubbers*, 398 F Supp at 786 (holding that plaintiff has same privacy right in his dormitory room as any adult has in the privacy of his home).

⁸⁷ *Lubbers*, 398 F Supp at 786.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 789 (noting that college drug laws track federal and state laws); accord *Piazzola*, 442 F2d at 289 (noting that regulation must be construed and limited in its application to further the university's educational function).

reasoned, a college's interest in maintaining discipline was not significant because all college students were adults, colleges were not military organizations, and elementary and secondary school students were presumptively subject to a greater degree of supervision compared to college students.⁹¹ Moreover, the court noted that the college permitted possession and use of alcohol and questioned how purely private possession and use of marijuana affected the college's educational function.⁹²

The federal district court in *Moore*, on the other hand, did not require a search warrant and was satisfied as long as there was merely a "reasonable cause" for the search for drugs.⁹³ In reaching this conclusion, the *Moore* court characterized the relationship of the university to the student as one in which there were "peculiar and sometimes . . . seemingly competing interests of college and student."⁹⁴ It reasoned that the university had an affirmative obligation to promulgate and enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process.⁹⁵ By analogizing to cases wherein a superior was in charge of maintaining discipline, order, and security, such as high school locker search cases,⁹⁶ it concluded that the university's duty to provide an environment conducive to learning tempered any privacy right of students.⁹⁷ Although the court noted that the disciplinary requirements of high school and college students differed, it reasoned that there were no distinctions between the fundamental duties of educators at both levels.⁹⁸ Even where the sole purpose of a search was to seek evidence of suspected violations of the law, the *Moore* court justified the requirement of "reasonable cause to believe" for two reasons: the "special necessities" of the student-college relationship and the fact that college disciplinary proceedings were not criminal proceedings in the constitutional sense.⁹⁹

⁹¹ *Lubbers*, 398 F Supp at 785 n 4 (noting that a Michigan statute provided that an eighteen year old had all the rights of a twenty-one year old).

⁹² *Id* at 790.

⁹³ 284 F Supp at 730.

⁹⁴ *Id* at 729.

⁹⁵ *Id*.

⁹⁶ *Id* at 729-31 nn 9-12, citing *People v Overton*, 20 NY2d 360, 283 NYS2d 22, 229 NE2d 596, 598 (1967) (reviewing search by school principal of high school student's locker for marijuana), and *United States v Grisby*, 335 F2d 652, 654 (4th Cir 1964) (excluding evidence from a search of Marine corporal's living quarters on suspicion of theft).

⁹⁷ 284 F Supp at 728-31.

⁹⁸ *Id* at 730 n 10.

⁹⁹ *Id* at 730, citing a due process case, *Dixon v Alabama State Board of Education*, 294 F2d 150 (5th Cir 1961), that did not require a full-blown adversary hearing in a college

A New York state court in *People v Haskins*¹⁰⁰ noted that the dangers presented by the prevalence of drugs in colleges was no less a problem than in high schools and because of the unique circumstance of searches by school officials, college and high school searches should be judged by the same standards. The *Haskins* court adopted a slightly different test than the test in *Moore*: there had to be "sufficient cause" for a search which, as the court stated, "will be less than that required outside the school precincts."¹⁰¹

The Supreme Court decided *T.L.O.* well after *Lubbers*, *Moore*, and *Haskins*. In *T.L.O.*, the Court applied a balancing test to determine the Fourth Amendment requirements of a search in the public high school context. The Court only required reasonable grounds and did not require a search warrant.¹⁰² The two dormitory search cases decided since *T.L.O.*¹⁰³ involved searches conducted primarily for health and safety purposes, where drugs were observed in plain view. Only one of these cases mentioned *T.L.O.*: *Neilson*, which involved a search that turned up marijuana in plain sight. The *Neilson* court distinguished *T.L.O.* on the basis of the high school's special need for an immediate response to behavior that threatened either the safety of school-children and teachers or the educational environment.¹⁰⁴ Moreover, the search in *Neilson* involved police, which the court believed distinguished it from *T.L.O.*¹⁰⁵

At least one university, however, has looked to *T.L.O.* as support for its search policy. In 1989, the University of North Texas ("UNT") adopted a dormitory search regulation in response to increasing use of illegal drugs on campus.¹⁰⁶ The UNT policy allowed staff to conduct warrantless room searches when they had reasonable suspicion of drugs.¹⁰⁷ The UNT search regulation

disciplinary proceeding.

¹⁰⁰ 48 AD2d 480, 369 NYS2d 869, 872 (1975).

¹⁰¹ 369 NYS2d at 872, citing *People v Scott D.*, 34 NY2d 483, 358 NYS2d 403, 315 NE2d 466, 469 (1974).

¹⁰² See text accompanying notes 82-83.

¹⁰³ See *Hunter*, 831 P2d 1033; *Neilson*, 666 NE2d 984.

¹⁰⁴ 666 NE2d at 986, citing *T.L.O.*, 469 US at 341-42.

¹⁰⁵ 666 NE2d at 986 (noting that *T.L.O.* did not decide whether probable cause and a search warrant might be required when police are involved), citing *T.L.O.*, 469 US at 341 n 7.

¹⁰⁶ See *Students Protest Search Rule: Dormitory drug policy at North Texas unconstitutional, foes say*, Dallas Morning News 23A (Feb 24, 1989) (About two hundred students and faculty attended a protest rally in February 1989.). See also *Dorm Drug Searches Challenged at College in Denton*, Austin Am-Statesman B5 (May 13, 1990).

¹⁰⁷ See *Dorm Drug Searches Challenged*, Austin Am-Statesman at B5 (cited in note 106). The policy allowed a room search to occur if staff members see or smell what they believe are illegal drugs or if they receive a credible tip from a resident or have other crite-

was challenged in a federal class action suit brought by four UNT students,¹⁰⁸ but the suit was dismissed due to technicalities.¹⁰⁹ UNT's General Counsel noted that the Supreme Court sanctioned on-campus searches without warrants in a case involving a New Jersey high school; he predicted that the *T.L.O.* holding would encompass all public schools including colleges and universities, and that, therefore, the UNT policy was on solid legal ground.¹¹⁰ However, *T.L.O.* was not a university dormitory search case and the Court in *T.L.O.* did not express how it would rule in such a case. At least one commentator has noted the possibility that *T.L.O.* could represent a reassessment of search and seizure doctrine in the entire educational sphere, especially in light of the increase of the drinking age to twenty-one and societal awareness of drug problems.¹¹¹

D. The Exclusionary Rule

If a court finds a Fourth Amendment violation in the dormitory search context, it must decide whether an appropriate remedy is to exclude the evidence either from a traditional criminal proceeding or from a university disciplinary proceeding. The main purpose for excluding evidence is to deter officials from violating the Fourth Amendment. In deciding whether to exclude evidence, the Supreme Court has engaged in a balancing of factors that weighs the deterrent value of exclusion against the social costs.¹¹²

In the dormitory search context, lower courts generally exclude illegally obtained evidence from criminal proceedings.¹¹³ The courts disagree, however, about whether evidence should be excluded in a college disciplinary proceeding brought to suspend a student for a drug violation. This split has fallen along the lines of two Supreme Court decisions applying the exclusionary rule to civil proceedings.

ria for strong suspicion. The policy stated that residence hall staff assumes that incense or clove cigarettes are being used to conceal the use of drugs and may enter the room.

¹⁰⁸ See *id.*

¹⁰⁹ Attorneys may have missed filing deadlines, and the temporary nature of student status did not facilitate pursuing the lawsuit. Conversation with a UNT professor (January 1998).

¹¹⁰ *Students Protest*, Dallas Morning News at 23A (cited in note 106).

¹¹¹ See Michael L. Keller, *Shall the Truce Be Unbroken?* New Jersey v. TLO and Higher Education, 12 J Coll & Univ L 415, 416-26 (1985).

¹¹² See *INS v Lopez-Mendoza*, 468 US 1032, 1040-46 (1984).

¹¹³ See *Piazzola*, 442 F2d at 286 (granting habeas relief where search initiated by police chief and two state narcotics agents); *Neilson*, 666 NE2d at 984, 987 (affirming motion to suppress where police entered room after evidence discovered in plain view); *McCloskey*, 272 A2d at 274 (reversing conviction where search initiated by narcotics agent and state trooper); *Cohen*, 292 NYS2d at 706 (suppressing evidence where police conducted search).

In *One 1958 Plymouth Sedan v Pennsylvania*,¹¹⁴ a unanimous Court applied the exclusionary rule to exclude evidence from a forfeiture proceeding, reasoning that a forfeiture proceeding was quasi-criminal in character. Its object, like criminal proceedings, was to penalize the commission of an offense against the law. The driver was arrested and charged with a criminal offense against Pennsylvania liquor laws. In the forfeiture proceeding, he was subject to the loss of his car worth \$1,000—an amount higher than the maximum fine in the criminal proceeding.¹¹⁵ The Court would not accept the anomalous result that the evidence was excludable in a criminal proceeding, but not in a forfeiture proceeding that required a determination that a criminal law had been violated. Therefore, it excluded the evidence.¹¹⁶ In contrast, in *United States v Janis*,¹¹⁷ where city police had seized wagering records and cash pursuant to a search warrant and then notified the Internal Revenue Service, the Court refused to suppress evidence because the punishment of suppression in a tax proceeding was too attenuated to deter the offending officers—city police.

Following *Plymouth Sedan*, the *Lubbers* court suppressed evidence used in a disciplinary proceeding where one student had been suspended for a term and the other for two years.¹¹⁸ The search had been conducted at 12:45 a.m. by university officials, a campus policeman, a Deputy Sheriff, and a person who was both a campus policeman and a Deputy Sheriff. The court weighed the injury to governmental interests against the potential benefits of the exclusionary rule. It concluded that, because the main purpose of the exclusionary rule was deterrence, if the rule was not applied, college officials would have no incentive to respect the privacy of the college's students.¹¹⁹ The *Lubbers* court reasoned that college suspension proceedings for violation of a college drug regulation required a determination that a criminal law had been violated. Moreover, just as forfeiture was a harsh penalty, suspension from college was a more severe penalty than was likely to be imposed by a state or federal court for a first-time marijuana offense.¹²⁰

¹¹⁴ 380 US 693, 702 (1965).

¹¹⁵ *Id.* at 701-02.

¹¹⁶ *Id.*

¹¹⁷ 428 US 433, 458 (1976).

¹¹⁸ 398 F Supp at 783, 795 (holding that evidence seized in an illegal search of student's room could not be used against him in a college disciplinary proceeding).

¹¹⁹ *Id.* at 782-83, 794-95 (noting, moreover, that students do not normally have the means to maintain protracted damage actions where they cannot recover except for bad faith).

¹²⁰ *Id.* at 794.

By contrast, the court in *Morale v Grigel*¹²¹ concluded that even though the search in that case violated the Fourth Amendment, evidence nonetheless could be used in suspension hearings. The search in *Morale* had been initiated by an RA who, together with the Head Resident, searched dormitory rooms for stolen property. Their search included checking closets and space under the student's bed and above a suspended ceiling.¹²² The RA asked another student to get a passkey to Morale's room, which was searched repeatedly.¹²³ During one of the searches, marijuana seeds were found in a closed plastic film container.¹²⁴ The court distinguished *Plymouth Sedan* because it came before *Janis*, and, referencing *Janis*, reasoned that the Supreme Court had never explicitly applied the exclusionary rule to civil proceedings.¹²⁵ The *Morale* court was concerned that applying the rule would impinge upon the university's ability to deal with students who failed to comply with regulations. The court concluded that the Supreme Court had intentionally left students remediless in the federal courts for violations of their Fourth Amendment rights.¹²⁶

The *Lubbers* court's reading of Supreme Court precedent is more persuasive than that in *Morale*. As *Lubbers* reasoned, a finding of a violation of a university regulation prohibiting drug use or possession requires a determination that the criminal law has been violated. Unlike *Janis*, where police did not have a stake in the outcome of the tax proceeding, university officials have a significant stake in the outcome of disciplinary proceedings: the university officials are the persons who implement and administer the university's regulations. Although the Supreme Court has not applied the exclusionary rule to many civil proceedings, an incentive is needed for university officials, and for campus police acting in conjunction with them, to implement the proper Fourth Amendment standards.

II. A PROPOSED ORGANIZATIONAL FRAMEWORK

This Part proposes a framework for organizing the various dormitory search cases. First, it develops a threshold determination that a court should initially make in order to place the search into one of three categories. Second, each of the three

¹²¹ 422 F Supp 988, 1000-01 (D NH 1976).

¹²² Id at 992.

¹²³ Id.

¹²⁴ Id at 993.

¹²⁵ Id at 1000.

¹²⁶ Id.

categories is matched with an appropriate Fourth Amendment standard for analyzing the constitutionality of the search.

A. Step One: Categorizing the Search

The modification of Fourth Amendment standards rests on locating an interest that is distinct from the traditional law enforcement objective to punish crime.¹²⁷ Therefore, a court's threshold inquiry in a dormitory search case is to categorize the purpose of the state actor's search. If a court determines that the search was conducted primarily to aid a municipal, state, or federal institution in its investigation and prosecution of crime, it should place the search in Category One—"Traditional Law Enforcement." If a court determines that a search was conducted pursuant to the university's interest in maintaining health or safety conditions in the dormitories, then it should place the search in Category Two—"Health/Safety Inspections and Plain View of Contraband." Finally, if a search is conducted pursuant to the university's interest in deterring drugs or contraband in order to maintain an environment amenable to education, then it should place the search in Category Three—"Search by University for Contraband."

The decision whether to place a search in Category One or Three may not always be clear, because either could involve campus police action. Generally, initiation or involvement by campus police in a search will result in placement in Category Three, because campus police are part of the university's regulatory or enforcement scheme.¹²⁸ In *New York v Burger*,¹²⁹ the Court suggested that the fact that officials with traditional police powers conduct or participate in the search is not determinative. Rather, as the Court reasoned, if police made searches pursuant to a comprehensive regulatory scheme, then their search was administrative and fell within an exception to the warrant requirement.¹³⁰

However, if it can be shown that the campus police officer was using the university regulatory scheme as a pretext for a traditional criminal investigation, then the search should be characterized as a Category One search. For example, in *United States v Johnson*,¹³¹ the Tenth Circuit found a search pretextual

¹²⁷ See Part I.C.

¹²⁸ A similar analysis is used to determine state action. See Part I.A.

¹²⁹ 482 US 691, 712 (1987).

¹³⁰ *Id.* at 699-701, 712 (state regulatory scheme required routine inspections for licenses and evidence of stolen vehicles).

¹³¹ 994 F2d 740, 743 (10th Cir 1993).

where a federal agent, who had no authority to conduct warrantless searches, initiated contact with a state agent, who was authorized by state statute to conduct warrantless searches of taxidermy shops. The court reasoned that, although there was a state statute authorizing state agents to make warrantless searches of taxidermy shops, no federal statute authorized federal agents to conduct such searches.¹³²

In placing the search into the appropriate category, a court should also utilize the principles that inform the 'state action' inquiry.¹³³ For example, traditional law enforcement objectives are often present in cases where federal, state, or municipal police initiate or are primarily responsible for carrying out the search. Thus, cases that should be placed in Category One include: *Piazzola v Watkins* and *Moore*, where municipal police requested the cooperation of university officials in searching for marijuana in university dormitory rooms;¹³⁴ *Commonwealth v McCloskey*,¹³⁵ where a narcotics agent and state trooper came to campus to search rooms for marijuana and met with a dean, who accompanied the officers to the rooms; and *People v Cohen*,¹³⁶ where the university contacted police who made a search of dormitories for drugs.

In contrast, a university health and safety objective is clear where a dean, head resident, or RA conducts a search pursuant to a campus health or safety regulation. Thus, cases that should be placed in Category Two include: *Arizona v Kappes*,¹³⁷ where RAs conducted a routine room inspection pursuant to university regulations for repairs and maintenance; *State v Hunter*,¹³⁸ where the director of housing conducted a search to find the cause of damage to school property; and *Neilson*, where college officials conducted a search in accordance with a residence hall contract allowing for inspections for health and safety.¹³⁹

More controversially, an educational purpose may exist where the university official or campus police officer initiates¹⁴⁰

¹³² *Id.*

¹³³ See Part I.A.

¹³⁴ *Piazzola*, 442 F2d 284, 286 (5th Cir 1971); *Moore*, 284 F Supp at 727-28. Although the court in *Moore* indicated that an educational purpose, not a criminal one, was served because the evidence was used only in disciplinary proceedings, it should still be placed in Category One instead of Category Three because municipal officers initiated the search and the university merely went along with them in their search.

¹³⁵ 272 A2d 271, 272 (Pa Super Ct 1970).

¹³⁶ 57 Misc 2d 366, 292 NYS 2d 706, 708 (NY Dist Ct 1968).

¹³⁷ 26 Ariz App 567, 550 P2d 121, 122 (1976).

¹³⁸ 831 P2d 1033, 1034-35 (Utah 1992).

¹³⁹ 666 NE2d at 985.

¹⁴⁰ Initiation is important because it indicates that the university has made a conscious

and conducts a search pursuant to a university regulation prohibiting drugs or contraband. Thus, cases that should be placed in Category Three include: *Lubbers*, where university officials and campus police officers who were also county deputy sheriffs conducted the search for marijuana;¹⁴¹ and *Morale*, where the Head Resident and an RA initiated and conducted the search for a stolen stereo.¹⁴² Cases in which no state action was found because only private university officials were involved, but which otherwise would be placed in Category Three, include: *Boettner*, where the Assistant Director of Protective Services conducted a search for marijuana with authorization from a university vice president;¹⁴³ *Haskins*, where a dean, alone, made a search for marijuana;¹⁴⁴ and *Burroughs*, where a resident hall director conducted a search for cocaine.¹⁴⁵

B. Fourth Amendment Standards and Application

1. Category One: Traditional Law Enforcement.

In a Category One "Traditional Law Enforcement" search, the Fourth Amendment requires a search warrant based on probable cause. Where officials initiate or direct a search for drugs or contraband, they primarily serve the criminal investigatory purpose of a government body. On balance, the probability that evidence will be used in criminal proceedings is high, and the intrusion on the student's privacy is great because the search entails examinations of personal areas, such as drawers and closets, for drugs, weapons, or other evidence of crime.

decision that drug use or contraband possession is a problem that somehow hinders its functioning as an educational institution.

¹⁴¹ 398 F Supp at 782. Although campus police officers were also county deputy sheriffs, one can infer from the facts of the case that the college officials and not the campus police/county sheriff initiated the search. It appears the college was the initiator for two reasons: (1) the court stated that the plaintiffs' room was entered and searched pursuant to college regulations that stated that college officials only had to have reasonable cause but that, if a county official made the search, a search warrant would have to be obtained; and (2) the opinion noted that "[c]ollege authorities were looking for marijuana." *Id.* at 787.

¹⁴² 422 F Supp at 992. *Morale* is difficult to classify because the initial search for the stereo was purported to be made pursuant to a health and safety regulation that did not mention searches for stolen items. *Id.* However, since a search for a stolen item is more akin to a search for drugs or contraband, in that it is an infraction of criminal law generally, it should be placed in Category Three.

¹⁴³ 362 NYS2d at 367-68. Although in *Boettner* the first evidence of knowledge of drugs on campus came from state police, the court was right in noting that mere knowledge of information does not mean the search was "state-directed." Rather, as the court pointed out, the university officials initiated and conducted their search independent of the state police and for university reasons.

¹⁴⁴ 369 NYS2d at 870.

¹⁴⁵ 926 SW2d at 245-46.

As noted above, *Piazzola*, *Moore*, *McCloskey*, and *Cohen* fall into Category One. In *Piazzola*, the state narcotics agents who asked for the cooperation of the university officials in making the search did not have a search warrant.¹⁴⁶ The court correctly held that because a search warrant was not obtained, the search, even though conducted with the accompaniment of university officials, was unconstitutional.¹⁴⁷

However, the court in *Moore*, a case with facts nearly identical to that of *Piazzola*, required only "reasonable cause."¹⁴⁸ In so doing, the court applied an incorrect Fourth Amendment standard. Because the search was initiated by police, the court should have required both a search warrant and probable cause. Applying the exclusionary rule analysis suggested in Part I.D, the *Moore* court should also have excluded the evidence in the disciplinary hearings that were held against the student.

Another Category One example is *McCloskey*, where a narcotics agent and a state trooper came to campus with a search warrant and met with the dean. Although the dean facilitated the search, it was initiated and conducted by the state officers. The court correctly held that full Fourth Amendment requirements applied—which, in addition to a search warrant, required that the officers identify themselves and state their purpose before entering the room.¹⁴⁹ Because there was no such announcement of purpose, the search was unconstitutional.¹⁵⁰

Finally, in *Cohen*, even though university officials initiated contact with state police to search the dormitory for drugs, they essentially delegated their powers to the police by having the police conduct the search. Therefore, the court correctly held that full Fourth Amendment requirements were required. Because a search warrant had not been obtained and no probable cause had been established, the search was unconstitutional.¹⁵¹ The Snow College dog-sniffing policy¹⁵² is analogous to *Cohen* in that Snow College requested the assistance of municipal police officers; and thus it could be found unconstitutional if police proceed to enter a student's room without a search warrant.

¹⁴⁶ 442 F2d at 286.

¹⁴⁷ Id at 290.

¹⁴⁸ 284 F Supp at 728, 730.

¹⁴⁹ See text accompanying notes 67-69.

¹⁵⁰ *McCloskey*, 272 A2d at 272.

¹⁵¹ *Cohen*, 292 NYS2d at 708-11.

¹⁵² See note 5 and accompanying text.

2. Category Two: Health/Safety Inspections and Plain View of Contraband.

In a Category Two "Health/Safety" search, the Fourth Amendment arguably does not require either a search warrant or probable cause. On balance, the student has a lesser expectation of privacy in the immediately visible areas of his dormitory room, and the university has an interest in maintaining its property and monitoring the health of its students.¹⁵³ Moreover, students have often consented to such searches through housing contracts or student's handbooks. As stated in Part I.B, if university officials observe drugs or stolen items in plain view during their health or safety inspection and call in police to retrieve the items, the warrantless inspection is not rendered unconstitutional.¹⁵⁴

Kappes, *Hunter*, and *Neilson* fall into Category Two. In *Kappes*, RAs were conducting routine safety and maintenance inspections when they came across marijuana in plain view on a student's desk. They called their supervisor, and the supervisor called campus security.¹⁵⁵ *Kappes* was correctly decided, because the marijuana had been observed in plain view by persons who were conducting legal health and safety inspections and thus police officers did not need a search warrant to seize the items.¹⁵⁶ The result in *Hunter* is similar.¹⁵⁷

The court in *Neilson*, however, required a campus police officer to obtain a search warrant before entering a dormitory room to collect evidence and take pictures of marijuana plants that had been observed in plain view by the university officials.¹⁵⁸ Under the rationale presented in Part I.B, the *Neilson* case was incorrectly decided because the university officials were in the room for a legitimate health purpose when they made their observations and the police officers' entry to take pictures was not a significant expansion of the university officials' legitimate search.

¹⁵³ See, for example, *Kappes*, 550 P2d at 124 ("The university has an obligation to provide a safe and studious environment for those in attendance.").

¹⁵⁴ See text accompanying notes 65-66.

¹⁵⁵ 550 P2d at 123.

¹⁵⁶ The court upheld the search as constitutional and reasonable because "[t]he right of privacy protected by the fourth amendment does not include freedom from reasonable inspection of a school-operated dormitory room by school officials." *Id.* at 124.

¹⁵⁷ 831 P2d at 1037-38. The court found that Hunter consented to the university's right of reasonable inspection and in doing so waived any Fourth Amendment objections to the university's exercise of that right. Thus, the court held that stolen university property seized in plain view could not be the subject of an unreasonable search.

¹⁵⁸ 666 NE2d at 985.

3. Category Three: Search Conducted by University for Contraband.

In a Category Three "University Contraband" search, this Comment proposes that the appropriate Fourth Amendment standard is to require probable cause but not a search warrant. Searches in Category Three are conducted by university officials pursuant to a university regulation to deter possession of drugs and contraband on campus and to provide an atmosphere conducive to educational pursuits. These searches are often conducted by or with the aid of campus police.

As noted in Part I.C, the Supreme Court has not been averse to conducting a balancing inquiry to adjust Fourth Amendment requirements where a noncriminal law enforcement objective is present, as it did in *Camara*. Moreover, the Court recognized in *T.L.O.* that searches in educational settings—even searches for violations of what are also criminal laws—can serve educational ends.¹⁵⁹ However, the appropriate balance that is struck in the dormitory setting results in Fourth Amendment requirements different than those in either *Camara* or *T.L.O.*

The two interests that need to be balanced are that of the student's expectation of privacy in her dormitory room and that of the university in maintaining an institution that promotes an educational environment. Students in a Category Three search have a significant expectation of privacy in their dormitory room. While students are at college, their dormitory rooms are their homes; a search for drugs or alcohol reaches into personal areas of a dormitory room; and there is the potential that evidence could be used in criminal proceedings.¹⁶⁰

On the other hand, a university's interest extends beyond merely maintaining the structure of its physical plant. The authorities of public colleges and universities may make necessary rules and regulations for the orderly maintenance of their institutions.¹⁶¹ Courts have observed that living on campus serves educational purposes equally as important as classroom instruc-

¹⁵⁹ See text accompanying notes 79-81.

¹⁶⁰ The fact that the university states in its policy that it will use the evidence only in a disciplinary proceeding may serve to limit traditional police involvement, thereby decreasing the privacy invasion to an extent. See *Camara*, 387 US at 530-31. Nevertheless, where probable cause is not required, searches made unnecessarily can be just as personally invasive to one's privacy, whether the evidence is to be used in a disciplinary proceeding or a criminal proceeding.

¹⁶¹ See Donald M. Zupanec, Annotation, *Validity, Under Federal Constitution, of Regulation or Policy of College or University Requiring Students to Live in Dormitories or Residence Halls*, 31 ALR Fed 813, 815 (1977), citing 15 Am Jur 2d Colleges and Universities § 22 (1976).

tion,¹⁶² such as exposing students to varied intellectual and political attitudes and providing an opportunity for students to share in each other's diverse experiences.¹⁶³ Living on campus also enables students to remain close to classes and meal services and to receive the support of other students and RAs.¹⁶⁴

With regard to whether a drug-free or reduced drug and alcohol environment promotes educational ends, the *Lubbers'* rationale—that possession of drugs is a purely private matter and that therefore a university does not have an interest in regulating it—is unpersuasive.¹⁶⁵ Where many dormitories consist of rooms shared by at least two people, they will often disagree as to the presence of drugs or contraband in the room. Moreover, the proximity of the dormitory rooms to one another, combined with the relative isolation of some campuses from towns and cities, insulates dormitories from traditional criminal law enforcement oversight and facilitates the ease with which drug transactions can be conducted. In addition, although drug or alcohol use may be a self-directed activity, their effects may be felt indirectly by others through side effects such as the vandalism that may occur to university dormitories where students reside.¹⁶⁶ Even self-directed activity can have fatal effects, as has been the case with binge drinking at some colleges.¹⁶⁷ Finally, although university drug and alcohol prohibitions may mirror traditional law enforcement prohibitions, the university's enforcement measures are contemplated as a separate and distinct scheme to deter drug and alcohol use on campus—the objective being a more livable, studious, and healthy environment for all.

Given these competing interests—students' privacy and universities' maintenance of educational living environments—a workable set of Fourth Amendment standards is one that requires traditional probable cause but not a search warrant.¹⁶⁸ In *T.L.O.*, the Court evaluated the search warrant and probable cause requirements separately.¹⁶⁹ This separate evaluation is par-

¹⁶² See 31 ALR Fed at 815.

¹⁶³ See *id.*, citing *Pratz v Louisiana Polytechnic Institute*, 316 F Supp 872 (D La 1970).

¹⁶⁴ See 31 ALR Fed at 815.

¹⁶⁵ See text accompanying notes 90-92.

¹⁶⁶ See *Hunter*, 831 P2d at 1034 (noting vandalism suspected to be result of alcohol and contraband violations).

¹⁶⁷ See note 2.

¹⁶⁸ Such a proposal has been made by others in certain high school search cases. See Justice Brennan's opinion in *T.L.O.*, 469 US at 354-58 (concurring in part and dissenting in part). See also Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception*, 66 NYU L Rev 1077, 1110 n 172 (1991).

¹⁶⁹ *T.L.O.*, 469 US at 340. See also Dale Edward F.T. Zane, Note, *School Searches Under the Fourth Amendment: New Jersey v. T.L.O.*, 72 Cornell L Rev 368, 390 n 170 (1987).

ticularly necessary in the dormitory context in order to adjust the standards according to the specific mix of privacy expectations and educational needs.¹⁷⁰

A warrant requirement would unduly frustrate a university's educational mission. It would restrict its ability to act upon a violation as it is occurring. In the dormitory context, although the need to maintain "immediate discipline" in the schoolhouse setting is not present as it was in *T.L.O.*, the need to control and deter drug and contraband possession is present. Deterrence of drugs and contraband on campus requires a quicker response than can be generated if search warrants are required. For example, in the close quarters of dormitories word of an impending search can be communicated quickly and drugs or contraband can be disposed of before university officials have time to go to a magistrate for a warrant.¹⁷¹ Colleges and universities may also have a pressing need to make searches on short notice in other types of situations, such as when the university is hosting an event where large numbers of people are coming to campus for the weekend.¹⁷²

Camara's requirement of a search warrant is inapposite in the dormitory search context. A search warrant was particularly important for the residents of apartment units, because it assured them that the "strangers" attempting to enter their homes were not impostors. However, in university housing, students are generally more familiar with the university officials and campus police.

While a search warrant requirement would make it more difficult effectively to maintain an educational living environment, in order to protect important privacy interests, a search of a dormitory room should require probable cause based upon individualized suspicion. This would be a common sense practical question to determine whether there is a "probable cause" to believe con-

("The Court demonstrated in *Camara v. Municipal Court*, that the warrant question should be separate from the probable cause standard question, . . . Professor Lafave noted . . . that [cases after *Camara*] . . . failed to distinguish between the warrant and probable cause questions.").

¹⁷⁰*T.L.O.*, 469 US at 340-41. See also Berman, Note, 66 NYU L Rev at 1105-22 (cited in note 168) (arguing for probable cause but no search warrant in certain extracurricular high school search cases).

¹⁷¹See Zane, Note, 72 Cornell L Rev at 390 n 170 (cited in note 169) (noting how students accused of infraction could simply hide items that violate school rules after being accused of possessing them).

¹⁷²See *Boettner*, 362 NYS2d at 367-68 (college authorized search of a student's room on Friday afternoon where Winter Weekend commenced that evening and a large number of people were coming to campus).

traband or evidence is located in a particular place.¹⁷³ A dormitory search case requirement of individual probable cause would be a higher standard than was required in either *Camara* or *T.L.O.* In *Camara*, probable cause based on "area-wide" (rather than individualized) factors was justifiable because the inspections were conducted for searches of health and safety violations rather than drugs or contraband. Conversely, drug and contraband searches in dormitories are more intrusive: a dormitory room is a student's home, private areas such as dresser drawers can be searched,¹⁷⁴ and the potential for use in criminal proceedings is higher than in a typical administrative search.

In *T.L.O.*, factors that counseled for only a "reasonable grounds" requirement were the need for flexibility in disciplinary procedures and a desire to preserve informal student-teacher relations and to spare teachers and school administrators the necessity of schooling themselves in the finer points of probable cause.¹⁷⁵ These factors are less present in the university setting. Unlike the elementary and secondary school setting where the maintenance of discipline is often conducted by the same persons who teach, university faculty members do not make the searches for drugs or contraband. Rather, university administrators, whose primary job is to provide an environment that protects the welfare of the students, set the search standards.¹⁷⁶ Thus, university administrators can direct their resources more pointedly to making sure their searches are supported by sufficient information. Under these circumstances, requiring the higher standard of probable cause rather than the "reasonable cause" standard of some of the new policies will diminish the instances in which students' privacy is wrongly and unnecessarily infringed.

"Probable cause" is not merely an empty phrase. It has a substantial body of legal precedent behind it, and its meaning can be manageably comprehended and applied by those in the university setting. To begin with, the campus police would likely have been trained in what constitutes probable cause. If not, general counsel at universities would be available to aid enforcement officials. Counsel could advise that probable cause may be estab-

¹⁷³ See *Illinois v. Gates*, 462 US 213, 230 (1983).

¹⁷⁴ Accordingly, where searches have involved less intrusion into personal areas, "reasonable suspicion" was sufficient. See *Terry v. Ohio*, 392 US 1, 26-30 (1968) (noting that search was confined to what was minimally necessary to learn whether person was armed).

¹⁷⁵ 469 US at 340-43.

¹⁷⁶ See, for example, Marks, *Bill Would Permit Dorm Searches*, Tulsa Trib at 1A (cited in note 6) (noting that the governing board for each college and university currently sets the dormitory search policies).

lished by personal observation, but what one observes must be closer to an actual violation of a law or regulation than not.¹⁷⁷ Thus, the UNT policy that permitted residence hall staff to assume that incense or clove cigarettes was used to conceal use of drugs¹⁷⁸ would not pass the probable cause test. College age students may burn incense for its unique aromas and not to mask the smell of marijuana. On the other hand, tips from student informants will often constitute sufficient grounds for probable cause.¹⁷⁹ If there is a question about abuse of discretion, the university official's probable cause finding can be challenged in court. Thus, the requirements of Category Three—probable cause based on individualized suspicion, but no search warrant—provide manageable standards for campus police and university officials to follow.

Lubbers and *Morale* fall into Category Three. In *Lubbers*, the university officials, an RA, and campus police who were also county deputy sheriffs searched the room where marijuana was found. *Lubbers* was only partially correctly decided according to the analysis in this Comment. The court correctly pointed out that the regulation under which the officials were acting failed to require probable cause in its requirement of "reasonable cause" to justify a room search, making it facially unconstitutional.¹⁸⁰ However, the *Lubbers* court also required a search warrant,¹⁸¹ which is not required under the proposed standard. *Lubbers'* exclusion of the evidence from the disciplinary proceeding was correct, under the analysis presented in Part I.D, if there was no probable cause for the search.

In *Morale*, an RA and a Head Resident of the New Hampshire Technical Institute conducted a search for a stolen stereo. Like *Lubbers*, the *Morale* case was only partially correctly decided according to the analysis in this Comment. The *Morale* court re-

¹⁷⁷ See *T.L.O.*, 469 US at 368-69 (Brennan concurring in part and dissenting in part) (applying the probable cause standard and concluding that presence of rolling papers was not enough evidence for probable cause because cigarettes were a staple item of commerce).

¹⁷⁸ See *Dorm Drug Searches Challenged*, Austin-Am Statesman at B5 (cited in note 106).

¹⁷⁹ See Joseph R. McKinney, Commentary, *The Fourth Amendment and The Public Schools: Reasonable Suspicion in the 1990s*, 91 Ed Rep 455, 461 (1994) (school officials may ordinarily accept at face value the information that students supply), citing *S.C. v Mississippi*, 583 S2d 188, 192 (Miss 1991); *Williams by Williams v Ellington*, 936 F2d 881, 888-89 (6th Cir 1991) (tips from a student believed to be motivated by malice or ill-will require more corroboration by school authorities).

¹⁸⁰ *Lubbers*, 398 F Supp at 791.

¹⁸¹ *Id* at 793.

quired that the university officials obtain a search warrant¹⁸² that the proposed framework would not. However, the requirement of probable cause¹⁸³ was correct, and because it was clear that there was no probable cause to believe that the stolen stereo would be found in the student's room,¹⁸⁴ the search violated the student's Fourth Amendment rights. Moreover, although *Morale* found the student's rights had been violated, it did not exclude the evidence from the disciplinary proceedings. The court should have excluded the evidence from the disciplinary proceedings under the analysis presented in Part I.D, as exclusion would give the university officials an incentive to obtain probable cause in future searches.

Finally, the ASU policy mentioned in the introduction would be facially unconstitutional under the proposed standard in this Comment because it requires only "reasonable cause." The proposed Oklahoma legislation and the UNT policy would be deficient for the same reason.

CONCLUSION

Part II of this Comment provides a framework for courts deciding dormitory search cases. Federal and state courts reviewing dormitory search cases should place the search into one of three categories and then apply the appropriate Fourth Amendment standard. The three categories and appropriate standards are: (1) a traditional law enforcement search if performed primarily by state or local police would require both a warrant and probable cause; (2) an inspection for health or safety by university officials, even one that results in discovery of incriminating evidence in plain view, would not require a warrant or probable cause; and (3) a search by university officials, with or without the aid of campus police, for evidence of drugs or contraband would require probable cause but not a search warrant.

The interests involved in the dormitory setting are important both from the student's and the university's perspective. This framework recognizes that the Supreme Court's precedent in other contexts, such as administrative and high school settings, cannot simply be superimposed upon the dormitory context. However, using the balancing inquiry and the principles of those precedents in a new setting results in the warrantless probable

¹⁸² 422 F Supp at 998.

¹⁸³ Id (implicit in court's requirement of "properly issued search warrant").

¹⁸⁴ Id at 992 (noting that search was a room-to-room search under the official's general authority for health and safety inspections).

cause requirement. The requirement establishes a "new truce," one where university officials and campus police are restrained in their searches by having to gather sufficient information of a violation and to judge the credibility of that information. It restrains them in such a way that protects students' important privacy interests, while at the same time permitting the university to provide an environment conducive to living and learning in the university setting.