Loyola of Los Angeles Law Review

Volume 57 | Number 3 Article 6

Summer 11-9-2024

Ogletree v. Cleveland State University and the Future of Remote Learning

Evan Morehouse

OGLETREE V. CLEVELAND STATE UNIVERSITY AND THE FUTURE OF REMOTE LEARNING

*Evan Morehouse**

The COVID-19 pandemic placed an unprecedented strain on schools. With students and teachers confined to their homes, school administrators were charged with the unenviable task of finding a way to restore some semblance of normalcy as quickly as possible. The solution was standing in plain sight: take an already existent technology and use it to connect educators to their students on a massive scale. The result: the virtual ubiquity of remote learning tools in schools and universities. But while remote learning software undoubtedly propped up the imperiled education sector, it did so at a cost. In requiring their students to embrace this technology, schools were effectively strongarming their pupils into forfeiting personal privacy in exchange for the privilege of staying in school. Leagues of students and pundits voiced their opposition to what they believed was an impermissibly coercive practice, but Aaron Ogletree, a student at Cleveland State University, went a step further. After his university required him to submit to a scan of his room before he could proceed with an exam, he sued the school in federal court for violating his Fourth Amendment rights. His claim was novel, but the court saw merit in it, agreeing that the university's policy of conducting pre-exam room scans was an unreasonable search violative of the Fourth Amendment and ruling in Ogletree's favor. Time will tell whether this shot across the bow to public universities that lean too heavily on remote proctoring technology is an aberration or the first of many judicial holdings of its kind. In the meantime, universities would be wise to learn from the mistakes of Cleveland State University, lest they, too, find themselves in the crosshairs of a disgruntled student with a preternatural awareness of his constitutional rights.

* J.D. Candidate, May 2024, LMU Loyola Law School, Los Angeles. This Comment is dedicated to my parents, Clark and Susan Morehouse.

INTRODUCTION

Although remote proctoring technology predated the COVID-19 pandemic by several decades, the demand for it exploded in the spring of 2020, when virtually every school in America closed its doors.[1] Offering online classes was hardly an alien concept to schools and universities before the pandemic,[2] but the idea of coordinating hundreds, if not thousands, of exams for students using their personal computers in off-campus locations presented a herculean task in need of an elegant solution. To remedy this operational nightmare, many educational institutions turned to remote proctoring companies for software that would enable them to administer and surveil online exams uniformly and efficiently.[3] All a school had to do to return to its routine exam schedule was pay a subscription fee for remote proctoring software and require its students to download the software to their personal computers.[4]

A school looking for a secure browser on which to administer its exams, for example, could simply employ the LockDown Browser developed by Respondus to cut off a student's access to all applications other than their test file until the exam is complete.[5] To combat cheating, it might also require its students to download Honorlock, a service that detects when students are using their phones to look up answers, scours the internet for leaked test questions, and listens for words or phrases that might indicate cheating.[6] Or it could use software developed by ProctorU, which uses facial-recognition technology to match a student's face to the image on their ID, logs typing anomalies, and

1. *See* Mary Retta, *Exam Surveillance Tools Monitor, Record Students During Tests*, TEEN VOGUE (Oct. 26, 2020), https://www.teenvogue.com/story/exam-surveillance-tools-remote-learning [https://perma.cc/6GLW-4E6L].

2. *See* Jeffrey R. Young, *Pushback Is Growing Against Automated Proctoring Services. But So Is Their Use*, EDSURGE (Nov. 13, 2020), https://www.edsurge.com/news/2020-11-13-pushback-is-growing-against-automated-proctoring-services-but-so-is-their-use [https://perma.cc/XBH4-MCFA].

3. *See* Susan Grajek, *Educause COVID-19 QuickPoll Results: Grading and Proctoring*, EDUCAUSE REV. (Apr. 10, 2020), https://er.educause.edu/blogs/2020/4/educause-covid-19-quickpoll-results-grading-and-proctoring#fn1[https://perma.cc/Q4P7-BDEZ] ("Over three-quarters of institutions may use online or remote proctoring for exams" during the pandemic.).

4. Young, *supra* note 2.

5. *Overview*, RESPONDUS, https://web.respondus.com/he/lockdownbrowser/ [https://perma.cc/J7HZ-V7T7].

6. Honorlock's Online Proctoring Features, HONORLOCK, https://honorlock.com/exclusive/#anchor-detect-devices [https://perma.cc/E7XF-2A9P].

employs remote proctors to keep track of suspicious activity.[7] Wondering why a student keeps looking off camera during his exam? Rest assured: a remote proctor already clocked it and forced him to scan his room before resuming his exam.[8] Or maybe it was a non-human proctor, using an algorithm to track students' eye movements during the exam and then sending each professor an automated report ranking test-takers by "suspicion-level."[9]

Thanks to the wide variety of tools these companies provide schools looking to make the leap to remote learning, the virtual proctoring industry witnessed historic growth in the months following the start of the pandemic.[10] While the market pioneer Respondus saw the most dramatic growth and still commands the largest market share by a wide margin,[11] all the players in the space experienced exponential upticks in business starting in early 2020.[12] Proctorio, the developer of the "suspicion score" software mentioned above, saw a 500 percent increase in its client list between 2019 and 2021.[13] Examity, a company that specializes in "individualized proctoring," struggled to hire and train enough proctors to keep up with the 35 percent boost in its projected quarterly business in 2020.[14] And ProctorU reportedly administered three million more remote exams in 2020 than it did in 2019, doubling its staff in just a few months.[15]

But in the wake of this unprecedented growth came deep-seated concern for the students being monitored by this software. Given that

---

7. Drew Harwell, *Mass School Closures in the Wake of the Coronavirus Are Driving a New Wave of Student Surveillance*, WASH. POST (Apr. 1, 2020, 10:00 AM), https://www.washingtonpost.com/technology/2020/04/01/online-proctoring-college-exams-coronavirus/ [https://perma.cc/WL77-RA7H].

8. Monica Chin, *Exam Anxiety: How Remote Test-Proctoring Is Creeping Students Out*, VERGE (Apr. 29, 2020, 5:00 PM), https://www.theverge.com/2020/4/29/21232777/examity-remote-test-proctoring-online-class-education [https://perma.cc/9J2C-3QGD].

9. Harwell, *supra* note 7.

10. *See* Shawn Hubler, *Keeping Online Testing Honest? Or an Orwellian Overreach?*, N.Y. TIMES (May 10, 2020), https://www.nytimes.com/2020/05/10/us/online-testing-cheating-universities-coronavirus.html [https://perma.cc/J3X2-97T4].

11. *About Respondus*, RESPONDUS, https://web.respondus.com/about/ [perma.cc/5K6E-SADF]; *see* Grajek, *supra* note 3.

12. Retta, *supra* note 1.

13. Nora Caplan-Bricker, *Is Online Test-Monitoring Here to Stay?*, NEW YORKER (May 27, 2021), https://www.newyorker.com/tech/annals-of-technology/is-online-test-monitoring-here-to-stay [https://perma.cc/TZ72-VJ4S].

14. *Individualized Proctoring*, EXAMITY, https://www.examity.com/individualized-proctoring/ [https://perma.cc/WL7X-6SNE]; Colleen Flaherty, *Big Proctor*, INSIDE HIGHER ED (May 10, 2020), https://www.insidehighered.com/news/2020/05/11/online-proctoring-surging-during-covid-19 [https://perma.cc/3ATZ-EKT7].

15. Caplan-Bricker, *supra* note 13; Hubler, *supra* note 10.

much of this technology effectively requires students to cede their privacy rights in exchange for the privilege of staying in school, it is hardly surprising that the widespread use of remote proctoring services raised alarms almost immediately.[16] From the early days of the pandemic, schools fielded an onslaught of complaints from students and faculty alike: the surveillance tech is "creepy,"[17] it discriminates against students of color,[18] it is ineffective and easy for determined cheaters to game.[19] Some students worried that their personal and biometric data was being compiled and stored by remote proctoring companies—or even their schools.[20] Public reports on remote proctoring services did little to assuage these concerns: while many of these companies claim to purge their systems of personal data collected while surveilling a student's computer,[21] others concede to leaving the decision of whether to delete this data, or even how to use it in the future, up to the discretion of the schools that contract with them.[22]

Ultimately, this extensive condemnation of remote proctoring software has done little to persuade institutions to ditch the tech, in large part because of the utter dearth of workable alternatives available to schools wishing to administer virtual exams.[23] The pandemic presented schools across the country with an operational headache of epic proportions and left them with very few options as to how to maintain the status quo. Considering the danger associated with allowing in-person exams for students uncomfortable with remote exam technology, many educators felt they had no other choice but to take the virtual route.[24] Nevertheless, the ubiquity of remote proctoring software

16. *See* Caplan-Bricker, *supra* note 13.

17. *See* Letter Calling for a Ban on Remote Proctoring Software in Schools, BAN EPROCTORING, https://www.baneproctoring.com/#letter [https://perma.cc/2QNP-BU8G]; Chin, *supra* note 8.

18. *See* Caplan-Bricker, *supra* note 13.

19. Gabriel Geiger, *Students Are Easily Cheating 'State-of-the-Art' Test Proctoring Tech*, VICE (Mar. 5, 2021, 7:01 AM), https://www.vice.com/en/article/3an98j/students-are-easily-cheating-state-of-the-art-test-proctoring-tech [https://perma.cc/YJC7-9WHS]; *see also* Lindsey Barrett, *Rejecting Test Surveillance in Higher Education*, 2022 MICH. ST. L. REV. 675, 676 (2022) ("Remote proctoring software is not pedagogically beneficial, institutionally necessary, or remotely unavoidable.").

20. Hubler, *supra* note 10.

21. *Id.*

22. Khayaal Desai-Hunt, *Gaggle: MPS's New Student Surveillance Software Brings Possible Protection and Danger*, SOUTHERNER (Mar. 14, 2021), https://www.shsoutherner.net/features/2021/03/14/gaggle-mpss-new-student-surveillance-software-brings-possible-protection-and-danger/ [https://perma.cc/PT2E-7TBM].

23. Harwell, *supra* note 7.

24. *Id.*

in schools continues to draw criticism. Since 2020, a veritable wealth of lawsuits has been filed by critics of the technology, some aimed at the remote proctoring companies themselves,[25] others targeting universities that pay to use their services.[26]

This Comment will explore the privacy rights issues associated with the widespread embrace of remote proctoring technology by discussing one such recent lawsuit that resulted in a federal court ruling against a public university's use of pre-exam room scans. Part I of this Comment will provide factual context for *Ogletree v. Cleveland State University*[27] before delving into a discussion of the Fourth Amendment and finally summarizing how the *Ogletree* court applied the legal framework to the facts of the case. In Part II, I will provide my analysis of the court's logic and discuss some ways in which I believe it used flawed reasoning to reach an incorrect holding. Finally, Part III will discuss the fallout from the *Ogletree* holding and lay out potential options for universities seeking to insulate themselves from liability stemming from their continued embrace of remote proctoring technology.

I. THE CASE

This case stems from a rather mundane controversy involving a public university, a litigious student, and a chemistry exam. The setting: Cleveland State University (CSU), a public research university with a sprawling, eighty-five-acre campus stretched across Ohio's capital city and populated by a diverse body of roughly 16,000 students.[28]

A. "An Invasion of Private Spaces"

CSU started offering some of its students the option of taking classes remotely long before the onset of the COVID-19 pandemic.[29]

25. *See, e.g.*, ELEC. PRIV. INFO. CNTR., IN RE ONLINE TEST PROCTORING COMPANIES: COMPLAINT & REQUEST FOR INVESTIGATION, INJUNCTION, & OTHER RELIEF 1 (2020), https://epic.org/wp-content/uploads/privacy/dccppa/online-test-proctoring/EPIC-complaint-in-re-online-test-proctoring-companies-12-09-20.pdf [https://perma.cc/Y67F-WLMH]; Patterson v. Respondus, Inc., 593 F. Supp. 3d 783, 783 (N.D. Ill. 2022).

26. *See, e.g.*, Class Action Complaint at 1, John Doe v. DePaul Univ., No. 2021-CH-01027 (Ill. Cir. Ct. Mar. 3, 2021).

27. 647 F. Supp. 3d 602 (N.D. Ohio 2022).

28. CLEV. STATE UNIV., https://engagecsu.com/ [https://perma.cc/AVM7-DMJL].

29. Second Amended Complaint at 3, Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602 (N.D. Ohio 2022) (No. 1:21-cv-00500); CLEV. STATE UNIV., REQUIRED PROCEDURES & RECOMMENDED PRACTICES TO ADDRESS SECURITY AND QUALITY OF ELEARNING COURSES 3

In 2016, the university administration codified a uniform standard of guidelines governing academic integrity in its virtual classes in a seven-page manual entitled "Required Procedures & Recommended Practices to Address Security and Quality of eLearning Courses."[30] CSU conducted a pilot version of the plan outlined in this manual in 2017, then rolled it out for large-scale implementation the following year.[31] The document is publicly available on various CSU websites, distributed during student orientation events, and included on syllabi and assignments of remote courses.[32]

The plan outlined in the policy document aims, in essence, to curb a student's chances of taking advantage of his remote position to cheat on exams.[33] For example, to "eliminate impersonation," the document requires students to have a photograph in the CSU database at the time of registration so that professors can readily compare it against the face of the student attending online lectures and taking exams.[34] In addition to this single requirement, the document includes a raft of recommended practices intended as "general guidelines" for staff members and professors of eLearning courses.[35] The ultimate decision to implement any of these procedural antecedents in a particular class is left to the individual faculty member's discretion.[36]

Among the document's myriad recommendations is an endorsement of the use of testing software that keeps track of the time a student takes to answer questions during exams.[37] The document further suggests that professors of remote courses hold in person all exams contributing to more than 25 percent of a student's final grade, except under extenuating circumstances.[38] Nowhere in the document does the school recommend or require its professors to implement room scans as part of their remote testing administration procedures.[39]

(2017) https://www.csuohio.edu/sites/default/files/Procedures_Practices_eLearning_Courses_Security_FINAL_3.2.17.pdf [https://perma.cc/FRF4-FELC].

30. Second Amended Complaint, *supra* note 29, at 3; CLEV. STATE UNIV., *supra* note 29, at 3.

31. CLEV. STATE UNIV., *supra* note 29, at 7.

32. *Id.* at 1.

33. *Id.*

34. *Id.* at 1–2.

35. *Id.* at 2–3.

36. *Id.*

37. *Id.* at 2.

38. *Id.*

39. Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602, 607 (N.D. Ohio 2022). *See generally* CLEV. STATE UNIV., *supra* note 29.

In 2020, the university supplemented its policy on remote testing with a battery of precautions instituted as a means of mitigating the spread of COVID-19 among students.[40] But by the time twenty-four-year-old Aaron Ogletree matriculated at CSU as a chemistry student in the Spring of 2021, the university was easing up on its COVID-19 protocols, including its requirement that all classes be held remotely.[41] Remote learning was still the norm, but the university had begun to implement a more flexible policy that allowed students who wanted to attend class in person to do so if they passed a "Daily Health Assessment" screening.[42] For Ogletree, however, attending in-person classes was not an option—he could not pass the daily screening because of health issues, and thus he was effectively barred from entering the CSU campus.[43] Instead, he joined his classes and took exams remotely from the home he shared with his mother and two siblings.[44]

A week before his first semester at CSU began, Ogletree emailed the school's General Counsel Kelly King to dispute a policy laid out in the syllabus for his General Chemistry II class.[45] The policy afforded his professor and exam proctors the "right to ask any student, before, during, or after an exam to show their surroundings, screen, and/or work area."[46] In his email to King, Ogletree complained that this policy, if implemented, would be in clear violation of his and his fellow students' Fourth Amendment right to protection against unreasonable searches.[47] He politely requested that it be removed from the syllabus, and three days later, it was.[48]

Nevertheless, on February 17, 2021, two hours before his remote test for General Chemistry II was scheduled to begin, Ogletree received an email from CSU testing services informing him that they would be "checking [his] ID, [his] surroundings and [his] materials" before the exam began.[49] Perturbed, Ogletree immediately fired off a

40. *See COVID-19 / Corona Virus Precautions,* CLEV. STATE UNIV., https://www.csuohio.edu/police/covid-19-coronavirus-precautions [https://perma.cc/TQ7N-AFUT].

41. Second Amended Complaint, *supra* note 29, at 6–7.

42. *Id.* at 7.

43. *Id.*

44. *Id.*

45. *Id.* at 8; *see* Email from Aaron Ogletree to Kelly King, Gen. Couns., Cleveland State Univ. (Feb. 17, 2021, 1:44 PM) (on file with author).

46. Second Amended Complaint, *supra* note 29, at 8.

47. Email from Aaron Ogletree to Kelly King, Gen. Couns., Cleveland State Univ. (Jan. 18, 2021, 8:19 AM) (on file with author).

48. *Id.*; Second Amended Complaint, *supra* note 29, at 8.

49. Email from Cleveland State Univ. Testing Servs. to Aaron Ogletree (Feb. 17, 2021, 10:25 AM) (on file with author).

deliberately worded email to King to express his displeasure at what he termed a continued "miscommunication regarding legal testing practices."[50] In his correspondence, he claimed to have "confidential settlement documents . . . scattered about [his] work area" that would be visible to his exam proctor if he were forced to go through with the room scan.[51] The two hours before his exam started, he argued, would not be "enough time to secure them."[52]

Despite his concerns with the unanticipated last-minute change of protocol, and with no response from King, two hours later Ogletree logged into his virtual exam room.[53] Apparently under the impression that denying the proctor's pre-exam requests would result in his ejection from the exam room and a failing grade on his test, Ogletree acquiesced to a scan of his room prior to the exam.[54] The scan lasted approximately twenty seconds and was visible to both his proctor and two other classmates in the exam room.[55] The room scan and test were recorded and retained by the university, which typically stores remote exam recordings for thirty days in a secure digital storage location accessible only to the school's cyber security administrators.[56]

After the exam, Ogletree sent another email to King with a subject line that read: "Impending Civil Action."[57] In it, he excoriated the room scan as an "invasion of private spaces" and complained that it "yielded no results and was based on no evidence . . . and resulted in injuries despite [his] best efforts to avoid them."[58] Though the proctor who oversaw Ogletree's exam denied seeing anything confidential or personal during the brief scan,[59] in his email to King, Ogletree claimed to have inadvertently exposed a 1099 form bearing his name, Social Security number, and other personal details while panning his camera around his workspace.[60] He criticized the scan as against university policy and against the policy outlined in his course syllabus and

50. Email from Aaron Ogletree to Kelly King, Gen. Couns., Cleveland State Univ. (Feb. 17, 2021, 10:40 AM) (on file with author).

51. *Id.*

52. *Id.*

53. *See* Second Amended Complaint, *supra* note 29, at 8–9.

54. *Id.*

55. Deposition of Aaron Ogletree at 25, Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602 (N.D. Ohio 2022) (No. 1:21-cv-00500); Second Amended Complaint, *supra* note 29, at 9.

56. Deposition of Hilda Iris Zana at 53, Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602 (N.D. Ohio 2022) (No. 1:21-CV-0050).

57. Email from Aaron Ogletree to Kelly King, *supra* note 45.

58. *Id.*

59. Deposition of Hilda Iris Zana, *supra* note 56, at 56–57.

60. Email from Aaron Ogletree to Kelly King, *supra* note 45.

declared his intention to file an action against the university "when there is a lull in my course load or at the end of the semester."[61]

Two weeks later, Ogletree made good on his promise, filing suit against CSU, its President, and its Board of Trustees with a claim that CSU's policy of conducting warrantless room scans of students' homes violated the Fourth Amendment's prohibition of unreasonable searches.[62] He asked the court to enjoin the university from conducting suspicionless video searches of students' homes during remote exams and sought declaratory judgment holding that the university had violated his and other students' constitutional rights.[63]

B. The Law

The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[64] The framers drafted this provision with the intent of safeguarding individual privacy, liberty, and "possessory interests against arbitrary intrusion by the government."[65] Accordingly, the limitations prescribed by this Amendment apply only to the actions of government actors.[66] The Fourteenth Amendment broadens the definition of "government actors" to state officers, including public school officials.[67]

To claim protection under the Fourth Amendment, an individual must first as a threshold matter show they were subjected to either a "search" or a "seizure."[68] If an investigative technique cannot rationally be classified as either, the strictures of the Fourth Amendment do not apply.[69] Following the logic articulated by the Supreme Court in its landmark decision in *United States v. Katz*,[70] a Fourth Amendment search "occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."[71] Thus, for an individual to clear this initial hurdle, he must prove *both* that he had an

61. *Id.*
62. Second Amended Complaint, *supra* note 29, at 9–10.
63. *Id.*
64. U.S. CONST. amend. IV.
65. DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW § 2.01 (2023).
66. Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Elkins v. United States, 364 U.S. 206, 213 (1960); New Jersey v. T.L.O., 469 U.S. 325, 336–37 (1985).
67. *Elkins*, 364 U.S. at 213; *T.L.O*, 469 U.S. at 336–37.
68. RUDSTEIN ET AL., *supra* note 65, § 2.03.
69. *Id.* § 2.01.
70. 389 U.S. 347 (1967).
71. Kyllo v. United States, 533 U.S. 27, 33 (2001) (citing *Katz*, 389 U.S. at 361).

expectation of preserving something as private *and* that that expectation, viewed objectively, was justifiable under the circumstances.[72]

But *Katz* is merely the beginning of the analysis. A search that passes the *Katz* test may still side-step Fourth Amendment liability if it adheres to two essential requirements expressly imposed by the text of the provision: it must be both "reasonable" and conducted pursuant to a warrant issued upon probable cause.[73] However, while it is always preferable for a government actor to obtain a warrant whenever feasible, because "the ultimate touchstone of the Fourth Amendment is reasonableness,"[74] a warrantless search can be reasonable if it falls under an exception to the warrant requirement.[75]

For example, a government actor may bypass his Fourth Amendment-imposed duties by showing that the "special needs" of the public, beyond the normal need for law enforcement, justified him in conducting a search without a warrant or probable cause.[76] To determine whether the special needs exception applies to a given government policy, a court will first scrutinize the primary underlying purpose served by that policy.[77] If its chief aim is to uncover evidence of ordinary criminal wrongdoing, it is presumptively unconstitutional.[78] If not, the court will evaluate the policy's reasonableness by balancing its intrusion on the individual's privacy expectations against its promotion of legitimate government interests.[79]

While the special needs doctrine has been invoked in a wide variety of circumstances, it originated in the context of public schools. In *New Jersey v. T.L.O.*,[80] the Supreme Court upheld the constitutionality of a warrantless search by a school principal of a student's purse after the student was caught smoking in the school bathroom.[81] In

72. RUDSTEIN ET AL., *supra* note 65, § 2.03.

73. Kentucky v. King, 563 U.S. 452, 459 (2011) (citing Payton v. New York, 445 U.S. 573, (1980)).

74. *Id.*

75. RUDSTEIN ET AL., *supra* note 65, § 2.01.

76. JOHN M. CASTELLANO, PROSECUTOR'S MANUAL FOR ARREST, SEARCH AND SEIZURE § 13.01 (3d ed. 2023); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

77. CASTELLANO, *supra* note 76, § 13.01.

78. *Id.*

79. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 619 (1989); *see also* New Jersey v. T.L.O, 469 U.S. 325, 337 ("On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–64 (1995).

80. 469 U.S. 325 (1985).

81. *T.L.O.,* 469 U.S. at 328.

doing so, the Court recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search."[82] To that end, the Court held that school officials need not obtain a warrant before searching a student under their authority if doing so "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[83] Furthermore, the Court saw the Fourth Amendment's probable cause requirement unnecessary for searches of students conducted by school officials when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[84]

A decade later, the Court reaffirmed this logic in *Vernonia School District 47J v. Acton*,[85] finding a public school's policy of conducting random, suspicionless drug tests on its students to be reasonable because it "was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[86] Requiring public school officials to strictly adhere to the Fourth Amendment's warrant requirement, the Court contended, would "undercut the substantial need of teachers and administrators for freedom to maintain order in the schools."[87]

The *Vernonia* court also took the *T.L.O.* standard—and the special needs exception—a step further by declaring that a search of a student by a public-school official could meet the Fourth Amendment's reasonableness requirement even if not based on individualized suspicion of wrongdoing.[88] To determine whether the special needs of the school justified such a suspicionless search of a student, the Court articulated a fact-specific balancing test requiring analysis of four factors: (1) the nature of the individual privacy interests affected; (2) the character of the intrusion; (3) the nature and immediacy of the government concern; and (4) the efficacy of the means of addressing the concern.[89]

82. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370 (2009) (quoting *T.L.O.*, 469 U.S. at 340).
83. *T.L.O.*, 469 U.S. at 340.
84. *Id.* at 342.
85. 515 U.S. 646 (1995).
86. *Id.* at 665.
87. *Id.* at 653 (quoting *T.L.O.*, 469 U.S. at 341).
88. *Id.*
89. *Id.* at 654–64.

Seven years after *Vernonia*, the Court again upheld the constitutionality of a public high school's random drug testing policy in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.[90] There, the Court utilized the four-prong *Vernonia* test to reach the conclusion that the drug testing policy was a "reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren."[91] Outside of the public school context, the Court has employed the special needs exception to uphold the constitutionality of a wide variety of invasive actions by a government actor, including a cheek swab used to obtain DNA samples of a serious criminal and a review of text messages sent by a city employee on a city-issued pager.[92]

C. The Ogletree *Opinion*

On August 22, 2022, the United States District Court for the Northern District of Ohio became the first federal court to hold that a room scan conducted by a public school via a remote proctoring service during a virtual exam was an unconstitutional search in violation of the Fourth Amendment.[93] To reach this conclusion, the court first addressed the threshold issue of whether the room scan was a Fourth Amendment search, utilizing the two-pronged *Katz* test.[94] Ogletree had no trouble clearing the first *Katz* hurdle, arguing that students have a subjective expectation of privacy in their homes, bedrooms, and other living spaces.[95] CSU had very little leverage with which to push back on this contention, as the sanctity of an individual's privacy expectation inside his home is a core tenet of Fourth Amendment jurisprudence.[96] Thus, the court opted not to diverge from established

90. 536 U.S. 822 (2002).

91. *Id.* at 838.

92. Maryland v. King, 569 U.S. 435 (2013); City of Ontario v. Quon, 560 U.S. 746 (2010).

93. Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602, 617 (N.D. Ohio Aug. 22, 2022); *see Test Integrity in the Remote Learning Era: How Your School Can Avoid Privacy Violations*, FISHER PHILLIPS (Sept. 7, 2022), https://www.fisherphillips.com/en/news-insights/test-integrity-in-the-remote-learning-era-how-your-school-can-avoid-privacy-violations.html [https://perma.cc/L8AL-DBBC].

94. *Id.* at 610.

95. Second Amended Complaint, *supra* note 29, at 9.

96. *See, e.g.*, Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); Payton v. New York, 445 U.S. 573, 589 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an

precedent and agreed with Ogletree that he had a subjective expectation of privacy in his home while taking his exam.[97]

As to the second *Katz* prong, CSU found ample support in case law to support its assertion that Ogletree's subjective expectation of privacy was objectively unreasonable.[98] Because the university's room scans are "routine" and "standard industry wide practice," CSU contended that Ogletree's privacy expectation during his exam was "too sensitive when measured against common experience."[99] To undergird this claim, the university cited witness testimony noting that no student had ever objected to a room scan before.[100] Furthermore, it argued that because remote proctoring technology was "in general public use" at the time the chemistry exam was administered, Ogletree's subjective expectation of privacy was not objectively justifiable under the circumstances.[101] Finally, CSU reasoned that the "operational realities" of administering virtual exams render a student's privacy expectation in this context objectively unreasonable.[102]

The court expended minimal effort in brushing these arguments aside, stating simply that the routine nature of the room scan and lack of any previous objection to CSU's testing policy did not alone render Ogletree's expectation of privacy in his home objectively unreasonable.[103] Furthermore, it slapped down the school's assertion that the widespread use of room scans placed them outside the ambit of the Fourth Amendment. It did so by invoking the *Katz* court's proclamation that "the procedural antecedents to a search that the Constitution requires apply even where new technologies make accessible places and information not otherwise obtainable without a physical intrusion."[104] Lastly, the court pointed out that the cases relied on by the university to back its "operational realities" argument applied to the specific context of employment, and it flatly refused to extend their logic beyond those narrow circumstances.[105] Therefore, the court

individual's home."); Florida v. Jardines, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.").

97. *Ogletree*, 647 F. Supp. 3d at 610.

98. *Id.*

99. Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 5, Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602 (N.D. Ohio 2022) (No. 1:21-cv-00500).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Ogletree*, 647 F. Supp. 3d at 610.

104. *Id.* at 611 (citing Katz v. United States, 389 U.S. 347, 359 (1967)).

105. *Id.* at 611.

sided with Ogletree again here, stating that his subjective expectation of privacy in his home while taking his remote exam was objectively reasonable by society's standards.[106] Thus, having handily cleared both *Katz* prongs, Ogletree successfully met his burden of convincing the court that the room scan conducted before his chemistry exam was a search within the meaning of the Fourth Amendment.[107]

1. Searches Under *Wyman v. James*

Next, the court took a slight detour to address CSU's argument that not only did the room scan not constitute a search under *Katz*, it was also not a search within the criteria of the Supreme Court's later decision in *Wyman v. James*[108] because it was limited, non-criminal, non-coerced, and regulatory in nature.[109] In *Wyman*, a woman sued the state of New York for terminating her state-subsidized welfare benefits after she refused to allow a government caseworker into her home to conduct a routine visitation.[110] The woman claimed the home visit mandated by the state as a condition of her continued receipt of assistance encroached on her constitutional rights because it was an unreasonable search within the context of the Fourth Amendment.[111]

The Supreme Court disagreed, holding that the home visitation as structured by New York law did not contravene the woman's Fourth Amendment rights in part because it fell outside the bounds of the provision's protection.[112] Specifically, the court noted that because "the visitation in itself [was] not forced or compelled," and "the beneficiary's denial of permission [was] not a criminal act," there was "no entry of the home and there [was] no search."[113] CSU argued that *Wyman* was an appropriate analog for *Ogletree* and that a comparison of the two naturally led one to conclude that its room scan did not violate Ogletree's Fourth Amendment rights.[114] It drew parallels between the home visit and its administration of remote exams, arguing that its

106. *Id.*
107. *Id.*
108. 400 U.S. 309 (1971).
109. Defendant's Motion to Dismiss at 6, Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602 (N.D. Ohio 2022) (No. 1:21-cv-00500); *Ogletree*, 647 F. Supp. 3d at 611.
110. *Wyman*, 400 U.S. at 314.
111. *Id.* at 314.
112. *Id.* at 317.
113. *Id.* at 317–18.
114. Defendant's Motion to Dismiss, *supra* note 109, at 6–7.

conduct, like that of the state caseworker in *Wyman*, did not fall within the technical definition of a search for several reasons.[115]

First, the room scan was conducted for the regulatory purpose of proctoring an exam, not for any purpose related to criminality.[116] Second, the scan was narrow in scope because it was limited to matters in plain view, extremely brief, and conducted by Ogletree himself.[117] Finally, Ogletree was given two hours' notice about the impending scan, which was plenty of time for him to relocate to a different room or simply hide his sensitive documents before the exam began.[118] All things considered, CSU contended that the room scan was significantly less intrusive than the home inspection in *Wyman*, and the consequences for refusing it (having to take the test on another day) were considerably less severe than those that followed refusal of the *Wyman* home visit (loss of welfare benefits).[119]

For his part, Ogletree pushed back on the university's reading of *Wyman*, arguing that the court in that case carved out an extremely limited exception to the definition of a Fourth Amendment search that did not apply to public universities.[120] He maintained that CSU was retrofitting *Wyman* to suit its needs and effectively asking the court to declare two new Fourth Amendment exceptions—one proclaiming that searching students for cheating was not a "search" and the other permitting "warrantless intrusion into a student's home for any "non-criminal" pedagogical purpose as long as it is not 'coerced and limited in scope.'"[121] In his view, these exceptions would "swallow decades of jurisprudence about the sanctity of the home under the Fourth Amendment."[122]

Again, the court sided with Ogletree, refusing to extend *Wyman* beyond its specific context and declining to carve out new exceptions to the Fourth Amendment.[123] Expanding *Wyman* beyond the context of public benefits to govern a case involving "the privilege of college admission and attendance," argued the court, would raise "even more

115. *Id.* at 6–8.
116. *Id.* at 6.
117. *Id.* at 7.
118. *Id.* at 3–4, 7.
119. *Id.* at 7–8.
120. Plaintiff's Opposition to Defendant's Motion for Summary Judgement at 4, Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602 (N.D. Ohio 2022) (No. 1:21-cv-00500).
121. *Id.* at 6–7.
122. *Id.* at 7.
123. Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602, 613 (N.D. Ohio 2022).

difficult questions about what legal standard, if any, governs the scans" and open the door to uncertainty "in other areas of life and the law that technology touches."[124] Accordingly, the court reiterated its conclusion that the room scan fell within the definition of a Fourth Amendment search.[125]

2. Reasonableness Through the Lens of *Vernonia*

Having resolved that CSU's room scan was a search, the court moved on to the next step in the Fourth Amendment framework: an analysis of its reasonableness.[126] It began by addressing Ogletree's insistence that the reasonableness analysis should be conducted using the individualized suspicion-based *T.L.O* test.[127] For once, the court disagreed with Ogletree, finding the *T.L.O.* standard inappropriate in this case because the room scan at issue was not based on CSU's individualized suspicion of Ogletree but was instead a part of the school's overarching anti-cheating policy.[128] Instead, it opted to use the four-pronged balancing test from *Vernonia* to determine whether the school's policy of conducting suspicionless room scans was reasonable because the policy served a special need of CSU that rendered the warrant and probable cause requirements of the Fourth Amendment impracticable.[129]

a. Nature of the privacy interest affected

The court began its analysis of the first factor of the *Vernonia* test by reiterating the "well-settled" belief in the infallibility of an individual's expectation of privacy from both physical and visual intrusion while in his home.[130] It then undermined CSU's argument that the room scan was less intrusive of Ogletree's privacy interest than the search found reasonable in *Earls*, dismissing it as misguided.[131] CSU was wrong to invoke *Earls* as an analog, said the court, because that case applies only to the context of elementary schools, where minor children are subject to compulsory school attendance.[132] In contrast,

124. *Id.* at 613–14.
125. *Id.* at 614.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 614–15.
130. *Id.* at 615.
131. *Id.*
132. *Id.*

the court pointed out that Ogletree was an adult who voluntarily enrolled in a higher educational institution at the time of the search and therefore did not, in the court's opinion, have a lesser privacy interest simply by virtue of being a student.[133] Because it did not view Ogletree as having a diminished privacy interest and because at the time he was subjected to the room scan, he was in a location held sacred by the Fourth Amendment, the court ruled that the first prong of the special needs balancing test weighed in Ogletree's favor.[134]

b. Character of the intrusion

The court's analysis of this factor was more nuanced, as it saw meritorious arguments on both sides. On the one hand, it granted that Ogletree inevitably ceded some of his personal privacy rights in exchange for the privilege of attending classes at CSU.[135] Furthermore, the room scan was minimally invasive, lasting about twenty seconds. The university did give Ogletree advance warning before the scan was conducted, and Ogletree himself was the one directing the camera during the scan.[136]

On the other hand, the court noted that, while another student who valued his privacy as highly as Ogletree might opt for a course that offered only in-person tests, Ogletree himself was bereft of such an alternative because his health prevented him from attending class in person.[137] Moreover, the fact that other students in the exam room could see Ogletree scan his room increased the invasiveness of the search.[138] And the court ultimately gave very little weight to the relatively short length of the scan itself or the fact that it may not have resulted in someone catching a glimpse of Ogletree's personal documents, stating that the Fourth Amendment's protection of the home is not dependent upon the quality or quantity of information obtained in a search.[139] Therefore, the court saw this factor weighing in favor of Ogletree as well.[140]

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 616; Deposition of Aaron Ogletree, *supra* note 55, at 25.
137. *Ogletree*, 647 F. Supp. 3d at 615–16.
138. *Id.* at 616.
139. *Id.* (citing Kyllo v. United States, 533 U.S. 27, 35 (2001)).
140. *Id.*

c. Governmental interests

Here, CSU argued that the room scan served the school's legitimate overriding interest in ensuring academic integrity and fairness in the administration of remote exams during the pandemic.[141] This assertion received no pushback from Ogletree, who agreed as to the merits of this interest and acknowledged the importance of preserving the integrity of remote exams.[142] Thus, the court was quick to declare that the legitimate government interest here tipped the scales slightly towards the university.[143]

d. Efficacy of the means

Weighing this final factor of the *Vernonia* test, the court first pointed to Ogletree's criticism of room scans as an ineffective means of ensuring remote testing integrity.[144] The scans, claimed Ogletree, were not an indispensable weapon in a school's anti-cheating arsenal but a minor obstacle that could easily be circumvented by a resourceful student determined to cheat on his exam.[145] Furthermore, Ogletree claimed that the university tacitly acknowledged the inessential nature of room scans as procedural safeguards by giving its professors the discretion to forego using them entirely.[146] In his estimation, the fact that room scans were administered inconsistently was proof that they were one of many viable options at the disposal of a professor intent on upholding the integrity of his remote exam.[147]

The court mostly agreed with Ogletree's logic here, giving little weight to CSU's argument that Ogletree's proposed alternatives to a room scan were insufficient in detecting and deterring cheating.[148] In the court's view, there was no evidentiary support for the university's dogged insistence that none of the supposedly less intrusive alternatives suggested by Ogletree were as effective as room scans at ferreting out cheaters.[149] In declaring that this factor, too, cut in favor of Ogletree, the court again criticized CSU for its inconsistent testing policies, stating that "a record of sporadic and discretionary use of

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 616–17.
146. *Id.* at 617.
147. *Id.*
148. *Id.*
149. *Id.*

room scans does not permit a finding that room scans are truly, and uniquely, effective at preserving test integrity."[150] With three out of the four *Vernonia* factors strongly favoring Ogletree, the court had little trouble holding that Ogletree's privacy interest in his home outweighed CSU's interest in maintaining the integrity of its remote testing procedures.[151] Thus, the court agreed with Ogletree that the university's practice of conducting rooms scans before exams was unreasonable under the Fourth Amendment.[152]

II. WHAT THE *OGLETREE* COURT GOT WRONG

In weighing the parties' interests, the *Ogletree* court made several key oversights that resulted in it coming down on the wrong side of the fence. To begin with, the court significantly downplayed how Ogletree's status as a student at CSU augmented his expectation of privacy at home while taking an exam, stating only that it "might affect the nature of the privacy interest at stake to some degree."[153] This is a gross understatement. In this author's opinion, Ogletree's status as a student at the time of the search is an essential piece of the puzzle here, altering the reasonableness analysis to a significant degree.

The simple fact is that if this exam had been administered in a university classroom, with exam proctors employing stringent, even invasive, surveillance techniques to mitigate cheating, no reasonable court would see it as an encroachment of the students' Fourth Amendment rights. This is so because a student—even an adult student in higher education—has a significantly reduced expectation of privacy while taking an exam in a classroom on school grounds.[154] For the court, however, the fact that Ogletree was taking the exam remotely from his home instead of in a classroom changed the Fourth Amendment calculus drastically.[155] It believed that because Ogletree chose to

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 615.
154. *See* Orin Kerr (@OrinKerr), X (Aug. 23, 2022, 2:51 PM), https://twitter.com/OrinKerr/status/1562195912671109121 [https://perma.cc/C5Y6-8M5V] ("A student has no 4th Amendment rights in a classroom when they're taking [an] exam . . . so there can't be a 4th Amendment violation [in this context]."); Caplan-Bricker, *supra* note 13 (quoting Proctorio founder Mike Olsen's argument that remote proctoring services are "just providing the tech version of what already existed in the classroom").
155. *See Ogletree*, 647 F. Supp. 3d at 615. It is worth noting that Ogletree made an even more extreme argument in his complaint when he claimed that "[t]his case involves a public university using technology to do virtually what it never could in-person: have a teacher enter and

be in a location held sacred by the Fourth Amendment, he should be considered a private citizen in his home first and a student taking a proctored exam a distant second.[156] This logic runs counter to common sense.

The court's refusal to engage with Ogletree's diminished privacy interest as a student taking an exam is especially egregious in light of the fact that, at the time of the incident, CSU offered its students the option of taking their exams on campus as a reasonable alternative to remote testing.[157] The fact that Ogletree himself could not attend classes in person and could apparently only take exams from his bedroom[158] should not change the fact that CSU was taking real steps to provide students alternatives to taking exams from their homes.[159]

The court's discussion of the nature of CSU's interests is equally imprudent. Its analysis of this issue consists of little more than a paragraph and concludes simply with a passive acknowledgment of CSU's legitimate interest in preserving the integrity of its tests.[160] But to the court, this interest is clearly not overriding enough to tip the scales in the university's favor in part because the court fails entirely to consider another, more immediate interest of CSU: its interest in administering exams and maintaining the status quo in the face of a devastating, worldwide pandemic. To put it simply: CSU was doing its best in the face of unprecedented change. Given its limited options, the school implemented a policy it believed to be in the best interests of its 16,000 students. If its chief aim was to insulate itself from Fourth Amendment liability at the expense of its students' interests, it could have required that all exams be administered on campus. Instead, it chose to accommodate its students with a more flexible policy. The *Ogletree* court's unwillingness to defer to the wisdom and judgment of CSU here departs from the Supreme Court's practice of allowing states to decide which regulatory tactics are in the best interest of their citizens.[161]

---

preemptively search students' homes—and even their bedrooms—on the mere notion that any student *might* try to cheat on a remote test." Second Amended Complaint, *supra* note 29, at 1. Although the *Ogletree* court's opinion never explicitly espouses this ill-conceived logic, the court's repeated emphasis on how the room scan violated Ogletree's privacy expectations in his home suggests that it may view Ogletree's outsized analogy as not far from the truth.

156. *See Ogletree*, 647 F. Supp. 3d at 615.

157. *Id*.

158. *Id*. at 608.

159. *Id.*

160. *Id*. at 616.

161. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 663 (1979) (finding a police practice of stopping automobiles to check a driver's license without reasonable suspicion that the driver was

Were the court more willing to give CSU the benefit of the doubt and less eager to pick apart its attempts at maintaining normalcy, it might have also found that the university's chosen method of combatting cheating was effective enough to sway the final *Vernonia* factor in its favor. Instead, the court focused much of its discussion on echoing (and implicitly underwriting) Ogletree's argument that room scans are ineffective at preserving test integrity.[162] In its analysis of this final prong, the court engaged with CSU's argument that room scans are an essential aspect of its anti-cheating procedures only to essentially brush it aside, repeating Ogletree's argument that "other procedural safeguards would advance the same purposes," and suggesting that the university consider "pedagogical alternatives."[163] Moreover, it rounded out its analysis by criticizing CSU's lack of evidentiary support for its claim that room scans are an irreplaceable means of combatting cheating, and it then immediately explained to itself why that might be the case: the technology is too new to have undergone comprehensive evaluation.[164]

In short, by giving Ogletree the benefit of the doubt at almost every turn, and by categorically refusing to concede that a university might be better suited than a court of law to determine how to best serve the needs of its students, the court got it wrong here. As a result of the *Ogletree* court's lopsided analysis of the issues at stake, it reached a conclusion that conflicts with common sense notions and diverges from the jurisprudence.

III. THE FUTURE

Ultimately, however, the *Ogletree* court's misguided logic will have minimal consequences for the world at large because of the extremely limited nature of its holding. Perhaps conscious of the repercussions of casting any wider of a net than necessary, the court issued a narrow injunction, prohibiting CSU "in connection with any exam, test, or other assessment, from subjecting Mr. Ogletree to a room scan that is administered without offering a reasonable alternative or . . .

unlicensed violative of the Fourth Amendment, but affording the state of Delaware the discretion to develop an alternative that involved less intrusion or that did not involve the unconstrained exercise of police discretion).

162. *Ogletree*, 647 F. Supp. 3d at 616–17.

163. *Id.* at 617.

164. *Id.*

without his express consent."[165] While this was a modest win for Ogletree, it was, at best, a symbolic victory for those seeking a definitive judicial decree that remote proctoring software violates an individual's constitutional rights.

Still, the *Ogletree* holding made enough of an impact on the culture to prompt a flurry of think pieces from respectable publications, many containing broad speculations about its effect on the future of remote proctoring.[166] It also clearly hit industry leader Respondus close enough to home that it felt compelled to issue an official statement to clarify the potential effect (or lack thereof) the ruling would have on its business moving forward.[167]

And while it has no direct impact on any university other than CSU, the *Ogletree* judgment can serve as a guideline for educational institutions hesitant to wholly abandon the technology that kept them running at the height of the pandemic. Respondus seems to agree: in its official statement, it cautioned institutions to put forth clear and unambiguous policies about the surveillance tactics used by remote proctoring technology and obtain student consent if possible.[168] To that end, it announced a change in its Student Terms of Service that will now require student users to acknowledge and consent to the possibility that they may be recorded taking an exam in a non-university location.[169]

This emphasis on student consent by both the *Ogletree* court in its holding and Respondus in its official statement may be an indication of how remote proctoring companies and public universities will attempt to avoid another *Ogletree* in the future. Indeed, consent is a commonly invoked exception to the Fourth Amendment's warrant requirement,[170] and it is possible that a court would find a room scan

165. Judgment Entry Terminating Case at 1, Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602 (N.D. Ohio 2022).

166. *See, e.g.*, Skye Witley, *Virtual Exam Case Primes Privacy Fight on College Room Scans*, BLOOMBERG L. (Jan. 25, 2023) https://news.bloomberglaw.com/privacy-and-data-security/virtual-exam-case-primes-privacy-fight-over-college-room-scans [https://perma.cc/Z4VC-DKC2]; Amanda Holpuch & April Rubin, *Remote Scan of Student's Room Before Test Violated His Privacy, Judge Rules*, N.Y. TIMES (Aug. 25, 2022), https://www.nytimes.com/2022/08/25/us/remote-testing-student-home-scan-privacy.html [https://perma.cc/F23H-V7HC].

167. *Our Take on the* Ogletree *Ruling*, RESPONDUS (Feb. 14, 2023), https://web.respondus.com/ogletree/ [https://perma.cc/5JFN-49H6].

168. *Id.*

169. *Id.*

170. *See* Marcy Strauss, *Restructuring Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 214 (2001) ("Although precise figures detailing the number of searches conducted pursuant to consent

conducted pursuant to full and voluntary consent as complying with the Amendment's reasonableness requirement. But a review of the facts of *Ogletree* plainly illustrates why it may be foolhardy for a university to use consent to shield itself from Fourth Amendment liability in the future.

CSU could have argued to the court that its room scan was reasonable because it was conducted with Ogletree's consent, but it did not—and for good reason. Even if it believed that Ogletree implicitly consented to a search by enrolling in the university's chemistry class to begin with,[171] it would carry the burden of proving that, under the totality of circumstances, the consent was voluntary and not the product "of duress or coercion, express or implied."[172] This would be a heavy burden for the university to carry for two key reasons.

First, when an individual merely acquiesces to a search (as Ogletree did here by complying with the room scan) without giving his explicit consent to it, he has not freely and voluntarily consented to waive his Fourth Amendment protection from unreasonable searches.[173] Second, according to Ogletree, the only reason he acceded to the scan was because he believed the alternative was to receive a failing grade on his exam.[174] Even if this were not actually the case,[175] the fact that Ogletree was under this impression may serve as evidence that his consent was the product of coercion, and "[w]here there is coercion there cannot be consent."[176] This example illustrates why it would be difficult for a university to lean on student consent in the future.

Thus, a public university seeking to avoid liability for utilizing room scans would be wise to consider alternatives to consent. For

---

are not—and probably can never be—available, there is no dispute that these types of searches affect tens of thousands, if not hundreds of thousands, of people every year.").

171. In an email to Ogletree, Kelly King pushed back on his assertion that a room scan would violate his constitutional rights by arguing that "even if it was a 'search,' students in the course would consent to such a search by virtue of choosing to take the course." Email from Kelly King, Gen. Couns., Cleveland State Univ. to Aaron Ogletree (Jan. 17, 2021, 2:09 PM) (on file with author). This argument does not, however, appear in any of the university's pleadings.

172. Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

173. Bumper v. North Carolina, 391 U.S. 543, 548–49 (1968); NANCY HOLLANDER ET AL., WHARTON'S CRIMINAL PROCEDURE § 28:3 (14th ed. 2002).

174. Second Amended Complaint, *supra* note 29, at 8.

175. And according to the proctor of Ogletree's chemistry exam, it was not: "If they said they weren't comfortable to take the test because I want to do the room scan . . . I would let them continue with the test, but I would report the situation [to the professor]." Deposition of Hilda Iris Zana, *supra* note 56, at 29–30.

176. *Bumper*, 391 U.S. at 550.

example, to allay the privacy and security concerns of its users, a school might take more careful steps to ensure that only the proctor (and not other students) is able to view the scan of a student's room. It might also decide to further restrict who has access to the video recordings of the room scans and make sure to delete the footage as soon as possible rather than let it sit on a server for weeks, even months, on end. In some cases, a university may have limited control over where these recordings end up and over the extent to which some remote proctoring companies collect and share personal information of students.[177] However, schools would be wise to conduct further research into the data collection practices of the software they use and potentially avoid services with overly invasive privacy policies.

Moreover, considering how heavily CSU's inconsistent testing policies seem to have weighed in the *Ogletree* court's decision to rule in Ogletree's favor,[178] it might be prudent for public universities to ensure that their own policies on remote testing are clearly delineated to students and uniformly administered by professors and exam proctors.[179] To do this, they can publish and make publicly available remote testing policy documents and include them in the syllabi for all courses. If they plan on conducting room scans before exams, they should ensure that procedure is followed by every proctor in every case and is not subject to the discretion of individual professors, as it was at CSU when Ogletree's room was scanned.[180]

Alternatively, public universities might avoid room scans altogether, and instead opt to employ other, less invasive remote testing security measures.[181] While some alternatives may not be feasible depending on the resources of the school and the size of the class, in some cases a professor may be able to use a product like Zoom to

177. *See* Chin, *supra* note 8, at 7–8 (providing an in-depth analysis of Examity's refusal to guarantee the security of personal data collected during remote exams).

178. Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602, 617 (N.D. Ohio 2022) ("[A] record of sporadic and discretionary use of room scans does not permit a finding that rooms scans are truly, and uniquely, effective at preserving test integrity.").

179. *See* Witley, *supra* note 166, at 3.

180. *See Test Integrity in the Remote Learning Era*, *supra* note 93 ("When developing your school's remote testing security measures, be thoughtful about the reason for a particular security measure and work to ensure that it is applied to all courses and students. Even one exception will cast doubt on the usefulness, efficacy, and necessity of the security measure."); CLEV. STATE UNIV., *supra* note 29, at 2 (describing its "Recommended Practices" as "general guidelines and up to the faculty member's discretion to implement based on course requirements, needs, and outcomes").

181. *See Test Integrity in the Remote Learning Era*, *supra* note 93.

monitor students during remote exams.[182] This would allow professors to continue to monitor their students virtually during exams without requiring students to download unfamiliar, intimidating software to their computers that requires them to sign away their privacy rights before they can begin an exam.

Yet another way schools may avoid their own *Ogletree* scenario (and curb their students' opportunities to cheat) would be to follow a suggestion from the *Ogletree* court and explore pedagogical substitutes for virtual exams.[183] Instead of multiple-choice exams, public universities might embrace more open-book evaluations, projects, and papers, which minimize the need for remote scans and make it more difficult for students to cheat by sharing answers with each other.[184] And, of course, the most definitive way for a university to avoid encroaching on the Fourth Amendment rights of its students during exams would be to abandon remote proctoring software entirely.[185] While this may not have been an option a few years ago when virtually all learning was conducted remotely, now that the world has returned to some semblance of normalcy, universities may simply require that all exams be held in person, thereby eliminating the need for remote proctoring tools.

CONCLUSION

In reality, schools are unlikely to ditch remote proctoring solutions for good now that the pandemic has introduced the possibility of large-scale virtual learning. The world has witnessed an irreversible change over the course of the past few years, and for as problematic as remote proctoring can be, it is hard to deny[186] that it has empowered educational institutions with the ability to reach beyond the boundaries of their campuses and connect with students in new and exciting ways. Though the future of remote learning remains uncertain, schools can at least ensure that, moving forward, they weigh their interests and the interests of their students in equal measure.

---

182. *See* Nora Igelnik, *Always Watching: Students, Instructors Weigh in on Proctorio's Testing Surveillance and Impact on Mental Health*, LANTERN (Jan. 9, 2023), https://www.thelantern.com/2023/01/always-watching-students-instructors-weigh-in-on-proctorios-testing-surveillance-and-impact-on-mental-health/ [https://perma.cc/ZCJ2-R3D5].

183. *Ogletree*, 647 F. Supp. 3d at 617.

184. *See* Chin, *supra* note 8, at 14–15; Flaherty, *supra* note 14, at 10.

185. *See* Barrett, *supra* note 19, at 676.

186. But not impossible. See, for example, Barrett, *supra* note 19, for a full-throated rejection of the necessity of remote proctoring tools.