Santa Clara University
School of Law

Santa Clara Law Review

Volume 9 | Number 1 Article 7

1-1-1969

The Dormitory Student's Fourth Amendment Right to Privacy: Fact or Fiction?

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THE DORMITORY STUDENT'S FOURTH AMENDMENT RIGHT TO PRIVACY: FACT OR FICTION?

Generally a warrantless search of private property is prima facie unreasonable unless authorized by proper consent.[1] Exceptions to this general rule arise "[I]n certain carefully defined classes of cases."[2] Apparently the student dormitory room in a tax-supported public university may be reasonably searched without a warrant and without the student's consent provided a university official authorizes the search.[3] If evidence obtained as a result of a dormitory search is admissible in a criminal proceeding, it is *a fortiori* admissible in a university disciplinary proceeding against the student.[4] However, it does not necessarily follow that evidence inadmissible in a criminal proceeding is inadmissible in a university disciplinary proceeding.[5]

Recent Supreme Court decisions indicate that the fourth amendment's emphasis is directed towards protecting *privacy* rights rather

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[1] U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See Katz v. United States, 389 U.S. 347, 357 (1967); *accord*, Terry v. Ohio, 392 U.S. 1 (1968); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967). The right to be free from unreasonable searches applies to the states through the fourteenth amendment, and evidence seized as a result of such an unreasonable search is inadmissible in a state criminal proceeding. Mapp v. Ohio, 367 U.S. 643 (1961).

[2] Camara v. Municipal Court, 387 U.S. 523, 528 (1967). Upon balancing the need for effective law enforcement with the right of privacy, "it may be contended that a magistrate's warrant may be dispensed with." Johnson v. United States, 333 U.S. 10, 14-15 (1947). The term "effective law enforcement" connotes two situations, first, where the safety of the police officer is or may be endangered, Terry v. Ohio, 392 U.S. 1, 29 (1968), and second, where a delay by officers may increase the possiiblity that evidence sought will be destroyed, Ker v. California, 374 U.S. 23, 42 (1963).

[3] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968); *cf.* United States v. Grisby, 335 F.2d 652 (4th Cir. 1964) (Marine corporal's living quarters searched on authorization of commanding officer); United States v. Donato, 269 F. Supp. 921 (3d Cir. 1967), *aff'd per curiam*, 379 F.2d 288 (3d Cir. 1967) (U.S. Mint employee's locker searched pursuant to orders by the security guard captain); People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *vacated per curiam*, 89 S. Ct. 252 (1968) (high school student's locker searched by permission of school vice-principal); People v. Kelly, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (1961) (Master of college dormitory was deemed authorized to consent to police search of defendant's room).

[4] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968). While *Moore's* holding involved the university proceeding, it apparently implied that the same search would be upheld in a criminal proceeding.

[5] *Id.* at 730.

than property rights.[6] Furthermore, the reasonableness standard necessary to justify a search or seizure is now sometimes less stringent than the traditional probable cause standard.[7] In light of these developments the threshold question in the case of a dormitory search without a warrant becomes: Does the fourth amendment guarantee privacy and security to the student in his dormitory room? If so, then the reasonableness of a search of those premises may be determined by striking a balance between the university's interest in maintaining campus order and discipline, and the student's interest in safeguarding his privacy.[8] This comment will examine the application of the fourth amendment to the dormitory resident in a tax-supported university in light of modern search and seizure decisions.[9] The precise issue was recently examined in *Moore v. Student Affairs Committee of Troy State University*,[10] while an analogous issue was decided in *People v. Overton*.[11]

MOORE AND OVERTON

In *Moore*, two state narcotics agents, pursuant to "reliable information" concerning the possible presence of marijuana on the

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[6] *See* Mancusi v. DeForte, 392 U.S. 364 (1968) (protection of union files located in multi-desk office); Katz v. United States, 389 U.S. 347 (1967) (protection of individual's words utterred in public telephone booth). See also Black, *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 112-26 (1967).

[7] Recent decisions emphasize the idea of "reasonableness" based on (1) the exigencies of the particular situation and (2) a balancing of interests between the public and private sectors. This has the effect of de-emphasizing the importance of the traditional standard of probable cause. *See* Terry v. Ohio, 392 U.S. 1 (1968) ("stop and frisk" held reasonable where police have reason to believe that suspect is armed and dangerous regardless of presence of probable cause for arrest); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative search pursuant to warrant held reasonable; "probable cause" for warrant exists if "reasonable" legislative or administrative standards are satisfied with respect to a particular dwelling); Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968) (dormitory search without warrant held reasonable if university official had reasonable cause to believe unlawful act had been performed and acted pursuant to "reasonable" inspection regulation).

[8] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 728-29 (M.D. Ala. 1968).

[9] The law of search and seizure in general is undergoing change. The Supreme Court, during the ten terms preceding the 1966 Term, handed down eleven opinions concerning search and seizure. During the 1966 Term alone, it handed down nine, plus two in the area of administrative searches. Three significant trends seem to be emerging: First, the limits relating to what can be seized have been broadened, i.e., the Court has abolished the distinction between "mere evidence" and "fruits and instrumentalities." Second, fewer types of cases are being exempted from the requirement that warrants be obtained. And third, the more functional approach of balancing the public and private interests involved is taking emphasis away from the traditional formulas for determining whether probable cause exists. Black, *supra* note 6 at 112.

[10] 284 F. Supp. 725 (M.D. Ala. 1968).

[11] 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *vacated per curiam*, 89 S. Ct. 252 (1968).

university campus, made a warrantless search of six dormitory rooms in two separate residence halls. The Dean of Men accompanied the agents, and a search was made of plaintiff's room, in his presence, yet over his objections. The search was not incident to a lawful arrest,[12] although there apparently was probable cause;[13] nor was any other offense committed by the plaintiff in the presence of the agents.[14] However, the search was conducted in accordance with a university regulation granting university officials inspection rights.[15]

The district court held that the regulation was reasonably applied; the officials acted on a "reasonable belief" that the room was being used for a purpose either illegal or likely to interfere seriously with campus discipline.[16] The standard of "reasonable cause to believe" which the court held to be lower than the constitutionally protected criminal law standard of "probable cause," was applied for two reasons: First, the necessity for maintaining order and discipline requires a reasonable regulation allowing inspection;[17] second, college disciplinary proceedings are not criminal proceedings in the constitutional sense and thus do not require an application of the exclusionary rule.[18]

But the court went on to state that even if the exclusionary rule did apply, the search which took place in *Moore* would not be un-

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[12] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 728 (M.D. Ala. 1968) (by stipulation).

[13] "The school authorities in this case not only had information sufficient to form 'reasonable cause to believe' plaintiff was using his room in a manner inconsistent with appropriate school discipline, but they also had enough information to amount to probable cause to believe the conduct was criminal." *Id.* at 730 n.11.

[14] *Id.* at 728.

[15] The Troy State University Bulletin 1967-1968 stated: "The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary the room may be searched and the occupant required to open his personal baggage and any other personal material which is sealed." This same language appeared in the "Oracle," a student handbook, and on the reverse side of a leaflet entitled "Residence Hall Policies."

[16] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 730 (M.D. Ala. 1968).

[17] *Id.* A reasonable right of inspection is necessary to insure that the university will be able to perform its duty to maintain an educational atmosphere even though it may infringe to some extent on the outer boundaries of the student's fourth amendment rights. *See also* People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *vacated per curiam*, 89 S. Ct. 252 (1968).

[18] A proceeding held to preserve order on the campus by disciplining students whose conduct interferes substantially with the educational function, does not require adherance to strict constitutional standards, but instead requires only that "rudimentary elements of fair play" be observed. Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

reasonable.[19] The fourth amendment does not prohibit reasonable searches when conducted by a superior charged with the responsibility of maintaining discipline or security.[20] And a student who "rents" a dormitory room automatically waives objection to any reasonable search conducted pursuant to reasonable and necessary regulations.[21]

Overton[22] involved a search of a high school student's locker by police detectives accompanied by the school's vice-principal. The New York Court of Appeals held that the supervisory powers of school officials, necessitated by the difficulty of order and discipline, gave the vice-principal the authority to consent to the search.[23] It was his "affirmative obligation" rather than the invalid search warrant which compelled him to inspect.[24] However, the United States Supreme Court recently vacated, and remanded the decision for reconsideration of the question whether the invalid search warrant negated the voluntariness of the consent,[25] thus implying that the vice-principal could otherwise authorize the search.

Notable in both *Overton* and *Moore* is the fact that in the former the vice-principal retained the combinations to all school lockers, while in the latter the university officials had a pass-key to all rooms in the residence halls. Furthermore, in both cases school publications reserved the right to regulate and inspect the premises.[26]

Though not directly in point, *Overton* is significant in that *Moore* cited it for the rule that a reasonable right of inspection is necessary to the performance of the institution's duty to maintain control and discipline even though it may infringe on the outer boundaries of the student's fourth amendment rights.[27]

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[19] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 730 (M.D. Ala. 1968). Whether this conclusion is dictum or alternative holding is not clear.

[20] See note 3 *supra* and accompanying text.

[21] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968).

[22] 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967).

[23] *Id.* at 363, 229 N.E.2d at 598, 283 N.Y.S.2d at 25.

[24] The basis for the dissenting opinion was, in essence, that the vice-principal was coerced by the invalid warrant. The majority opinion, on the other hand, said that the vice-principal would have consented as he did regardless of the presence of the invalid warrant. *Id.* at 362, 229 N.E.2d at 597, 283 N.Y.S.2d at 24.

[25] Overton v. New York, 89 S. Ct. 252 (1968), *per curiam*. The Supreme Court referred the lower court to Bumper v. North Carolina, 391 U.S. 543 (1968). In *Bumper*, the Court held: "When a law enforcement officer claims authority to search a home under a warrant which is actually invalid, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion." *Id.* at 550.

[26] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 728 (M.D. Ala. 1968); People v. Overton, 20 N.Y.2d 360, 363, 229 N.E.2d 596, 598, 283 N.Y.S.2d 22, 25 (1967), *vacated per curiam*, 89 S. Ct. 252 (1968).

[27] Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 730

THE THRESHOLD QUESTION

When the issue of illegal search has been raised in the past, courts have initially examined the nature and extent of the property interest involved to determine if there was a constitutionally protected area.[28] However, recent decisions indicate that the fourth amendment protects a citizen's right to privacy even if he has no property interests in his physical surroundings.[29] In *Katz v. United States*,[30] where a public telephone was wiretapped without a warrant, the fact that there was no physical intrusion or trespass was not controlling. The Court held that the fourth amendment protects people, not places.[31] Hence the criterion becomes whether the individual seeks to preserve the particular activity as private, regardless of whether he is in an area accessible to the public.[32] Thus the premise that property interests control the right of the government to search and seize has been discredited.[33]

This new emphasis on privacy prights was further clarified in *Mancusi v. DeForte*.[34] There, a defendant's standing to object to an unconstitutional search was challenged. Defendant, a union official, shared a large office with several co-workers, all of whom had common access to the union files. The Court held that his relationship to the files was sufficient to allow him to challenge the method by which the prosecution obtained the files: "[C]apacity to claim the

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(M.D. Ala. 1968). The *Moore* court recognized the difference which exists between the disciplinary requirements of high school and college students, but stated that, "[N]o distinction can be drawn between the fundamental duties of educators at both levels to maintain appropriate discipline. A reasonable right of inspection of school property and premises—even though it may have been set aside for the exclusive *use* of a particular student—is necessary to carry out that duty. . . ." *Id.* at 730 n.10 (emphasis added).

[28] *See* United States v. Botsch, 364 F.2d 542 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967), where the court found that since defendant's landlord possessed a key to the premises he had leased to the defendant and had authority to receive packages for him, he could authorize a search without violating defendant's *right to possession*. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), business files were subject to defendant's *possessory interests*. In two eavesdropping cases, Silverman v. United States, 365 U.S. 505 (1961) and Lopez v. United States, 373 U.S. 427 (1963), the legality of recordings turned on whether or not there was a *trespass or physical intrusion*. And Jones v. United States, 362 U.S. 257 (1960) held that in a prosecution for possession of narcotics one who is present in an apartment with the consent of the tenant at the time of search has a *sufficient interest in the premises* to establish him as a "person aggrieved" by the search.

[29] Mancusi v. DeForte, 392 U.S. 364 (1968); Katz v. United States, 389 U.S. 347 (1967).

[30] 389 U.S. 347 (1967).

[31] *Id.* at 351.

[32] *Id.* at 351-52.

[33] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 306 (1967); Katz v. United States, 389 U.S. 347, 353 (1967).

[34] 392 U.S. 364 (1968).

protection of the [fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[35]

Moore recognized that fourth amendment rights do not depend upon traditional property concepts.[36] By recognizing that a university student has fourth amendment rights,[37] *Moore* impliedly embraces the new concept of privacy. This implication is bolstered by analogy; if a telephone booth and a large business office are constitutionally protected areas of privacy, the dormitory room must be attributed with the same security.[38]

THE TEST: REASONABLENESS

While warrantless searches are prima facie unreasonable,[39] a traditional exception was made where the search was incident to a lawful arrest under exigent circumstances, such as physical danger to the police officer[40] or imminent destruction of the evidence sought.[41] However, the recent Supreme Court rulings seem to utilize a new approach in determining reasonableness. "[T]he sounder course is to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness."[42] These exigencies should be tested by "balancing

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35 *Id.* at 368. Note also Mr. Justice Harlan's concurring opinion in *Katz*: "[T]here is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967). Thus, both the belief of the individual and the circumstances confronting him determine whether the right of privacy exists.

36 284 F. Supp. 725, 729 (M.D. Ala. 1968). *Moore* cites *Katz* for the principle that fourth amendment rights do not depend on a "general theory of the right of privacy." *Id.* But that "general theory" is the common law tort theory behind invasion of privacy—the individual's "right to be left alone by other people." Katz v. United States, 389 U.S. 347, 350 (1967). This general right of privacy must be distinguished from the constitutional right to protection of private activities. "What . . . [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52.

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

38 Obviously, the student residing in a dormitory room has a great expectation of privacy. Under the old property rule, it was uncertain whether the student's room was a protected area, as indicated in *Moore*. The rationale used to hold a search of the room valid was one of consent. Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 730-31 (M.D. Ala. 1968). But under the new emphasis on privacy this rationale does not necessarily hold true; while a student may waive the right of privacy, a third party should not be able to search without such waiver.

39 See cases cited note 1 *supra*.

40 State v. Chinn, 231 Or. 259, ——, 373 P.2d 392, 398 (1962).

41 Ker v. California, 374 U.S. 23, 40 (1963).

42 Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968). *See* Warden, Md. Penitentiary v.

the need to search against the invasion which the search entails," although the notions underlying the warrant procedure and the probable cause requirement remain relevant.[43]

In *Terry v. Ohio*,[44] the crucial issue was not the propriety of the officer's taking steps to investigate the petitioner's suspicious behavior, but whether the invasion of petitioner's personal security by being searched for weapons in the course of that investigation was justified.[45] The search initially involved a patting of petitioner's clothing to determine whether he was carrying a concealed weapon. Only after determining that Terry did in fact have a gun, did the investigating officer require him to remove his coat. Balancing the extent of the personal privacy invaded against the governmental interest in preventing crime and the individual officer's more immediate interest in self-preservation, the procedure taken by the officer was deemed reasonable.[46]

Camara v. Municipal Court[47] declared reasonableness to be the ultimate standard in determining the validity of the search, adding that "[I]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[48] *Camara* involved an attempted search of a dwelling by local health officers. The court held that by applying a reasonableness standard and balancing the public and private interests involved, a warrant could issue for "area" searches involving a "relatively limited invasion of the urban citizen's privacy."[49] Thus, while recognizing the warrant requirement for health department inspections, the cause requirement for issuing such warrants was reduced.[50]

Hayden, 387 U.S. 294, 299 (1967) where the court stated, "The permissible scope of search must . . . at the least, be as broad as may be necessary to prevent the danger that the suspect at large in the house may resist or escape." *Warden, Md. Penitentiary* also broadened the scope of the search by holding a search is not limited to "fruits and instrumentalities," but may include "mere evidence" of a crime. *Id.* at 306-07.

43 Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

44 392 U.S. 1 (1968).

45 *Id.* at 23.

46 *Id.* at 30-31.

47 387 U.S. 523 (1967).

48 *Id.* at 539.

49 *Id.* at 536-37. *See* See v. Seattle, 387 U.S. 541, 545 (1967): "The [administrative] agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field."

50 The *Camara* Court disagreed with the holding in Frank v. Maryland, 359 U.S. 360 (1959), and quoted Justice Douglas' dissenting opinion with approval: "Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those

Moore recognized the trend of modern search and seizure cases, for it formulated a "reasonable cause to believe" standard for university officials based upon the "special necessities" of the student-university relationship.[51] There the university's fundamental duty to operate as an educational institution necessitated a reasonable right of inspection, based on reasonable cause, even though it might infringe peripherally on the student's fourth amendment rights.[52] *Moore's* "special necessities" formula is tantamount to the "exigencies" rationale employed in *Camara* and *Terry*. Also, the court's standard of "reasonable cause to believe" seems to incorporate the "balancing" concept by which *Terry* and *Camara* concluded that searches may sometimes—depending on the exigencies or necessities—be conducted with less than the traditional probable cause.

Moore followed the modern trend of search and seizure cases by balancing interests and mouthing the standard of reasonableness, yet failed to provide safeguards for infringements of student rights. Although the subjects of the *Camara* search were selected indiscriminately, a search warrant was nevertheless required. This warrant, albeit issued on less than traditional probable cause, was required to prohibit the "inspector in the field" from making the decision to search the particular premises.[53] "[B]road statutory safeguards[54] are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty."[55] Yet, in *Moore*, where the rooms searched were singled

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that would justify such an inference where a criminal investigation has been undertaken. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought. This is not to sanction synthetic search warrants but to recognize that the showing of probable cause in a health case may have quite different requirements than the one required in graver situations." *Id.* at 817.

51 284 F. Supp. 725, 730 (M.D. Ala. 1968).

52 *Id.*, citing with approval, People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *vacated per curiam*, 89 S. Ct. 252 (1968).

53 Camara v. Municipal Court, 387 U.S. 523, 532 (1967). In *Moore*, the Dean of Men was summoned to the office of the Chief of Police on the morning of the search and informed that the police had information concerning "the possibility of there being marijuana on the campus." Later that morning a second meeting was held at which a list of the names of students whose rooms the officers desired to search was produced. At 1 p.m. the officers received additional information that some of the students they were interested in were preparing to leave campus for a break following the end of the examination period. Finally, at 2:45 p.m. the search of plaintiff's room took place, and marijuana was found. From these facts it appears that the officers had ample time to obtain a search warrant.

54 The inspector in the field had been required by local ordinance to display proper credentials, inspect only at "reasonable times," and not obtain entry by force where no emergency exists. *Id.* at 531-32.

55 *Id.* at 533.

out beforehand, no warrant was required. By not requiring a search warrant, but still following the "special necessities" doctrine to justify the imposition of a standard less than "probable cause," *Moore* essentially leaves the student helpless to resist the invasion of his privacy.

It might be argued that *Camara* can be distinguished from *Moore* because *Camara* involved the threat of criminal prosecution resulting either from the search itself or from refusal to consent to such a search. However, *Moore* posed a similar threat. The express purpose of the search was to uncover evidence of a crime, which would, if successful, not only open the door to expulsion, but to criminal prosecution as well.[56]

While the warrant procedure is the constitutionally prescribed safeguard,[57] recent Supreme Court history has shown that the fourth amendment, standing alone, could not effectively protect citizens from unreasonable searches.[58] In order to sanction such searches the Court has denied admitting into evidence the products of an unreasonable search.[59] But *Moore* saw no such need where the evidence was presented in a unversity disciplinary proceeding.[60]

THE EXCLUSIONARY RULE

In 1961 the Supreme Court held that "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[61] Twelve years before, the Court held in *Wolf v. Colorado*[62] that the "security of one's privacy against arbitrary intrusions by the police" was "implicit in the 'concept of ordered liberty' and as such enforceable against the states . . . ."[63] Nevertheless, *Wolf* failed to exclude from a state prosecution evidence obtained from such searches. *Mapp v. Ohio*,[64] realizing that the right to privacy was basic to a free society, felt

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56 Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 730 (M.D. Ala. 1968).

57 U.S. CONST. amend IV.

58 Mapp v. Ohio, 367 U.S. 643 (1961). Without the exclusionary "[R]ule the freedom from State invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this court's high regard as a freedom 'implicit in the concept of ordered liberty.'" *Id.* at 655.

59 *Id.*

60 Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 730 (M.D. Ala. 1968).

61 Mapp v. Ohio, 367 U.S. 643, 655 (1961).

62 338 U.S. 25 (1949).

63 *Id.* at 27.

64 367 U.S. 643 (1961).

that it could not justifiably grant that right yet fail to exclude the products of its invasion.[65]

Moore believed that the exclusionary rule should not apply to a university disciplinary proceeding. The court followed the reasoning in *Dixon v. Alabama State Board of Education*[66] and intimated that the rules of evidence, including the exclusionary rule, "[M]ight be detrimental to the college's educational atmosphere and impractical to carry out."[67] *Moore* implied that the application of the rule was unncessary since a university proceeding does not involve the detrimental consequences implicit in a criminal proceeding.[68]

However, as previously discussed, the threat of criminal prosecution in *Moore* was very real.[69] Even if there is no criminal prosecution, the risk of irreparable harm brought about by suspension or expulsion is always present in a university disciplinary proceeding.

The courts have recognized the serious consequences attending expulsion from a state university. "It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution."[70] Since expulsion or suspension is universally recorded on the student's transcript, he bears the stigma the rest of his life. With today's emphasis on education the risk of losing "life, liberty and property" is indeed tremendous.

Parrish v. Civil Service Commission[71] realized that such a risk

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[65] *Id.* at 655.

[66] 294 F.2d 150 (5th Cir. 1961).

[67] *Id.* at 159.

[68] 284 F. Supp. 725, 730 (M.D. Ala. 1968).

[69] See p. 151 *supra*. The threat of criminal prosecution was a deciding factor. *See* Camara v. Municipal Court, 387 U.S. 527, 531 (1967). *Camara* overruled Frank v. Maryland, 359 U.S. 360 (1959). In *Frank* the Court upheld a conviction of one who had refused to permit a warrantless search of private property for the purpose of locating and abating a suspected nuisance. The *Frank* majority held that since the inspector did not ask that the property owner open his doors to a search for evidence of criminal action, which might have been used to secure a criminal action against him, all that was involved was a less-intense "right to be secure from intrusion into personal privacy." *Id.* at 365. *Camara* disagreed. While a "routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for fruits and instrumentalities of crime," 387 U.S. 530, the rights involved in an administrative search are certainly not "peripheral" as suggested in *Frank*. It would be absurd to say that "[T]he individual and his property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id.*

[70] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

[71] 66 Cal. 2d 260, 425 P.2d 223 (1967). *Parrish* can be distinguished from the normal search and seizure case since it involved a mandamus brought by a social

of loss can take many forms, only one of which is imprisonment. There, the penalty threatened was a denial of a publicly conferred benefit, that is, welfare payments. Although the searches involved were designed to secure proof of welfare ineligibility rather than to lay the basis for criminal prosecution,[72] the California Supreme Court nevertheless stated that the methods used were unconstitutional. The court found that most of the homes to be searched were selected at random without grounds to suspect violations of the Welfare and Institutions Code.[73] More importantly, the court reasoned that while a governmental body could decline to extend to its citizens the enjoyment of a particular set of benefits, it could not condition the receipt of those benefits on any and all terms it pleased.[74]

While there has been a great amount of controversy over the question whether a university education constitutes a right or a privilege, the fact remains that the interest involved is of tremendous value. As the cases have indicated, education is "vital and, indeed, basic to a civilized society. Without sufficient education [one] would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens."[75]

The threat of forfeiting vital educational benefits in university disciplinary proceedings is at least equivalent to the danger of losing welfare benefits in administrative actions, and parallel to the threat of criminal penalties imposed for refusing to submit to "area" housing inspections. If the latter risk is a sufficient deprivation of life, liberty and property to warrant application of the exclusionary rule, then it seems that the danger of expulsion in the university hearing justifies excluding evidence obtained through unreasonable searches. However, if the university official can vicariously consent to a dormitory search in the student's stead, then the opportunity to exclude evidence would not even arise.

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worker who was fired for insubordination for refusing to participate in mass morning raids on the homes of welfare recipients. Petitioner asserted the unconstitutionality of the search as a defense to the charge of insubordination for refusing to participate in it. The court recognized petitioner's standing and thus reached the issue of constitutionality.

[72] While the court proceeded on the benefit theory, nevertheless it stated that the county could not preclude the possibility of criminal prosecution. *Id.* at 265, 425 P.2d at 226.

[73] *Id.* at 267, 425 P.2d at 228.

[74] *Id.* at 271, 425 P.2d at 230; *accord*, Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409 (1967); Rosenfield v. Malcolm, 65 Cal. 2d 559 421 P.2d 697 (1967).

[75] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

CONSENT AND WAIVER

Traditionally, the issue of consent has been analyzed from the property right approach to the fourth amendment. For example, earlier cases invalidated searches made pursuant to a landlord's consent.[76] However, in some situations the court found that the one consenting had a greater interest in the premises than a mere landlord.[77] In *People v. Overton*, for example, the vice-principal was deemed responsible for order, assignment and maintenance of the physical facilities, including the lockers. Although the student was entitled to exclusive possession of the locker, the court held that this was vis-à-vis other students only; that is, the school maintained a proprietary interest.[78]

In light of the increasing emphasis on privacy rights rather than property rights, the proprietorship rationale advanced in *Overton* and accepted by *Moore*[79] is untenable. The fourth amendment protects people, not places,[80] and it is the individual's subjective expectation of privacy that determines the protected area.[81] If the privacy theory is extended to its logical conclusion, a co-tenant should not be able to waive his roommate's subjective right to privacy. By a parity of reasoning, the property oriented consent rationale, which allows a co-tenant to consent to a search of the premises, is of questionable validity.[82]

Certainly the student residing in a dormitory has the right to expect that other students will respect his right to privacy. He may also expect the same from university officials. But *Moore* suggests that in view of the inspection clause in the *College Bulletin*, the

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[76] Chapman v. United States, 365 U.S. 610 (1961); People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956).

[77] *See* United States v. Botsch, 364 F.2d 542 (2d Cir. 1966), *cert. denied* 386 U.S. 937 (1967) (landlord retained possession of key to rented shed and received authorization from defendant to accept packages for him); People v. Caritativo, 46 Cal. 2d 68, 292 P.2d 513 (1956) (caretaker of an estate believed he had a joint right of control over premises occupied by defendant); People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955) (student living in private home, no matter what his capacity in reality, was looked upon by the homeowner as a co-tenant, giving the owner the right to authorize a search of entire premises).

[78] 20 N.Y.2d at 363, 229 N.E.2d at 597-98, 283 N.Y.S.2d at 25 (1967). "Indeed, it is doubtful if a school would be properly discharging its duty of supervision over the students, if it failed to retain control over the lockers."

[79] 284 F. Supp. at 730 (M.D. Ala. 1968). Not only does *Moore* seem to accept *Overton's* rationale of consent, but also intimates that the university retains the proprietary interest and control over dormitory rooms. *Id.*

[80] Katz v. United States, 389 U.S. 347, 351 (1967).

[81] *Id.* at 351-52.

[82] For example, People v. Gorg, 45 Cal. 2d 776, 783, 291 P.2d 469, 473 (1955), held that "co-tenants" could *consent*. But under the privacy theory, it is implicit that only the individual may *waive* his fourth amendment rights.

student waives his right to be free from university inspections. *Moore* thus intimates that mere knowledge of the specific regulation constitutes a valid waiver. However, it seems reasonable to suggest that by accepting residence in a college dormitory, the student waives all rights of privacy. This seems diametrically opposed to the fourth amendment right of privacy theory established by the Supreme Court, since that right seems to be exclusive to the individual. There must be a clear distinction between a student's intelligent waiver of a constitutional right and his submission to authority based on a fear of either disciplinary action or non-admittance to a university.[83] And if the privacy theory is to remain the law in matters of search and seizure, the consent rationale espoused by *Overton* and embraced by *Moore*[84] must either be altered or abandoned completely.

CONCLUSION

It appears that the laws of search and seizure are undergoing substantial change. The trend is toward protecting privacy rights, not merely property rights. In essence, then, search and seizure practices such as those in *Moore* and *Overton* are likely to be subject to close scrutiny by the courts.

Moore recognized that students have constitutional rights, including the right to be free from unreasonable searches and seizures. But no safeguards for the continued preservation of those rights were enunciated.

While "reasonable cause to believe" may remain the standard, a search warrant, such as in *Camara,* should be required for dormitory searches. This would provide one safeguard. The exclusionary rule would provide another. The consequences of arbitrary action by university officials in light of the importance of education are too great to be ignored by the courts. The dormitory student should not be left helpless to pursue an education subject to the arbitrary suspicions of university officials.

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[83] *Cf.* Parrish v. Civil Service Comm., 66 Cal. 2d 260, 268, 425 P.2d 223, 229 (1967): "With increasing frequency the courts have denied the efficacy of any consent to a search obtained by covert threats of official sanction or by implied assertions of superior authority. The courts have been quick to note the disparity of position between a government agent and an ordinary citizen; they have taken cognizance of the threat of unspecified reprisals which inheres in the official request for admission."

[84] 284 F. Supp. at 729 (M.D. Ala. 1968).