

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

Tyler Cameron Gutterman, Dale
Nelson, Hunter Johnson, *and* Brian
Hiltunen,

Plaintiffs,

v.

Indiana University, Bloomington; *and*
Michael McRobbie, *in his official*
capacity as President of Indiana
University,

Defendants.

Case No. 1:20-CV-2801

Complaint

1. Plaintiffs, undergraduate students at Indiana University Bloomington, were subject to illegal surveillance by the University that violated the Fourth Amendment's prohibition on unreasonable searches and breached the University's contractual obligations to Plaintiffs. The University used Student ID Cards, which it required Plaintiffs to carry, as a tool to track Plaintiffs' movements into and out of their dorms as part of an official investigation into Plaintiffs' fraternity's conduct. The University continues to collect data on students' movements using Student ID Cards, and may access such data without providing the subject of the search an opportunity to challenge the use of such data before a neutral decisionmaker.

2. Plaintiffs therefore bring this action pursuant 42 U.S.C. § 1983 and 28 U.S.C. § 1367, seeking declaratory and injunctive relief for the violations of their constitutional and contractual rights, and nominal damages in the amount of \$1.

PARTIES

3. Plaintiff Tyler Cameron Gutterman is an undergraduate student at Indiana University Bloomington, who began his studies in the fall of 2018. During the school year, he resides in Monroe County, Indiana.

4. Plaintiff Dale Nelson is an undergraduate student at Indiana University Bloomington, who began his studies in the fall of 2018. During the school year, he resides in Monroe County, Indiana.

5. Plaintiff Hunter Johnson is an undergraduate student at Indiana University Bloomington, who began his studies in the fall of 2018. During the school year, he resides in Monroe County, Indiana.

6. Plaintiff Brian Hiltunen is an undergraduate student at Indiana University Bloomington, who began his studies in the fall of 2018. During the school year, he resides in Monroe County, Indiana.

7. Defendant Indiana University Bloomington is a public research university in Bloomington, Monroe County, Indiana, and the flagship institution of the Indiana University system.

8. Defendant Michael McRobbie is the President of Indiana University, and is sued in his official capacity. His office address is Bryan Hall 200, 107 S. Indiana Ave. Bloomington, Indiana 47405.

JURISDICTION AND VENUE

9. This case raises claims under the Fourth Amendment of the United States Constitution and 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343; The Court has pendant jurisdiction over Plaintiffs' breach of contract claim under 28 U.S.C. § 1367.

10. Venue is appropriate under 28 U.S.C. § 1391(b) because a substantial portion of the events giving rise to the claims occurred in the Southern District of Indiana.

FACTUAL ALLEGATIONS

11. Plaintiffs Gutterman, Nelson, Jackson, and Hiltunen are undergraduate students at Indiana University Bloomington ("IU").

12. In the fall of 2018, all four Plaintiffs were freshmen completing their first semester of study at IU.

13. As freshmen, Plaintiffs chose to take part in IU's campus traditions and activities, including its Greek life. All four plaintiffs chose to pledge for the same fraternity, Beta Theta Pi.

14. During the fall 2018 semester, Beta Theta Pi was subject to an investigation by IU officials into suspected or alleged hazing incidents.

15. As part of this disciplinary investigation, IU officials accessed the historical records of Plaintiffs' Official University Identification Card ("ID Cards," also referred to as a "CrimsonCard") to track Plaintiffs' movements.

16. Plaintiffs are required to carry an ID Card as a condition of their attendance at the University. Upon information and belief, IU retains historical records of ID Card usage.

17. These records track every time a student “swipes” his card to gain access to a university building or to use a university facility (“swipe data”). As the University website explains, “CrimsonCard is much more than a photo ID. It’s a print release card, keycard to authorized university buildings, library card, and if you’re enrolled in a dining services plan, it’s your meal ticket.” Indiana University, *Using your Card*.¹

18. The University retained the swipe data for several months and used it to check the alibis of several students — including Plaintiffs — after an alleged off-campus hazing incident by comparing their “swipe” data to their testimony as to their whereabouts at the time of the incident. The Plaintiffs had testified they were in their dorm rooms at the time.

19. The investigation resulted in sanctions for Beta Theta Pi, but Plaintiffs were not found guilty of any wrongdoing. Indeed, as freshmen pledges, they would have been far more likely to be the victims of any hazing activity, rather than the perpetrators.

20. The Constitution protects persons from unreasonable searches of their homes and property. U.S. Const. amend IV. *See* Ind. Const. Art. I, Sec. 11. Warrantless searches that intrude into the privacy of the home are “presumptively

¹ <https://crimsoncard.iu.edu/using/index.html>

unreasonable absent exigent circumstances.” *United States v. Karo*, 468 U.S. 705, 714–15 (1984).

21. A college or university dorm room enjoys the same constitutional status as a home, because for the student it is his or her primary/personal residence during the school year. *See Piazzola v Watkins*, 442 F.2d. 284, 289 (5th Cir. 1971).

22. The swipe data encompasses the whole range of students’ movements and activities. It is used to access not only students’ dorm buildings, but their individual bedrooms — as well as access elevators and dorm building common areas — all spaces in which dorm residents enjoy an expectation of privacy. *See Piazzola*, 442 F.2d. at 288 (quoting *Commonwealth v. McCloskey*, 217 Pa. Super. 432, 435, 272 A.2d 271, 273 (1970)) (a “dormitory room is analogous to an apartment or a hotel room.”); *State v. Houvener*, 186 P.3d 370 (Wash. Ct. App. 2008) (recognizing an expectation of privacy in dorm building common areas).

23. The swipe data also records students’ movement around campus: students use their ID Cards to check out library books, access academic buildings, parking garages, parking meters, to purchase meals at university dining halls, sodas and snacks from campus vending machines, laundry machines, print materials they need for class on university printers, and all manner of sundry other daily activities — whether eating, sleeping, or studying, the swipe data records and reveals it. *See Indiana University, Who Accepts CrimsonCard.*²

² <https://crimsoncard.iu.edu/using/Who%20Accepts%20CrimsonCard.html>

24. Moreover, the swipe data is not limited to campus facilities — it operates as a payment card at numerous businesses nearby, including restaurants, grocery stores, pharmacies, airport shuttles, tanning salons, and or wellness centers. *Id.* Though not involved in this incident, the assertion of authority in this case would equally permit evaluation of students’ personal financial information, i.e., swipe data for monetary transactions to determine if a student’s alibi that he was at an off-campus restaurant was truthful.

25. The University continues to maintain a database of student swipe data from student ID cards, giving permission to access institutional data to “all eligible employees and designated appointees of the university for all legitimate university purposes.” Management of Institutional Data policy (DM–01). The University does not provide the subject of such a search of swipe data the opportunity to obtain precompliance review before a neutral decisionmaker.

26. The privacy concerns in this sort of data are significant: IU officials could use this kind of swipe-card data to determine who attended the meetings of a disfavored political organization, or who is seeking medical services, or even who a student is romantically involved with. And since it could potentially be stored indefinitely, investigators need not determine that there is probable cause before tracking it — historical records could be consulted for anyone who falls under suspicion.

27. “[I]n order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance

review before a neutral decisionmaker.” *City of L.A. v. Patel*, 576 U.S. 409, 420 (2015).

28. The case law supports the rights of students to an expectation of privacy, even when they live in University supplied housing, since “courts are understandably reluctant to put the student who has the college as a landlord in a significantly different position than a student who lives off campus in a boarding house.” *People v. Superior Court (Walker)*, 143 Cal. App. 4th 1183, 1202, 49 Cal. Rptr. 3d 831, 845 (2006) (quoting 4 LaFare, Search and Seizure (4th ed. 2004) § 8.6(e), pp. 260–261).

29. Such actions are subject to challenge under the federal civil rights laws, since “[c]ourts have found campus police and other full-time employees of the university, such as head residents and directors of housing, to be state actors.” Kristal O. Stanley, *The Fourth Amendment and Dormitory Searches: A New Truce*, 65 U. Chi. L. Rev. 1403, 1046 (1998) (collecting cases cases); see also *Morale v. Grigel*, 422 F. Supp. 988, 996 (D.N.H. 1976) (Resident Assistants are state actors).

30. Tenants do not lose their Fourth Amendment rights simply because the government is serving as their landlord. To hold otherwise would endanger the reasonable expectations of millions of Americans — college students in this case, but also residents of public housing projects. See *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994) (enjoining Chicago’s warrantless searches of public housing residents).

31. Moreover, IU's use of the swipe data to track students' movements constitutes a violation of its own policies.

32. Indiana University policy UA-13 states that the ID Card exists "to verify their [students, employees, others] identity and manage their access to University services and facilities. The ID card will be used to verify the identity of the bearer of the card in University facilities when such identification is needed to be present at those facilities or on University grounds." The policy states that the card's "intended use" is to be "an electronic identification, validation, and authentication credential for authorized access to services and facilities."

33. The policy does not entitle the University to access, use, or release this swipe data, and the use of swipe data to check past entries to University buildings to check the alibis of students during an investigation does not comport with the intended purpose of the card — to contemporaneously verify the identity and manage access to University services and facilities of by cardholders.

34. There is, of course, no question that Plaintiffs are and were who they say they are, and that Plaintiffs accessed University buildings they were entitled to enter using their ID Card. The use of this information to investigate Plaintiffs was therefore a breach of the contractual rights established by IU's own policies.

35. The use here of swipe data does not fit within the policy's explicit "safety and security exception." That exception is strictly limited to "[i]dentification information collected for production" of the card; it says nothing about ongoing access to students' individual, personal movements on campus.

36. The Seventh Circuit has expressly held that University policies are part of the contract between a student and the university. *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992). See *Medlock v. Trustees of Indiana Univ.*, 738 F.3d 867, 872–73 (7th Cir. 2013) (considering policies in “The A to Z Guide—the university's student-housing handbook” as part of a § 1983 suit).

37. The tracking of Plaintiffs’ movements violated this contractual obligation the University owed to its ID Card holders.

38. Indiana courts have likewise found that in the university context “the relationship between a student and an educational institution is contractual in nature.” *Amaya v. Brater*, 981 N.E.2d 1235, 1240 (Ind. Ct. App. 2013) (quoting *Neel v. Indiana University Board of Trustees*, 435 N.E.2d 607, 610 (Ind. Ct. App. 1982)). While “Indiana courts have taken a very flexible approach to the scope of contractual promises between students and universities,” *Id.*, courts hold that “it is generally accepted that a university’s catalogues, bulletins, circulars, and regulations that are made available to its students become of part of this contract.” *Chang v. Purdue Univ.*, 985 N.E.2d 35, 46 (Ind. Ct. App. 2013).

39. In violating Plaintiffs’ contractual rights and invading their privacy, IU officials acted illegally, arbitrarily, capriciously, and in bad faith. *Amaya*, 981 N.E.2d at 1240.

COUNT I

The tracking of Plaintiffs' movements constitutes a violation of their Fourth Amendment and Fourteenth Amendment rights against unreasonable searches.

40. The allegations in the preceding paragraphs are incorporated herein by reference.

41. The Fourth Amendment has been incorporated against the State of Indiana via the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

42. Defendants deprived Plaintiffs of their Fourth Amendment right against unreasonable searches by tracking their movements into and out of their homes using swipe data.

43. In depriving Plaintiffs of their Fourth Amendment right, Defendants, and their agents, were acting under color of state law.

44. Plaintiffs have a reasonable expectation of privacy that society is prepared to recognize as legitimate in their swipe data. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

45. Plaintiffs have a reasonable expectation of privacy that society is prepared to recognize as legitimate in their movements into, out of, and within their homes. *United States v. Karo*, 468 U.S. 705, 714–15 (1984).

46. Defendants do not have any substantial or exigent government interest that would justify the search in this case.

47. The University's policies are not narrowly tailored to the means least restrictive of Plaintiffs' privacy.

48. Plaintiffs are therefore entitled to declaratory and injunctive relief and nominal damages under 42 U.S.C. § 1983.

COUNT II

Defendants' use of student ID card's swipe data constitutes a violation of their Fourth Amendment and Fourteenth Amendment rights because it does not provide an opportunity for the student being searched to obtain precompliance review from a neutral third party.

49. The allegations in the preceding paragraphs are incorporated herein by reference.

50. Defendants deprived Plaintiffs of their Fourth Amendment right against unreasonable searches by retaining student ID card swipe data and continuing to access it without providing the subject of the search an opportunity to obtain precompliance review before a neutral decisionmaker. *Patel*, 576 U.S. at 420.

51. In depriving Plaintiffs of their Fourth Amendment right, Defendants, and their agents, were acting under color of state law.

52. Plaintiffs have a reasonable expectation of privacy that society is prepared to recognize as legitimate in their swipe data. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

53. Defendants do not have any substantial or exigent government interest that would justify the search without precompliance review before a neutral decision maker.

54. The University's policies are not narrowly tailored to the means least restrictive of Plaintiffs' privacy.

55. Plaintiffs are therefore entitled to declaratory and injunctive relief and nominal damages under 24 U.S.C. § 1983.

COUNT III

Defendants' tracking of Plaintiffs' movements constitutes a breach of the contract between Plaintiffs and the University.

56. The allegations in all preceding paragraphs are incorporated herein by reference.

57. The University's policies constitute a contract between the University and Plaintiffs. *Amaya v. Brater*, 981 N.E.2d 1235, 1240 (Ind. Ct. App. 2013).

58. The University's policies do not permit access to swipe data for purposes other than Identification.

59. The University's policies do not permit officials to track students' movements using swipe data.

60. The use of swipe data violated the enforceable contractual promise made to Plaintiffs' by the University.

61. In violating Plaintiffs contractual rights and invading their privacy, IU officials acted illegally, arbitrarily, capriciously, and in bad faith. *Amaya*, 981 N.E.2d at 1240.

62. In the alternative, the University's policies constituted a representation by the University upon which Plaintiffs reasonably relied to their detriment, and therefore the University is collaterally estopped from using swipe data to track Plaintiffs' movements.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

a. Declare that the use of swipe data to track Plaintiffs' movements violated their Fourth Amendment right against unreasonable searches.

b. Declare that the use of swipe data to track Plaintiffs' movements without providing them an opportunity to obtain review by a neutral decisionmaker violated their Fourth Amendment right against unreasonable searches.

c. Declare that the use of swipe data to track Plaintiffs' movements violated the University's contractual obligations to Plaintiffs.

d. Enjoin the University from further use of swipe data in investigations except where the University has obtained a warrant or can demonstrate exigent circumstances.

e. Enjoin the University to expunge the investigation for which the University used swipe data of Plaintiffs from their permanent records, to the extent that Plaintiffs' records include information about such investigation;

f. Award Plaintiffs nominal damages of \$1;

g. Award Plaintiffs their costs and attorney's fees under 42 U.S.C. § 1988.

h. Award any further relief to which Plaintiffs may be entitled.

Dated: October 29, 2020

Respectfully Submitted,

By: /s/ Anita Y. Milanovich

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*pro hac vice motions to be filed

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