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## Breaking the Fourth's Wall: The Implications of Remote Education for Students' Fourth Amendment Rights

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# Breaking the Fourth’s Wall: The Implications of Remote Education for Students’ Fourth Amendment Rights

## ABSTRACT

*As the COVID-19 pandemic forced both public K-12 and higher education institutions to transition to exclusively provide remote education, students’ homes and personal lives were exposed to the government like never before. Zoom classes and remote proctoring were suddenly the norm. Students and their families scrambled to create appropriate offices and classroom spaces in their homes, and many awkward and invasive scenarios soon followed. While many may have been harmlessly captured on camera, like classes that witness a student’s family eating lunch in the background or a dog on the couch, even these harmless instances have insidious implications for the future of government intrusion upon the interests protected by the Fourth Amendment within the home and beyond.*

*This Note argues that public schools’ virtual window into students’ homes, through mandatory remote classes and exam proctoring without the consent of students and their families, is an unreasonable search in violation of the Fourth Amendment. Going forward, public schools using remote learning technology should be required to obtain consent from students or their guardians prior to implementing such methods. Consent may be implicit or explicit, but must be informed and give individuals sufficient advance notice to adequately consider—or even object to—the government intrusion upon their privacy.*

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## I. INTRODUCTION

Even before the COVID-19 pandemic in the spring of 2020, remote-learning and educational technology industries were already experiencing the beginning of their golden age.<sup>1</sup> By 2019, video surveillance was common on K-12 school campuses and schools employed third-party software to monitor online activity when students were at home.<sup>2</sup> This level of surveillance and recording brought concerns—particularly regarding students’ rights to privacy and the lack of precautions against hacking and improper use of student information.<sup>3</sup>

However, when COVID-19 restrictions prevented in-person schooling,<sup>4</sup> teachers scrambled to transition to online teaching and remote proctoring and students’ personal lives became available to

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1. See Barbara Fedders, *The Constant and Expanding Classroom: Surveillance in K-12 Public Schools*, 97 N.C. L. REV. 1673, 1680–81 (2019).

2. *Id.* at 1693–94.

3. *Id.* at 1683–84; Diana S. Skowronski, *Coppa and Educational Technologies: The Need for Additional Online Privacy Protections for Students*, 38 GA. ST. U. L. REV. 1219, 1224–25 (2022).

4. See generally Jim Alrutz, *Legislative Update: Early State and Federal Responses to Coronavirus-Related School Closures*, 40 CHILD. LEGAL RTS. J. 146 (2020) (giving an overview of early state and federal responses to the COVID-19 pandemic in light of the fact that forty-nine states engaged in regulation of school disease responses); *Data: Coronavirus and School Closures in 2019-2020*, EDUC. WEEK (Dec. 3, 2021), <https://www.edweek.org/data-coronavirus-and-school-closures-in-2019-2020/2021/12> [<https://perma.cc/E9DZ-AM4Y>] (“At their peak, the closures affected at least 55.1 million students in 124,000 U.S. public and private schools. Nearly every state either ordered or recommended that schools remain closed through the end of the 2019-20 school year.”); *Fast Facts: Closed schools*, NAT’L CTR. FOR EDUC. STAT. (Oct. 3, 2023) <https://nces.ed.gov/fastfacts/display.asp?id=619> [<https://perma.cc/T756-5FDQ>] (“Number and enrollment of public elementary and secondary schools that have closed, by school level, type, and charter status: School years 2010–11 through 2021–22”); SUMIT CHANDRA ET AL., *CLOSING THE K-12 DIGITAL DIVIDE IN THE AGE OF DISTANCE LEARNING 3* (Common Sense Media 2020), [https://www.common Sense Media.org/sites/default/files/research/report/common\\_sense\\_media\\_report\\_final\\_7\\_1\\_3pm\\_web.pdf](https://www.common Sense Media.org/sites/default/files/research/report/common_sense_media_report_final_7_1_3pm_web.pdf) [<https://perma.cc/62CV-E82B>] (“Due to COVID-19 school facility closures, 50 million K-12 public school students have had to learn remotely from home.”).

public school officials—and thus the state—like never before.<sup>5</sup> In *New Jersey v. T.L.O.*, the Supreme Court established that juveniles have a lowered expectation of privacy and rights against searches under the Fourth Amendment while in school due to their vulnerable developmental states, the school's interest in the safety and discipline of its students, and the school's position *in loco parentis*.<sup>6</sup> Yet the scope of this decision is unclear; the validity of its extension to remote proctoring or Zoom classes, where students have no choice but to display their homes and sometimes family members on camera, remains undecided. Given the unprecedented circumstances triggered by pandemic restrictions, there is no case law to suggest that the *T.L.O.* exception extends to a student's home and family.<sup>7</sup>

This Note argues that it is a Fourth Amendment violation for public educational institutions, both K-12 and higher education, to require students to show their private living spaces over video without proper notice.<sup>8</sup> Part II gives background on the relationship between the Fourth Amendment, technology, and children, as well as examples of how courts have handled constitutional challenges to COVID-19 restrictions. In particular, Part III analyzes *Ogletree v. Cleveland State University*, a recent case in the US District Court for the Northern District of Ohio in which a student alleged that a room scan for remote proctoring of his exam was an impermissible search under the Fourth Amendment.<sup>9</sup> This analysis focuses on the unique issues that the pandemic has created for the Fourth Amendment rights of students and explores how these concerns affect K-12 students differently than those in higher education.

Part IV presents a solution as to how schools should approach the conflict between the need for remote learning and student privacy

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5. Tiffany C. Li, *Privacy in Pandemic: Law, Technology, and Public Health in the COVID-19 Crisis*, 52 LOY. U. CHI. L. J. 767, 790 (2021). See also *The Federal Role in Education*, U.S. DEPT. OF EDUC. (June 15, 2021) <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/QV7U-KU38>] (“Education is primarily a State and local responsibility in the United States. It is States and communities, as well as public and private organizations of all kinds, that establish schools . . .”).

6. *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985); Fedders, *supra* note 1, at 1718.

7. See *T.L.O.*, 469 U.S. at 326; Caroline A. Foster, *Your Home, the New Classroom: How Public-School Zoom Use Encroaches into Family Privacy*, 22 J. HIGH TECH. L. 131, 139 (2021) (“However, there are limitations on the scope of what school officials can search, showing that schools do not have endless authority over students and their belongings.”).

8. See Conan Becknell, *Constitutional Law—Fourth Amendment Search and Seizure—Online Schools During a Pandemic: Fourth Amendment Implications When the State Requires Your Child to Turn on the Camera and Microphone Inside Your Home*, 44 U. ARK. LITTLE ROCK L. REV. 161, 174, 187 (2021); see also *Ogletree v. Cleveland State Univ.*, 647 F. Supp. 3d 602, 614 (N.D. Ohio 2022).

9. 647 F. Supp. 3d at 609.

in juxtaposition with the *Ogletree* decision.<sup>10</sup> This Note suggests that students need more procedures to protect their information and prevent school administrators from having at-will visual access to students' homes. Though the Public Health Emergency for COVID-19 officially ended in May of 2023,<sup>11</sup> the government's use of invasive technology is enduring with no end in sight.<sup>12</sup> Hybrid learning, a mixture of both remote and in-person communication, remains commonplace in K-12 and higher education systems.<sup>13</sup> This technology has become a foundational part of modern education and has no foreseeable cessation.<sup>14</sup> Thus, it is essential that the law and application of the Fourth Amendment are appropriately construed to protect the rights of students in this new era. This reasoning goes beyond the issue of students' privacy amidst the COVID-19 crisis. After all, government powers may encroach gradually to consume individual rights under the guise of seemingly reasonable safety measures.<sup>15</sup> It is important for courts to view cases regarding such invidious government intrusions with a skeptical eye in order to protect against them.<sup>16</sup>

## II. BACKGROUND

### A. *Technology and Fourth Amendment Searches*

The late twentieth and twenty-first centuries produced a breadth of case law on the limitations of police and other entities' use of technology to obtain citizens' personal information.<sup>17</sup> However, as

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10. *See id.*

11. Assistant Secretary for Public Affairs, *COVID-19 Public Health Emergency (PHE)*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (May 16, 2023), <https://www2.ed.gov/about/overview/fed/role.html> [https://perma.cc/9YK9-BCVE].

12. *End of the Federal COVID-19 Public Health Emergency (PHE) Declaration*, CTRES. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html> [https://perma.cc/7LP3-FW79] (last visited Sept. 29, 2023); Skowronski, *supra* note 3, at 1224–25.

13. *See Li, supra* note 5, at 794.

14. *See id.*

15. *Boyd v. U.S.*, 116 U.S. 616, 635 (1886); *see Ogletree*, 647 F. Supp. 3d at 616.

16. *Boyd*, 116 U.S. at 635.

17. *See* Robert Ellis Smith, *Sometimes, What Is Public Is Private*, 59 R.I. BAR J. 33, 33 (2011); *Katz v. U.S.*, 389 U.S. 347, 349, 358 (1967); *Smith v. Maryland*, 442 U.S. 735, 735, 745–46 (1979) (holding a telephone company's use of a pen register to record numbers dialed from defendant's phone was not a Fourth Amendment search because defendant did not have a "legitimate expectation of privacy" in that information); *U.S. v. Karo*, 468 U.S. 705, 706, 721 (1984) (holding that even though the Government is limited in the information they may obtain about private residences using electronic devices, there was no search of a rented locker when police put a "beeper" inside the defendant's container of chemicals because it did not reveal anything about the locker's contents and the police located the defendant's locker by sense of smell); *Kyllo v. U.S.*,

technology changes rapidly, modifications to the law—especially Fourth Amendment doctrine—tend to lag behind current needs of society.<sup>18</sup> When analyzing potential searches, the text of the Fourth Amendment requires consideration of two questions: (1) whether the act was indeed a “search” under the Fourth Amendment, and (2) whether a search was unreasonable such that it required a warrant.<sup>19</sup> Other cases address a third question regarding whether the warrant requirement should be applied in a given scenario, which will be discussed below.<sup>20</sup>

In *Katz v. United States*, the Supreme Court rejected a property-based approach for application of the Fourth Amendment, though the Court maintained that consideration of physical intrusion was but one element of a Fourth Amendment analysis.<sup>21</sup> Property-oriented analysis relegates Fourth Amendment protection to cases where government parties make a physical intrusion or trespass into an area specially mentioned in the Fourth Amendment (houses, persons, papers, and effects).<sup>22</sup> *Katz* adopted the “reasonable expectation of privacy test,” which instead considers whether the government action “infringed on the target’s reasonable expectation of privacy.”<sup>23</sup> The Court later clarified that *Katz* expanded on—but did not replace—the previous property-oriented approach.<sup>24</sup> Though the Fourth Amendment is not “measurable in terms of ancient niceties of tort and property law,” courts may still consider the location in which the intrusion took place

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533 U.S. 27, 29–30, 40 (2001); *U.S. v. Jones*, 565 U.S. 400, 402 (2012); *Carpenter v. U.S.*, 138 S. Ct. 2206, 2208–11 (2018) (holding that police’s acquisition of personal location information maintained by a third party—cell-site location information (“CSLI”)—should generally be considered a Fourth Amendment search because CSLI provides information similarly to a GPS and does not fit under *Smith*’s third party doctrine). *See also* *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1344 (11th Cir. 2017) (holding that plaintiff-users could not bring suit under the Video Privacy Protection Act when the Network disclosed users’ viewing history to third parties because the users were not “consumers” under the Act); *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1267 (9th Cir. 2019) (the district court did not abuse its discretion in certifying a class of Facebook users alleging Facebook’s facial-recognition technology violated the Illinois Biometric Information Privacy Act).

18. *See* Tracey Maclin, *Katz, Kyllo, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 *MISS. L. J.* 51, 58–59 (2002).

19. CHRISTOPHER SLOBOGIN, *ADVANCED INTRODUCTION TO U.S. CRIMINAL PROCEDURE* 21 (Edward Elgar 2020); 4 *WHARTON’S CRIMINAL PROCEDURE* § 24:1 (14th ed.); 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 . . .”).

20. SLOBOGIN, *supra* note 19, at 54.

21. *Id.*; *see also Katz*, 389 U.S. at 359.

22. U.S. CONST. amend. IV; SLOBOGIN, *supra* note 19, at 23; *see also Katz*, 389 U.S. at 359.

23. SLOBOGIN, *supra* note 19, at 23; *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).

24. *U.S. v. Jones*, 565 U.S. 400, 407 (2012).

in their analysis of potential Fourth Amendment violations, particularly when dealing with searches within the home.<sup>25</sup>

Using the *Katz* test, which is better adapted to advances in technology than a purely property-oriented approach, there are four regimes to determine whether a series of actions is a “search” within the meaning of the Fourth Amendment.<sup>26</sup> Out of these four regimes, this Note focuses on the knowing exposure and general public use doctrines.<sup>27</sup>

The knowing exposure doctrine states that “what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected” by the Fourth Amendment.<sup>28</sup> However, this doctrine also contains the caveat that the Fourth Amendment does not protect that which a person has knowingly exposed to the public, even if done so in his or her home.<sup>29</sup> For example, a government actor may inspect one’s trash left on a curb, or use a plane to get a view of one’s backyard, and it will not be a Fourth Amendment “search,” because that person has knowingly left those materials out for the public to see.<sup>30</sup>

The general public use doctrine, affirmed in *Kyllo v. United States*, states that technology commonly available to the public may be used to investigate without establishing reasonableness under the Fourth Amendment.<sup>31</sup> In *Kyllo*, the Supreme Court held that the police could not use thermal imaging technology to monitor an individual’s conduct within their home without a warrant.<sup>32</sup> The Court reasoned that, where the government uses “sense-enhancing technology that is not in public use” to obtain access to information that would ordinarily require a warrant, it has infringed on the Fourth Amendment right against unreasonable searches.<sup>33</sup>

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25. *Id.*; *Silverman v. U.S.*, 365 U.S. 505, 511 (1961).

26. SLOBOGIN, *supra* note 19, at 23–28.

27. The other two Fourth Amendment analysis regimes, known as the contraband-specific doctrine and the assumption of risk doctrine, are not discussed in this Note. The contraband-specific doctrine connects the scope of what is a “search” to the content of what is discovered or sought. This is not relevant to this Note, as remote proctoring provides universal views into the homes of students rather than a targeted search. The assumption of risk doctrine applies when a person reveals private information to a third party who then involves a government entity, a scenario that is also not explored in this Note. See SLOBOGIN, *supra* note 19, at 23–28.

28. *Katz*, 389 U.S. at 351.

29. *Id.*

30. See SLOBOGIN, *supra* note 19, at 25.

31. *Id.*; *Kyllo v. U.S.*, 533 U.S. 27, 40 (2001).

32. *Kyllo*, 533 U.S. at 40.

33. *Id.* at 34; Smith, *supra* note 17, at 38.

*B. Reasonableness*

If a court determines that a government act qualifies as a “search” under the Fourth Amendment, the government must obtain a warrant to engage in its intrusion.<sup>34</sup> This warrant requirement mandates that the government actor show probable cause, and by extension show that the search is not unreasonable, in order to inspect that space without violating an individual’s constitutional rights.<sup>35</sup> Suspicionless searches are presumably prohibited by the Fourth Amendment.<sup>36</sup> There are exceptions to this rule, including instances where a party gives informed consent to the search or is a member of a “special population,” such as children and prisoners.<sup>37</sup> When dealing with special populations specifically, courts have applied a balancing test of “reasonableness” derived from *Terry v. Ohio*.<sup>38</sup>

The Supreme Court has stated that government actors performing searches are acting within their legal limits when they ask for and obtain a person’s consent.<sup>39</sup> Giving consent to an invasion of privacy narrows the scope of the Fourth Amendment’s protection against unreasonable search.<sup>40</sup> Consent is considered a waiver of Fourth Amendment rights and allows a search to be undertaken where there would otherwise be no substantive basis to obtain a warrant.<sup>41</sup> Alternatively, consent may be characterized as an act that automatically makes a search “reasonable.”<sup>42</sup> Under this definition, focus shifts away from the individual’s intent to give consent and instead centers on whether the government actor “reasonably” believed that the individual gave consent.<sup>43</sup>

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34. *Kyllo*, 533 U.S. at 31.

35. *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523 (1967) (“The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard.”).

36. *Ogletree v. Cleveland State Univ.*, 647 F. Supp. 3d 602, 614 (N.D. Ohio 2022).

37. *SLOBOGIN*, *supra* note 19, at 70; *New Jersey v. T.L.O.*, 469 U.S. 325, 325–26 (1985); *see also Fedders*, *supra* note 1, at 1723.

38. *SLOBOGIN*, *supra* note 19, at 70; *T.L.O.*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)) (“Determining the reasonableness of any search involves a twofold inquiry: first, one must consider ‘whether the action . . . was justified at its inception’; second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”).

39. *See* WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 8.1 (6th ed. 2022).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*



Children have less ability to consent to Fourth Amendment searches of the home.<sup>44</sup> As the Supreme Court explained in *Georgia v. Randolph*, a child—as a presumed resident and person who “belongs” on the premises—may have the authority to invite the police into the family’s living room without the parents’ explicit consent.<sup>45</sup> However, the child would not have the same authority to authorize a search of more private areas of the house, such as the parents’ bedroom.<sup>46</sup> With less ability to give appropriate consent to a traditional search of private spaces, it follows that a child also has less ability to consent to virtual searches.<sup>47</sup>

As the Fourth Amendment applies uniquely to the “special needs” of juveniles, children are afforded less privacy, especially on public school property.<sup>48</sup> School officials have more power to search students—in that they need less suspicion—than do other governmental actors like police with adult, criminal suspects.<sup>49</sup> In *New Jersey v. T.L.O.*, the Supreme Court held that a school official’s search of a student’s person or belongings will be found permissible when the methods used are “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>50</sup> The Court reasoned that children have lesser privacy interests compared to school officials’ heightened interest in protecting the study body through efficient, informal discipline.<sup>51</sup> Thus, despite lacking probable cause for the search at issue, the schools’ interests in safety and efficient administration outweighed the student’s privacy interest.<sup>52</sup> This reasoning, however, does not apply automatically to remote learning, as minor students are beyond a schools’ physical custody while in remote class. School officials’ ability to act *in loco parentis* only takes effect when a child’s parents or usual guardians are not present to do so themselves.<sup>53</sup>

Even physically invasive searches have been held reasonable; applying *T.L.O.* to *Vernonia School District 47J v. Acton*, the Supreme

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44. *Georgia v. Randolph*, 547 U.S. 103, 112 (2006).

45. *Id.* at 111–12.

46. *Id.* at 112.

47. *See id.*

48. *New Jersey v. T.L.O.*, 469 U.S. 325, 332 n.2 (1985); Andy Froelich, *The Increasingly Covert and Invasive Surveillance of Students and Its Visible Role in the School-to-Prison Pipeline*, 40 CHILD. LEGAL RTS. J. 118, 131 (2021).

49. Froelich, *supra* note 48, at 131; *see T.L.O.*, 469 U.S. at 326.

50. *T.L.O.*, 469 U.S. at 326.

51. *See id.*; SLOBOGIN, *supra* note 19, at 71.

52. *See T.L.O.*, 469 U.S. at 326; SLOBOGIN, *supra* note 19, at 71.

53. *See T.L.O.*, 469 U.S. at 336–37; *see also* SLOBOGIN, *supra* note 19, at 70.

Court found that a requirement mandating that all students in public school sports submit to random drug testing was not a violation of students' Fourth Amendment rights given evidence of frequent drug use among student-athletes.<sup>54</sup> Students' "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard schools' custodial and tutelary responsibility for children."<sup>55</sup> The Supreme Court expanded on *T.L.O.*, finding that suspicionless public school searches—even those as intrusive as urinalysis—were circumstances with "special needs" in which a warrant "would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'"<sup>56</sup> This holding relied in part on the reasoning that, in trying out for sports teams, student-athletes have voluntarily submitted to a higher level of monitoring and a lower expectation of privacy than the general student body.<sup>57</sup> This is an extreme example of school officials' duty to protect students, yet, in many ways, demonstrates a willingness to disregard students' privacy interests.<sup>58</sup> Consequently, *Vernonia* and *T.L.O.* establish limited Fourth Amendment rights for minor students on school grounds, which pandemic restrictions have further limited.<sup>59</sup>

### *C. Constitutional Rights in the Age of COVID-19*

Both during the pandemic and since, there has been ample litigation surrounding hastily-promulgated COVID-19 regulations.<sup>60</sup> Courts faced novel issues requiring unprecedented interpretations of constitutional doctrine. As a judge for the US District Court for the Eastern District of Kentucky summarized:

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54. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665–66 (1995) (citing *T.L.O.*, 469 U.S. at 339).

55. *Vernonia Sch. Dist.*, 515 U.S. at 656.

56. *Id.* at 653 (quoting *T.L.O.*, 469 U.S. at 341).

57. *Id.* at 657.

58. *See id.*

59. *T.L.O.*, 469 U.S. at 341; *Vernonia Sch. Dist.*, 515 U.S. at 656. *See also* Froelich, *supra* note 48, at 131–132; Li, *supra* note 5, 792.

60. *See generally* League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 129 (6th Cir. 2020) (permitting an emergency stay on the district court's finding that an executive order allowing some businesses to reopen before others did not meet rational basis review); Doe v. Franklin Square Union Free Sch. Dist., 568 F. Supp. 3d 270, 292 (E.D.N.Y. 2021) (holding that the plaintiff failed to show likelihood of success on the merits when she claimed the New York State Department of Public Health's requirement that students wear masks violated her daughter's substantive due process rights because other courts had found similar facts failed rational basis review).

The Constitution does not transform itself because of the moment. But that is not to say that the moment does not present facts so unique that they require courts to engage in the application of Constitutional principles for the first time. The COVID-19 pandemic is such a moment.<sup>61</sup>

Many courts construed well-known constitutional doctrines in new ways to permit COVID-19 restrictions.<sup>62</sup> Judges were willing to give more deference to the decisions of local and state governments, even as private parties alleged constitutional violations.<sup>63</sup> Accordingly, many plaintiffs were not successful, particularly in cases where courts had precedentially applied rational basis to similar government actions.<sup>64</sup>

For example, in *League of Independent Fitness Facilities and Trainers, Inc. v. Whitmer*, business owners of indoor fitness facilities challenged the governor of Michigan's executive order allowing restaurants, bars, and salons to reopen with fewer restrictions.<sup>65</sup> After the US District Court for the Western District of Michigan issued a preliminary injunction prohibiting the enforcement of the governor's order—finding that it failed to satisfy even rational basis review under the Fourteenth Amendment—the governor moved for an emergency stay of the injunction pending appeal.<sup>66</sup> In its analysis, the US Court of Appeals for the Sixth Circuit gave significant weight to the government's interest in managing the spread of COVID-19 over the plaintiffs' interest in equal treatment.<sup>67</sup> The court noted that some challenges to COVID-19 restrictions involving certain individual rights, such as the free exercise of religion, are subject to strict judicial scrutiny.<sup>68</sup> However, where precedent had traditionally applied rational basis review to executive actions, “almost without exception, courts in [COVID-19 regulation challenges] have appropriately deferred to the judgments of the executive in question.”<sup>69</sup>

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61. *Pleasant View Baptist Church v. Beshear*, No. 220CV00166GFVTCJS, 2021 WL 4496386, at \*1 (E.D. Ky. Sept. 30, 2021) (holding that Kentucky Governor's COVID-19 order temporarily halting in-person classes for K-12 schools did not violate the Constitution because “the circumstances are so unique that the constitutional principles are not clearly established”).

62. *See* cases cited *supra* note 60.

63. *See Whitmer*, 814 F. App'x at 129 (“Shaping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people. Even if imperfect, the Governor's Order passes muster under the rational basis test.”) (citations omitted).

64. *Id.*

65. *Id.* at 127.

66. *Id.*

67. *Id.* at 129–30.

68. *Id.* at 126.

69. *Id.*

The Sixth Circuit's assessment of the rationale behind challenges to COVID-19 restrictions was accurate; the Supreme Court seemed to validate this interpretation a few months later in *Roman Catholic Diocese of Brooklyn v. Cuomo*.<sup>70</sup> The Court found that the plaintiffs, a church and synagogue, were likely to succeed on the merits of their claim asserting that certain New York COVID-19 restrictions violated the Free Exercise Clause's "minimum requirement of neutrality."<sup>71</sup> The restriction at issue allowed businesses deemed "essential" to admit any number of people, whereas places of worship were restricted to a maximum of ten persons.<sup>72</sup> Because the Constitution explicitly protects the free exercise of religion, the restriction received strict scrutiny and did not survive.<sup>73</sup> The Court reasoned that these restrictions were biased against a specially protected activity in addition to being "more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions . . . and far more severe than has been shown to be required."<sup>74</sup>

Even as COVID-19 restrictions have gradually lifted, precedent set by court decisions during the peak of the pandemic continues to shape current and future analyses of individual rights.<sup>75</sup> These decisions reflect a judicial struggle to protect these rights while simultaneously allowing government infringement upon them to address a global emergency and its consequences.<sup>76</sup> Any such emergency tests the strength of constitutional protections.<sup>77</sup> During a crisis, a government intrusion might be perceived as necessary, but

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70. 141 U.S. 63, 67 (2020) (reasoning that, because the Court applies strict scrutiny rather than rational basis review to restrictions on the free exercise of religion, Cuomo's order was held to a high standard than other COVID-19 regulations and the Court was not obligated to defer to the government's decision).

71. *Id.* at 66.

72. *Id.*

73. *Id.* at 67; *see also* Tandon v. Newsom, 141 U.S. 1294, 1296 (2021) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 136 (1987) ("When a State denies receipt of a benefit because of conduct mandated by religious belief . . . [it] must be subjected to strict scrutiny and can be justified only by proof of a compelling state interest.")

74. *Roman Cath. Diocese*, 141 U.S. at 67.

75. *See* League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 126, 129 (6th Cir. 2020).

76. *See id.* at 126–27.

77. *See Pleasant View Baptist Church v. Beshear*, No. 220CV00166GFVTCJS, 2021 WL 4496386, at \*1 (E.D. Ky. Sept. 30, 2021).

these intrusions may instead be the federal government's means to get its "foot in the door" to gradually erode individual rights.<sup>78</sup>

### III. ANALYSIS

#### A. *Ogletree v. Cleveland State University and Other COVID-19 Caselaw*

*Ogletree v. Cleveland State University* is a case that was appealed to the US Court of Appeals for the Sixth Circuit that applies the Supreme Court's guidelines from *Roman Catholic Diocese of Brooklyn* to the policies of institutions of higher learning.<sup>79</sup> Plaintiff Ogletree was a student who disputed a policy on the syllabus of his General Chemistry II class that reserved the right for the professor and exam proctors to require students to scan their surroundings at any time before, during, or after an exam.<sup>80</sup> In general, the defendant-University allowed professors to determine their own proctoring protocol.<sup>81</sup> In response to Ogletree's opposition, the professor removed this policy from the syllabus before the semester started.<sup>82</sup> At the end of the semester, roughly two hours before the scheduled exam, the professor notified Ogletree that he would in fact have to record a scan of his surroundings in order to take the exam.<sup>83</sup> The plaintiff told the professor that he objected, claiming that his bedroom was the only reasonable place he could take his exam and he would not have time to put away personal documents.<sup>84</sup> Receiving no response from his professor, Ogletree complied when the exam proctor instructed him to record a scan of his room, a copy of which was then stored with a third-party vendor.<sup>85</sup> Ogletree brought suit in the District Court for the Northern District of Ohio, alleging a breach of his Fourth Amendment right against unreasonable searches.<sup>86</sup> The court found in his favor: the

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78. *Cf.* *Boyd v. U.S.*, 116 U.S. 616, 635 (1886) ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.").

79. *See* *Ogletree v. Cleveland State Univ.*, 647 F. Supp. 3d 602, 616 (N.D. Ohio 2022), *appeal filed*, No. 23-3081 (6th Cir. Feb. 1, 2023) (considering a student's Fourth Amendment right to privacy a particularly important individual right in the case of COVID-19 related infringements); *Roman Cath. Diocese*, 141 U.S. at 66-67.

80. *Ogletree*, 647 F. Supp. 3d at 607-08.

81. *Id.* at 607.

82. *Id.* at 608.

83. *Id.* at 609.

84. *Id.*

85. *Id.*

86. *Id.*

mandate to reveal his bedroom qualified as an unconstitutional Fourth Amendment search.<sup>87</sup>

The court cited *Katz* and *Kyllo* in its analysis to determine whether Ogletree communicated an actual, subjective, and reasonable expectation of privacy against the University's "promotion of legitimate governmental interests."<sup>88</sup> In doing so, the court rejected the defendant-University's claim that the search was appropriate because room scans are in "general public use."<sup>89</sup> The District Court clarified that, under *Katz*'s general public use doctrine, even though use of uncommon technology was an automatic search, "the Supreme Court did not hold the inverse—that the use of a technology in 'general public use' could not be a Fourth Amendment search."<sup>90</sup> Even where commonly-used technology allows a party to obtain information that would otherwise require physical trespass, it still may constitute a Fourth Amendment search.<sup>91</sup> Though *Katz* abandoned the pure, property-focused Fourth Amendment doctrine, the *Ogletree* court noted that "at the Fourth Amendment's 'very core'" is the expectation that one may retreat to one's home in relative peace.<sup>92</sup> Thus, that the scan occurred in the plaintiff's bedroom and he had no other appropriate place to take his exam were significant factors in determining whether a search occurred.<sup>93</sup>

*Ogletree*, a civil case, found exam proctor scans to be general, suspicionless searches.<sup>94</sup> This is significant for Fourth Amendment analysis because of the established doctrine that, so long as the act is not an individualized criminal search, a government representative does not necessarily need to obtain a warrant.<sup>95</sup> Given that *Ogletree* implicated a general, suspicionless search, the University could have proved the search's reasonableness even without a warrant if they had shown evidence of either consent or "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable."<sup>96</sup>

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87. *Id.* at 614.

88. *Id.* at 611, 614, 616 (quoting *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 619 (1989) (citing *Kyllo v. U.S.*, 533 U.S. 27, 33 (2001))); *Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

89. *Id.* at 611 (quoting *Katz*, 389 U.S. at 359).

90. *Id.*

91. *Id.*

92. *Id.*; see SLOBOGIN, *supra* note 19, at 23.

93. *Ogletree*, 647 F. Supp. 3d at 615–16.

94. *Id.* at 614.

95. *See id.* at 611–12.

96. *Id.* at 614–15 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)).

Had the defendant-University given Ogletree proper notice of its intent to require a room scan, he could have made arrangements to take the exam elsewhere, such as the university's testing center.<sup>97</sup> If Ogletree had still chosen to take the exam in his room after receiving notice of the University's intent to scan, then the defendant-University could have argued that he had actually and subjectively consented to the search.<sup>98</sup> However, because Ogletree was notified mere hours before his exam, he did not have a meaningful opportunity to avoid this search and thus did not voluntarily consent to it.<sup>99</sup> Additionally, Ogletree's enrollment in the class was not "automatic consent" under the Fourth Amendment.<sup>100</sup> Though the University did not force Ogletree to enroll in General Chemistry II and he knew that the defendant-University used some remote proctoring, consent should not be inferred simply because a plaintiff "(a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing."<sup>101</sup> The *Ogletree* court suggested that the fact that a plaintiff could have theoretically avoided a search does not unequivocally signal implicit consent.<sup>102</sup>

Just as the court found Ogletree had not consented to the search of his room, the *Ogletree* court also found that the facts did not pass the test for reasonableness under the "special needs" exception to the Fourth Amendment warrant requirement.<sup>103</sup> In order for the government to conduct a search without a warrant, precedent requires a court to consider: "(1) the nature of the privacy interest affected; (2) the character of the intrusion; (3) the nature and the immediacy of the government concern; and (4) the efficacy of this means of addressing the concern."<sup>104</sup>

Regarding the nature of Ogletree's privacy interest under *Kyllo*, a non-physical intrusion into the home should receive the same protection that a physical trespass would trigger.<sup>105</sup> As Ogletree was an adult at the time of the intrusion and higher education is not mandatory, the court did not afford the defendant-University the same

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97. See *id.* at 615–16.

98. See *id.*

99. *Id.*

100. *Id.*; see LAFAVE, *supra* note 39, at § 8.2(l).

101. LAFAVE, *supra* note 39, at § 8.2(l).

102. See *Ogletree*, 647 F. Supp. 3d at 608, 612, 616.

103. *Id.* at 617.

104. *Id.* at 615.

105. *Id.* (citing *Kyllo v. U.S.*, 533 U.S. 27, 34 (2001)).

custodial allowances as a K-12 school.<sup>106</sup> Of course, one may argue that Ogletree consented to the search, unlike minor students who are obligated to attend school.<sup>107</sup> By the very act of enrolling in university, students voluntarily trade some, but not all, privacy rights in exchange for education.<sup>108</sup> Ogletree, however, was not able to give meaningful consent due to a lack of sufficient notice of this search.<sup>109</sup>

Despite the existence of more physically-invasive searches, a room scan is a Fourth Amendment search nonetheless.<sup>110</sup> Even though a remote proctoring room scan often takes less than thirty seconds and only captures one room of a house, it is still an unreasonable intrusion.<sup>111</sup> The Supreme Court has recognized on multiple occasions that the “Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.”<sup>112</sup> The court in *Ogletree* also took into account the effect of the COVID-19 pandemic and restrictions when analyzing the character of the search.<sup>113</sup> These extenuating circumstances weighed in favor of the plaintiff: Ogletree had limited class options due to a medical condition that prevented his attending in person, the defendant-University’s exam policies were neither clear nor uniform, and Ogletree did not receive notice of the scan requirement until two hours before the exam.<sup>114</sup>

The defendant-University claimed strong governmental interests in ensuring academic integrity, fairness, and facilitating remote exams.<sup>115</sup> Though legitimate, these interests were not as strong as those rooted in safety or health, especially in light of the plaintiff’s own health and safety concerns and the fact that there were other exam procedures available.<sup>116</sup> Fourth Amendment “reasonableness” does not require that the government’s means be the most efficient nor least intrusive, only that they be reasonable.<sup>117</sup> In this case, the defendant-

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106. *Id.* (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 829–30 (2002)) (noting that, because Ogletree was an adult, his privacy interests were not analogous to the minor students on school property in *Earls*).

107. *See id.*

108. *Id.*

109. *See id.* at 616–17.

110. *Id.* at 616.

111. *Id.*

112. *Id.* (quoting *Kyllo v. U.S.*, 533 U.S. 27, 37 (2001)).

113. *Id.*

114. *Id.* at 614–17.

115. *Id.* at 616.

116. *Id.* at 617.

117. *Id.* (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 837 (2002)).



University inconsistently employed room scans and did not show that they were uniquely or exceptionally effective in maintaining academic integrity.<sup>118</sup> Considering these factors, the court determined that the plaintiff's interests in maintaining his privacy and safety outweighed the countervailing governmental interests.<sup>119</sup> Thus, the defendant-University's room scan policy, as applied to these circumstances, was an unreasonable search under the Fourth Amendment.<sup>120</sup>

### *B. K-12 Fourth Amendment Concerns*

Following *T.L.O.* and *Vernonia*, courts have accepted that the Fourth Amendment rights of minors are unique.<sup>121</sup> The fact that the *Ogletree* plaintiff was a legal adult was an important consideration in the *Ogletree* decision.<sup>122</sup> Even though the plaintiff was in school, the court rejected claims that this case should be entirely governed by *T.L.O.* and *Vernonia*, as those cases are specific to the circumstances of minors in the temporary custody of school officials.<sup>123</sup> The reasoning in *T.L.O.* and *Vernonia* is limited to juvenile students on public school property—a fact that was often neglected during the pandemic and the shift to remote teaching.<sup>124</sup>

Remote learning was seemingly the best solution for maintaining functioning schools in response to the practical concerns raised during COVID-19 lockdowns around the world.<sup>125</sup> Particularly at the beginning of the pandemic, when COVID-19 was largely a mystery, remote learning ensured all students could remain safe and healthy while authorities studied the transmission and effects of the virus.<sup>126</sup> Conferencing apps, such as Zoom, allowed for convenient and widely accessible communications for anyone with an internet connection,<sup>127</sup>

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118. *Id.*

119. *Id.*

120. *Id.*

121. See *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–55 (1995).

122. *Ogletree*, 647 F. Supp. 3d at 615.

123. *Id.* (distinguishing *Vernonia Sch. Dist.*, 515 U.S. at 656, and *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 837 (2002)).

124. Foster, *supra* note 7, at 133–34.

125. *Id.* at 151–52.

126. *Id.* at 149–50; *Map: Coronavirus and School Closures in 2019–2020*, EDUC. WK. (Sept. 16, 2020), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html> [<https://perma.cc/JM9R-HFYD>].

127. Foster, *supra* note 7, at 151–52.

but concerns for student privacy raised by these technologies had escalated prior to the COVID-19 pandemic and have not yet subsided.<sup>128</sup>

Particularly in K-12 schools, both the recent rise in school violence and digital monitoring of students on and off school property have caused alarm for many parents, likely for good reason.<sup>129</sup> For example, in 2020, a school in Colorado Springs called the sheriff when a teacher saw a twelve-year-old student playing with a toy gun during his online class.<sup>130</sup> Even though he did not bring the gun to school or threaten a classmate, this student felt serious ramifications and later changed schools as a result.<sup>131</sup> The student's parents were understandably concerned by this intrusion and its effects.<sup>132</sup> Usually, what happens in a family's home is private and outside of a public school's sphere of influence.<sup>133</sup> However, this incident showed this family, as well as the general public, that virtual learning vastly expanded this sphere of influence.<sup>134</sup>

It is important to note, however, that even before the COVID-19 pandemic reshaped daily life, surveillance *off* school grounds had already been steadily increasing.<sup>135</sup> Prior to digital monitoring, one of the most overt forms of monitoring were School Resource Officer (SRO) programs in schools across the country.<sup>136</sup> SROs provide in-school law enforcement and disciplinary support and are often staffed by police officers who coordinate with the local police department.<sup>137</sup> Such programs have been controversial but are by no means uncommon.<sup>138</sup>

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128. See Fedders, *supra* note 1, at 1675–76, 1687–88 (noting that as of 2019, legal scholars' already expressed serious concerns about the sweeping use of digital learning devices and student management software in the name of student safety against improved educational outcomes).

129. *Id.* at 1675; see Aaron Feis, *Colorado School Calls Sheriff on Boy, 12, Who Showed Toy Gun in Virtual Class*, N.Y. POST (Sept. 7, 2020, 4:23 PM), <https://nypost.com/2020/09/07/colorado-school-calls-sheriff-on-boy-who-showed-toy-gun-in-virtual-class/> [<https://perma.cc/ES98-8BL4>].

130. Feis, *supra* note 129.

131. See *id.*; Foster, *supra* note 7, at 139–40.

132. See Feis, *supra* note 129.

133. See Li, *supra* note 5, at 794 (stating that before the pandemic, students “could reasonably expect that they would be able to protect information about their homes from the eyes of their fellow students or educators. However, the pandemic has now changed our society's understanding of schools and homes as spaces and has blurred the divide between school and home . . .”).

134. See Feis, *supra* note 129.

135. In 2019, roughly fifty-two thousand SROs were employed in schools across the country, more than 1,400 schools used monitoring technology to check school-issued devices or content related to a school email address, and between 2015 and 2020, over twenty-five thousand students' social media was surveilled in Chicago alone. Froelich, *supra* note 48, at 121, 124.

136. Fedders, *supra* note 1, at 1698; see Froelich, *supra* note 48, at 124.

137. Froelich, *supra* note 48, at 119.

138. *Id.*

A certain level of general surveillance in K-12 schools has become commonplace both on and off school grounds, especially in the last ten to fifteen years.<sup>139</sup> Many public schools monitor activity on school-issued devices or through social media monitoring software, sometimes without informing students and their families.<sup>140</sup> These practices have raised concerns about student surveillance in the home, which created legal issues as early as 2010.<sup>141</sup> In *Robbins ex rel. Robbins v. Lower Merion School District*, parents sued the district when they discovered that a school remotely activated the webcams of school-issued laptops without the knowledge of students or their parents.<sup>142</sup> The District Court for the Eastern District of Pennsylvania held for the plaintiff-students and granted an injunction against this school's practice, but not before the school had already captured over fifty-six thousand images of students' lives outside of school.<sup>143</sup>

Even when students themselves have not been the targets of surveillance, remote learning has also had implications for parents who were often caught unaware in the background of their children's classes.<sup>144</sup> In some cases, this has been harmless or embarrassing.<sup>145</sup> However, as remote learning gained popularity, schools confronted parents' intimate, and occasionally even illegal, conduct during their children's classes.<sup>146</sup> Whereas *T.L.O.* and subsequent cases established

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139. See *id.* at 120.

140. See *id.* at 121.

141. See *Robbins ex rel. Robbins v. Lower Merion Sch. Dist.*, Civ. Action No. 10-665, 2010 WL 3421026 (E.D. Pa. Aug. 30, 2010).

142. *Id.* at \*1; see Vince Lattanzio, *WebcamGate Teen: "I Hope They're Not Watching Me,"* NBC10 PHILA. (Feb. 22, 2010, 8:59 AM), <https://www.nbcphiladelphia.com/news/local/webcam-gate-teen-i-hope-theyre-not-watching-me/1867819/> [<https://perma.cc/MN2D-6JVN>].

143. *Robbins*, 2010 WL 3421026, at \*1; Froelich, *supra* note 48, at 123.

144. Foster, *supra* note 7, at 157–58.

145. See *id.*; see also Hannah Sparks, *Mom Can't Stop Laughing After Accidentally Flashing Daughter's Zoom Class*, N.Y. POST (May 27, 2020, 6:29 PM), <https://ny-post.com/2020/05/27/mom-laughs-after-getting-caught-naked-during-daughters-class-on-zoom/> [<https://perma.cc/5TUJ-AJRQ>] (interviewing a mother who came out of the shower in front while unaware that her daughter had relocated her remote learning class to the mother's bedroom).

146. See Foster, *supra* note 7, at 157–58; Paul Best, *Florida Parents Reportedly Smoking Weed, Drinking During Kids' Remote Classes*, FOX NEWS (Sept. 18, 2020), <https://www.foxnews.com/us/florida-parents-reportedly-smoking-weed-drinking-during-kids-remote-classes> [<https://perma.cc/R2ZP-G8N9>] (reporting “parents can be seen walking around unclothed while drinking and smoking during . . . classes” and “need to realize that there is a window into their homes during remote learning”); Robby Soave, *When Teachers Call the Cops on Parents Whose Kids Skip Their Zoom Classes*, REASON FOUND. (Sept. 17, 2020, 9:00 AM), <https://reason.com/2020/08/17/teachers-zoom-classes-parents-child-services-coronavirus/> [<https://perma.cc/2G2X-5EQA>] (criticizing public school officials for “putting the authorities on speed dial” on parents for suspected abuse when children are absent from Zoom classes).

that minors have a lowered expectation of privacy in schools, the same precedent does not exist for adults in their own homes.<sup>147</sup>

As mentioned above and shown in the *Robbins* case, the expansion of school surveillance into students' homes and personal lives was a contested topic well before the recent pandemic.<sup>148</sup> However, in 2020, students and their families were quickly and inescapably brought face-to-face with the full implications of remote learning and its effects on their lives outside of public education.<sup>149</sup> This mix of preexisting privacy concerns and the transition to mandatory remote learning created the perfect conditions for a rise in litigation challenging the effects of these practices.

It is worth noting that not all intrusions into the home create negative consequences for students or parents; on occasion, the expansion of the teacher's view may help a student.<sup>150</sup> In 2020, a teacher witnessed one of her seven-year-old students being sexually assaulted while she was on break from her Zoom class.<sup>151</sup> The teacher, a mandatory reporter with a duty to report suspected child endangerment, immediately notified authorities who were then able to act quickly to arrest the assaulter.<sup>152</sup> The teacher's ability to report this information to authorities was only possible due to her insight into her student's home.<sup>153</sup> Her ability to help, albeit via what should still be considered an intrusion upon privacy, prevented the continuation of traumatizing abuse.<sup>154</sup> Although an outlying example of a beneficial government intrusion, it was not only to the benefit of this victim and her community but consistent with the principle that such circumstances should undergo standard Fourth Amendment analysis.<sup>155</sup>

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147. See *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985).

148. *Robbins*, 2010 WL 3421026, at \*1; see Froelich, *supra* note 48, at 123; Foster, *supra* note 7, at 166 n. 116.

149. See Foster, *supra* note 7, at 159–60 (“[S]tudents are facing privacy issues that would not occur in a normal classroom . . . . Further, the intrusive nature of virtual learning extends beyond just impacting the students, as parents and siblings also need to be mindful as to what they do behind the screen of their child's or sibling's remote learning class.”).

150. See Becknell, *supra* note 8, at 174, 187.

151. Deanese Williams-Harris & Rosemary Sobol, *Man Accused of Assaulting 7-year-old Girl During Online Learning Class Had Been Sexually Abusing Her for a Year, Prosecutors Say*, CHI. TRIB. (Oct. 17, 2020, 2:06 PM), <https://www.chicagotribune.com/news/breaking/ct-online-sex-abuse-caught-charged-20201017-fepiggml2bcopkduhoaqmpcofi-story.html> [<https://perma.cc/37SS-7ZDR>].

152. *Id.*

153. Becknell, *supra* note 8, at 186.

154. *Id.* at 187.

155. *Id.* at 187–88.

*Sharp v. Community High School District 155* presents entirely different circumstances.<sup>156</sup> A teacher called the police when she believed she had seen a student handling a firearm during a virtual class, which the Dean analogized to bringing a gun to school.<sup>157</sup> The school suspended the student from remote classes and his parents filed suit alleging the program did not have their consent to surveil their child or the interior of their home in violation of the Fourth Amendment.<sup>158</sup> Unlike in *Ogletree*, the *Sharp* court found there was no unreasonable search.<sup>159</sup> While the teacher looked into the student's room, she did not look "for the purpose of gathering information or exploring the home."<sup>160</sup> Thus, this inspection was not a search because the government actor did not engage with the "purpose of finding something, to explore, to examine."<sup>161</sup>

The *Sharp* court was reluctant to find that a school must obtain parental consent in order to hold remote video classes or take disciplinary action for multiple reasons.<sup>162</sup> One reason was the practical concern of ensuring attendance for virtual classes, expanding on the Supreme Court's reasoning in *T.L.O.*<sup>163</sup> Additionally, the court noted that the plaintiffs could have positioned the computer so it only showed a plain background and effectively "controlled what the government official saw on screen."<sup>164</sup> In the view of this court, the practical elements outweighed the family's privacy and Fourth Amendment concerns.<sup>165</sup> However, *Sharp* also showcases how much power and personal information school officials can obtain in remote classes.<sup>166</sup>

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156. See *Sharp v. Cmty. High Sch. Dist. 155*, No. 3:21-CV-50324, 2022 WL 2527997, at \*1 (N.D. Ill. July 7, 2022).

157. *Id.*

158. *Id.* at \*2.

159. Compare *id.* at \*5 (holding "even if the video constituted a search, that search, as alleged, was reasonable" when remote learning was the only way to continue providing education under COVID-19 restrictions), with *Ogletree v. Cleveland State Univ.*, 647 F. Supp. 3d 602, 617 (N.D. Ohio 2022) (concluding that "Cleveland State's practice of conducting room scans is unreasonable" under the Fourth Amendment because the plaintiff's privacy interest in his house outweighed Cleveland State's interest in maintaining exam integrity).

160. *Sharp*, 2022 WL 2527997 at \*4; see also *Kyllo v. U.S.*, 533 U.S. 27, 40 (2001).

161. *Sharp*, 2022 WL 2527997 at \*4; see also *Kyllo*, 533 U.S. at 40.

162. See *Sharp*, 2022 WL 2527997 at \*4.

163. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985) (holding school officials are only held to a "reasonableness" standard when searching a student by reason of the school's need for flexibility and the students' lower expectation of privacy)).

164. *Id.*

165. *Id.*

166. See *id.*

This student faced consequences as if he had brought a gun to school, even though he never left his bedroom.<sup>167</sup>

Utilizing remote lectures and proctoring in educational settings offers distinct advantages, both in times of health crises and as a lasting tool beyond such situations.<sup>168</sup> Remote learning can accommodate some disabilities and health conditions, integrate emerging technology into education, and prevent or interrupt otherwise undetectable crimes.<sup>169</sup> And, of course, remote learning tools allowed education to survive an unexpected global health emergency and set the foundation for educational flexibility that would otherwise not have been possible.<sup>170</sup> While these advantages counter Fourth Amendment concerns, such concerns are reinforced by the limitation that certain disability accommodations, necessitating hands-on assistance or conflicting with the integrity of remote proctoring, cannot be effectively provided virtually.<sup>171</sup> Regardless of any pre-pandemic controversy, mandatory remote learning has not only heightened but also complicated the preexisting Fourth Amendment debate and privacy concerns.<sup>172</sup>

#### IV. SOLUTION

Despite the differences between higher education and K-12 institutions, similar basic principles can protect students' Fourth Amendment rights at any stage in their educational careers.<sup>173</sup> Overall, universities and K-12 schools should comply with the Fourth

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167. See *id.* at \*2.

168. Fedders, *supra* note 1, at 1681; Foster, *supra* note 7, at 131–32; see McKala Troxler, *Evaluating the Impact of the COVID-19 Pandemic on Students with Disabilities*, 50 J. L. & EDUC. 362, 367 (2021); Li, *supra* note 5, at 794 (“It is possible that more schools will rely on distance education in the future, perhaps due to familiarity gained by faculty, staff, and students during the pandemic. As such, these technologies—and their impact on privacy—will become even more important in the future.”).

169. See Becknell, *supra* note 8, at 186–87; Fedders, *supra* note 1, at 1681; Ogletree v. Cleveland State Univ., 647 F. Supp. 3d 602, 608 (N.D. Ohio 2022) (explaining that Ogletree had no choice but to take exams remotely when his health conditions made in-person learning unsafe). *But see* Troxler, *supra* note 168, at 376–77 (noting that school closures also injured many students with disabilities by preventing them from receiving accommodations and services to which they were entitled); Li, *supra* note 5, at 797 (“Parents of neurodiverse children may have even more responsibilities with online learning.”).

170. See Foster, *supra* note 7, at 150–52.

171. Gordon v. State Bar of Cal., No. 20-CV-06442-LB, 2020 WL 5816580 at \*1–\*2, \*6 (N.D. Cal. Sept. 30, 2020) (denying a motion to enjoin in-person test requirements when remote proctoring was not discriminatory and plaintiffs, whose disabilities prevented compliance with the procedure, proposed alternatives that were unduly burdensome); see Foster, *supra* note 7, at 133–34.

172. See Foster, *supra* note 7, at 162–63.

173. See Becknell, *supra* note 8, at 191.

Amendment by creating standardized remote education policies and giving students and their families adequate notice about these policies.<sup>174</sup> Standardized methods of remote education ensure that students across schools experience the same level of intrusion.<sup>175</sup> When combined with proper notice, standardized policies further support the goal of keeping students informed so that they have a reasonable expectation of remote education's effect on their lives.<sup>176</sup> The form of the policy and notice may differ depending on the age of the student while maintaining Fourth Amendment protections for K-12 schools and universities equally, as will be explored subsections A and B.

### A. K-12 Schools

To balance the costs and benefits of remote learning, public K-12 schools should be required to have standardized remote learning policies and obtain informed consent from parents using detailed consent forms.<sup>177</sup> Without this consent, mandatory camera-on remote learning in K-12 schools is an unreasonable search under the Fourth Amendment.<sup>178</sup> Currently, such searches do not fall under the special needs exception to warrant requirements.<sup>179</sup> Unlike on school property, students have a reasonable expectation of privacy in their homes.<sup>180</sup> Online classrooms often require students to keep their cameras on for the duration of the class and, under *Kyllo*, the Fourth Amendment requires particular protection of an individual's home.<sup>181</sup> In the physical world, a person always has the option to close their door or shut their curtains to the outside world, but the same is not true of online education. K-12 students are particularly vulnerable to invasions of privacy and the dangers of remote surveillance due to their age, yet they often do not have a choice as to whether they will show their homes on camera.<sup>182</sup>

Contrary to the court's belief in *Sharp*, K-12 students have little ability to determine what is revealed by their webcam and cannot be

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174. See Fedders, *supra* note 1, at 1723–24; Becknell, *supra* note 8, at 191–92; Skowronski, *supra* note 3, at 1237–38; LAFAVE, *supra* note 39; *Ogletree*, 647 F. Supp. 3d at 616–17.

175. See Becknell, *supra* note 8, at 191–92; Skowronski, *supra* note 3, at 1235–38; LAFAVE, *supra* note 39.

176. See Becknell, *supra* note 8, at 191–92; see also *Ogletree*, 647 F. Supp. 3d at 616.

177. Becknell, *supra* note 8, at 191–92; see Skowronski, *supra* note 3, at 1237–38.

178. See Becknell, *supra* note 8, at 188.

179. See *id.* at 187–88, 190–91.

180. *Id.* at 167, 172.

181. See *id.* at 181–82; *Kyllo v. U.S.*, 533 U.S. 27, 34–45 (2001).

182. See Becknell, *supra* note 8, at 181–82.

said to have meaningfully “consented” to this search.<sup>183</sup> Children are under the charge of a family member or guardian and are not in complete control of their home.<sup>184</sup> Even though there are ways to conceal one’s surroundings over Zoom, such as virtual backgrounds or muting oneself, there is no guarantee that students will be permitted to use these features.<sup>185</sup> Even if they are permitted to use these tools, there is no assurance that they will know how to use them to effectively prevent intrusion.<sup>186</sup>

Some may argue that remote classroom intrusions fall under the knowing exposure doctrine.<sup>187</sup> Under an overly strict reading of the knowing exposure doctrine, the Fourth Amendment does not protect what a child “knowingly” exposes to their online class, whether or not their parent is aware of the exposure.<sup>188</sup> After all, the child technically knows what they are doing, and public schools are likely a public space.<sup>189</sup> However, the reasoning behind the knowing exposure doctrine suggests a requisite level of understanding and intent to expose in order for an intrusion to be reasonable.<sup>190</sup> “Knowing exposure” in practice works as a proxy for an outward manifestation of consent for the public to have access to one’s private information.<sup>191</sup> Suggestions that a minor has the same understanding of the consequences of exposing personal information as an adult are unfounded; however, K-12 students frequently bring their parents’ personal spaces into the online classroom and there is no clear measure of how much parents know about the extent of this exposure.<sup>192</sup> Allowing a child’s understanding of

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183. See Skowronski, *supra* note 3, at 1234. *But see* Sharp v. Cmty. High Sch. Dist. 155, No. 3:21-CV-50324, 2022 WL 2527997, at \*4 (N.D. Ill. July 7, 2022).

184. See Fedders, *supra* note 1, at 1708; Becknell, *supra* note 8, at 184.

185. See Becknell, *supra* note 8, at 182–83.

186. See *id.*

187. See *id.* at 167.

188. See *id.* at 167, 190.

189. See *generally id.* at 171, 182 (explaining that whether a child has consented or is able to a search depends on factors such as the age and maturity of the child, whether the space is particularly private, and the scope of the search at issue).

190. See SLOBOGIN, *supra* note 19, at 23–24.

191. See *id.*; U.S. v. Chadwick, 433 U.S. 1, 2 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991) (“By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination . . . [O]ne who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.”).

192. See Fedders, *supra* note 1, at 1707–08; Skowronski, *supra* note 3, at 1225–26; U.S. v. Jones, 565 U.S. 400, 407–08 (2012) (explaining that a “reasonable expectation of privacy” is defined both by legal concepts and “understandings that are recognized by society”) (quoting Minnesota v. Carter, 525 U.S. 83, 88 (1998)); Foster, *supra* note 7, at 169–70; see also SLOBOGIN, *supra* note 19, at 23–24.



“reasonable privacy” to define their parents’ Fourth Amendment rights would create a frightening loophole for Fourth Amendment protections.

The court in *Sharp* also failed to address the fact that the lesser privacy interest in *T.L.O.* only applied because the students were on school property.<sup>193</sup> When a child is at home, school administrators do not have the same interest in protecting the safety of the entire student body or in preserving classroom discipline, as the child may be with other adults and the teacher is not automatically acting *in loco parentis*.<sup>194</sup> These differences significantly distinguish online classrooms from the circumstances in *T.L.O.*, where a school official was given special discretion to invade the privacy of a student in the name of student body safety.<sup>195</sup> A teacher has much more responsibility for a child on school property compared to when teaching over video, which means that remote K-12 education does not fall within the “special needs” exception to the warrant requirement of the Fourth Amendment.<sup>196</sup>

The vulnerability of juveniles and the intrusiveness of video classrooms suggest a need for standardization and regulation of public schools’ usage of mandatory remote learning.<sup>197</sup> Additionally, schools would be better served by creating privacy and internet safety courses for both teachers and students, as well as doing more research into the data-collecting and storage habits of video conferencing software.<sup>198</sup> Teachers should be required to use school-approved platforms and tools for teaching.<sup>199</sup> This way, remote learning can avoid a patchwork system, providing families with a better understanding of exactly how much of their lives will be exposed and instructors with adequate safety guidance when using virtual platforms.<sup>200</sup>

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193. See *Sharp v. Cmty. High Sch. Dist.* 155, No. 3:21-CV-50324, 2022 WL 2527997, at \*4 (N.D. Ill. July 7, 2022); *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985).

194. *Foster*, *supra* note 7, at 165 (“Learning from within an individual’s own home is vastly different than physically going to school to learn—or attending a school sponsored field trip—where there is a higher need to control student’s behavior to maintain an orderly environment.”).

195. See *T.L.O.*, 469 U.S. at 326; *Froelich*, *supra* note 48, at 131.

196. See *T.L.O.*, 469 U.S. at 326; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Froelich*, *supra* note 48, at 131.

197. See *Becknell*, *supra* note 8, at 191.

198. See *Skowronski*, *supra* note 3, at 1234, 1237–38.

199. See *Becknell*, *supra* note 8, at 191; *cf. Ogletree v. Cleveland State Univ.*, 647 F. Supp. 3d 602, 607–08, 616 (N.D. Ohio 2022) (holding that the University’s remote learning policy was an unreasonable intrusion under the Fourth Amendment when procedures were left to the professor’s discretion because this did not provide proper notice to students of a mandatory room scan).

200. See *Becknell*, *supra* note 8, at 191; *Fedders*, *supra* note 1, at 1723–24; *see also Skowronski*, *supra* note 3, at 1226.

Schools could adopt a standard policy requiring students to hide or filter their backgrounds, or use a video conferencing platform that automatically gives all participants a background filter. It would also be good practice to have a deletion program that automatically deletes students' information and any class recordings after a set amount of time.<sup>201</sup> In an ideal world, these characteristics would be taken care of automatically in a school-specific telecommunication platform or by modifying more commonly used platforms.<sup>202</sup> Finally, schools should consider limiting remote student-teacher meetings to regular school hours, or at the very least regulate when school officials may meet with students outside of school hours. This way, a family member is aware if a child meets with a teacher after school for detention, a club, or help with work. No matter which of these privacy policies, if any, a school implements, there should be continuing reassessments of the efficacy and necessity of remote learning methods.<sup>203</sup> Such tools must be "proportional to the threats they are designed to address" and should be adapted or replaced accordingly.<sup>204</sup>

Moreover, schools should employ a standardized consent form that outlines information about district and classroom remote learning policies including, but not limited to: which platform the school is using; what kind of data that platform collects; a schedule of when remote classes will take place; whether the student's camera and microphone must be turned on; and a summary of how the school intends to handle issues such as a child missing or misbehaving in remote class.<sup>205</sup> The form would require the signature of the student's parent or guardian.<sup>206</sup> This way, the school's presence in a student's home does not blindside other household residents and families have the option to take extra measures to protect their privacy.<sup>207</sup> Further, the practice of transparency allows families to have a voice in the debate on how remote learning tools should be used.<sup>208</sup> Obtaining explicit, informed consent manages the reasonableness of the Fourth Amendment search that can take place during online learning so that schools may safely continue to provide remote education when the need arises.<sup>209</sup>

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201. Fedders, *supra* note 1, at 1724.

202. *See id.* at 1724–25.

203. *See id.*

204. *See id.*

205. *See* Becknell, *supra* note 8, at 191.

206. *Id.*

207. Fedders, *supra* note 1, at 1723–24.

208. *See id.*

209. *See id.*; Skowronski, *supra* note 3, at 1235–38.

*B. Higher Education*

Where any public university subjects students to remote proctoring without notice, forcing students to expose their homes to state actors, a Fourth Amendment search occurs.<sup>210</sup> Similar to the proposed solution above, to avoid engaging in unconstitutional Fourth Amendment searches, public universities should adopt and publish a standard remote learning policy for all classes or, alternatively, require policy disclosure by each professor before the semester begins.<sup>211</sup>

Circumstances of the pandemic and large-scale remote learning left students with limited choices for classes and exam procedures.<sup>212</sup> Students across the country share similar experiences to the plaintiff in *Ogletree*.<sup>213</sup> Elements of the *Ogletree* case that are not unique to his circumstances include the *Ogletree* facts weighing against waiver of the warrant requirement under *Vernonia*, the personal nature of the student's privacy interest, the State's relatively minor interest in maintaining exam integrity, and the dubious efficacy of the anti-cheating means employed.<sup>214</sup> However, even though the Northern District of Ohio granted the *Ogletree* plaintiff's requested declaratory and injunctive relief, both were limited to that plaintiff and were not extended to all similarly situated students.<sup>215</sup> The court emphasized these facts were exacerbated by *Ogletree*'s vulnerability to COVID-19, but in doing so the court did not recognize that many other students face similar circumstances regardless of medical vulnerability.<sup>216</sup>

Under the knowing exposure doctrine, there is an argument that a university student's surroundings on Zoom are "knowingly exposed to

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210. See Foster, *supra* note 7, at 159–60; Becknell, *supra* note 8, at 191; *Ogletree v. Cleveland State Univ.*, 647 F. Supp. 3d 602, 614 (N.D. Ohio 2022).

211. See Becknell, *supra* note 8, at 191; cf. LAFAVE, *supra* note 39.

212. See generally Dorit R. Reiss & John DiPaolo, *COVID-19 Vaccine Mandates for University Students*, 24 N.Y.U. J. LEGIS. & PUB. POLY 1, 5, 6, 17, 32 (2021) (noting that between March and April of 2020, over 1,300 colleges transitioned to remote education and analyzing how religious exemptions, disabilities, and the perceived "lower-quality" of remote learning complicated both the implementation of remote education and attempts to return to in-person instruction).

213. See *id.* at 5.

214. See *id.*; *Ogletree*, 647 F. Supp. 3d at 614–17; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–64 (1995).

215. *Ogletree*, 647 F. Supp. 3d at 619 (reasoning a remedy extending beyond this plaintiff was not necessary to provide *Ogletree* with sufficient relief).

216. See *id.* at 618. But see *COVID-19: People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 11, 2023), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/AN2R-3ETA>] (listing some of the many health conditions that may require a person to take extra precautions against contracting COVID-19; including but not limited to weak immune system, obesity, diabetes, and heart conditions).

the public” and thus not part of a search.<sup>217</sup> However, though the *Ogletree* plaintiff was not obligated to attend the University, he had little notice that he would be required to scan his room and thus did not knowingly agree to expose his home to the public.<sup>218</sup> The exacerbated health risks of the pandemic meant that the plaintiff had few choices as to the classes he could take.<sup>219</sup> Some may argue that, by enrolling in a university class with a syllabus that requires remote proctoring, university students consent to searches by reason of the fact that they knowingly expose their private space on a “public” video platform.<sup>220</sup> But, where students do not receive proper notice, this “consent” is illusory and the invasion remains an unreasonable Fourth Amendment search.<sup>221</sup>

In addition, as the court in *Ogletree* explained, the fact that the Supreme Court found the use of sense-enhancing technology not in general public use indicative of a Fourth Amendment search does not automatically entail that the reverse is also true.<sup>222</sup> Of course, webcam technology is commonplace in modern culture and often used in both K-12 and higher education; but such technology still provides a direct view into the home, which is a particularly private location that still receives special protection.<sup>223</sup> The intrusion via technology, rather than physical trespass, does not automatically change Fourth Amendment analysis.<sup>224</sup> Fourth Amendment doctrine suggests that there is a reasonable expectation of privacy in one’s home whether one attends school of any level, either remotely or in person.<sup>225</sup>

As legal adults, university students cannot fall under the *T.L.O.* “special population” exception.<sup>226</sup> Though Cleveland State argued *Ogletree* consented to the search by enrolling in the class, such “consent” was not informed because the remote exam policy was removed from the syllabus was not a standard practice across the University.<sup>227</sup> Where universities give students sufficient information

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217. See SLOBOGIN, *supra* note 19, at 23–24; *Katz v. U.S.*, 389 U.S. 347, 351 (1967); *see also Ogletree*, 647 F. Supp. 3d at 612, 615.

218. *Ogletree*, 647 F. Supp. 3d at 609.

219. *See id.* at 615–16.

220. *See* LAFAVE, *supra* note 39, at § 8.2(l).

221. *See Ogletree*, 647 F. Supp. 3d at 616; *see also* LAFAVE, *supra* note 39, at § 8.1.

222. *Ogletree*, 647 F. Supp. 3d at 611.

223. *Id.*; *see U.S. v. Jones*, 565 U.S. 400, 407 (2012); *see also Katz v. U.S.*, 389 U.S. 347, 359 (1967).

224. *See Kyllo v. U.S.*, 533 U.S. 27, 34 (2001); *Ogletree*, 647 F. Supp. 3d at 615.

225. *Ogletree*, 647 F. Supp. 3d at 615–16; *see Kyllo*, 533 U.S. at 34; *Katz*, 389 U.S. at 359; *Jones*, 565 U.S. at 407–09.

226. *See Ogletree*, 647 F. Supp. 3d at 615; *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

227. *Ogletree*, 647 F. Supp. 3d at 608; *see* LAFAVE, *supra* note 39.

about the policies of a school or particular course, one may say that students have consented to a subsequent search via remote class.<sup>228</sup> However, if they have not received this information, the search is nonconsensual and therefore unreasonable under the Fourth Amendment.<sup>229</sup>

As a result, universities should have standardized, easily accessible remote learning policies so students automatically have sufficient notice of the school's intent to view their personal spaces.<sup>230</sup> The notice of this standard policy would be communicated to students through the terms and conditions when they enroll in the university, ensuring that they are informed before agreeing to attend and pay tuition.<sup>231</sup> If this were the case, professors would not need to send policy descriptions for each class because students would have already consented through their initial enrollment agreements.<sup>232</sup> Alternatively, universities may allow professors to choose their own remote education format but must require advance disclosure of these plans.<sup>233</sup> Proper notice would entail descriptions of exam procedures in course materials that are available to students before they register or, at the very least, while there is still time to change their course schedule.<sup>234</sup> This would allow students to consent to search via webcam by registering for a course.<sup>235</sup>

The measures taken to give notice and obtain consent need not be as intensive as those for K-12 schools<sup>236</sup> because university is not

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228. See LAFAVE, *supra* note 39, at § 8.2(l); *cf. Ogletree*, 647 F.Supp. 3d at 616 (finding that the plaintiff had not implicitly consented to a Fourth Amendment search when the university failed to give him sufficient notice of their intent to scan his room during an exam).

229. See *Ogletree*, 647 F. Supp. 3d at 616; LAFAVE, *supra* note 39, at § 8.1.

230. See Becknell, *supra* note 8, at 191; LAFAVE, *supra* note 39; *see also* Skowronski, *supra* note 3, at 1235–38.

231. See LAFAVE, *supra* note 39, at § 8.1; *see also Ogletree*, 647 F. Supp. 3d at 616 (“[P]articularly in the nascent Zoom era, the core protection afforded to the home, the limited options, inconsistency in application of the policy, and short notice of the scan weigh in Plaintiff’s favor.”).

232. See LAFAVE, *supra* note 39; *see also Ogletree*, 647 F. Supp. 3d at 615 (noting that by enrolling at Cleveland State, Ogltree “necessarily” traded some of his privacy in exchange for education, though he did waive his constitutional rights under these facts).

233. See Becknell, *supra* note 8, at 191; *see also* LAFAVE, *supra* note 39.

234. See sources cited *supra* note 233.

235. See LAFAVE, *supra* note 39, at §§ 8.1, 8.2(l).

236. See *id.* at § 8.2(l); *Ogletree*, 647 F. Supp. 3d at 615 (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 829–30 (2002) (distinguishing *Earls*, in which unemancipated minors have lessened privacy interests in light of the school’s “custodial and tutelary responsibility for children,” from *Ogletree*, in which an adult voluntarily attends Cleveland State University)).

mandatory and most university students are legal adults.<sup>237</sup> It may be sufficient for a university to make information about a uniform policy easily accessible, and a student's consent would be expressed through enrollment rather than a parent's signature.<sup>238</sup>

Though the proposed changes are seemingly minor, they meaningfully protect students' reasonable expectation of privacy in their homes.<sup>239</sup> Privacy in the home lies at the core of Fourth Amendment doctrine and has historically been protected against even the mildest of intrusions, as noted by Justice Bradley in *Boyd v. U.S.*:

It may be that [a given intrusion] is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way . . . . This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right . . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.<sup>240</sup>

Though frequent video conferencing has become an accepted part of life and is likely to remain so, courts should still take into account the undeniable expansion of public and governmental influence into the home.<sup>241</sup> Precedent has recognized time and again that it is crucial to protect against gradual intrusions upon an individual's privacy, particularly at times in which the line between what is public versus private becomes blurred by technological advances.<sup>242</sup>

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

238. See *Ogletree*, 647 F. Supp. 3d at 616–17; LAFAVE, *supra* note 39, at § 8.2(1); Becknell, *supra* note 8, at 191.

239. See *Ogletree*, 647 F. Supp. 3d at 617; Becknell, *supra* note 8, at 191; *see also* Foster, *supra* note 7, at 160.

240. *Boyd v. U.S.*, 116 U.S. 616, 635 (1886).

241. See Li, *supra* note 5, at 793 (“Just as the shift to remote online work has changed the boundaries between work and home, affecting the way society understands these two separate contexts and the corresponding expectations of privacy in each, so has the shift to remote education changed the boundaries between school and home. Students have certain expectations of privacy in the educational setting.”); *see also* *Ogletree*, 647 F. Supp. 3d at 610; *Katz v. U.S.*, 389 U.S. 347, 359 (1967); *U.S. v. Jones*, 565 U.S. 400, 408–09 (2012); *Kyllo v. U.S.*, 533 U.S. 27, 34 (2001).

242. See *Katz*, 389 U.S. at 351 (finding what one “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected”); *Kyllo*, 533 U.S. at 34 (“[O]btaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained . . . constitutes a search—at least where (as here) the technology in question is not in general public use.”); *Boyd*, 116 U.S. at 635; *see also* *Jones*, 565 U.S. at 408–09.

## V. CONCLUSION

Public schools using remote education and exam proctoring that monitor or record students in their homes may be engaging in unreasonable searches under the Fourth Amendment if such programs remain improperly managed.<sup>243</sup> As video conferencing has only recently become part of daily life, students are often uninformed as to when and how often the government, by way of public school employees and officials, may be monitoring them.<sup>244</sup> In the case of both K-12 schools and universities, proper management should include obtaining the informed consent of the students or their guardians.<sup>245</sup> For K-12, this entails holding teachers to standard remote learning policies to protect student privacy and internet safety, in addition to sending consent forms to students and their families with an explanation of their remote education program and policies.<sup>246</sup> On the other hand, even though university students are legal adults and may consent to exposure by choosing to pursue higher education, public universities must still ensure that consent is informed, otherwise it is not valid.<sup>247</sup> This may be accomplished by providing sufficient notice of remote education policies well in advance of the start of the semester.<sup>248</sup> Students would implicitly give informed consent to be searched under a standardized, school-wide policy by enrolling in the university or, if the professor has created unique remote education procedures, by signing up for the class.<sup>249</sup> Overall, it is vital that courts and legislators do not allow chaotic and unprecedented circumstances to become the predicate for “stealthy encroachments” upon the Fourth Amendment.<sup>250</sup> As technology becomes more integrated with daily life, its reach extends into the once-private domain of the home.<sup>251</sup> Nevertheless, the

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243. See Foster, *supra* note 7, at 159–60; Becknell, *supra* note 8, at 191; *Ogletree*, 647 F. Supp. 3d at 617.

244. See *Ogletree*, 647 F. Supp. 3d at 609–10; LAFAVE, *supra* note 39, at § 8.2(l).

245. See *Ogletree*, 647 F. Supp. 3d at 611, 615; Becknell, *supra* note 8, at 191; see also LAFAVE, *supra* note 39.

246. Becknell, *supra* note 8, at 191; see Skowronski, *supra* note 3, at 1235–38; see also Foster, *supra* note 7, at 171.

247. See *Ogletree*, 647 F. Supp. 3d at 615–617, 620; LAFAVE, *supra* note 39, at §§ 8.1, 8.2(l); Becknell, *supra* note 8, at 191.

248. See sources cited *supra* note 247.

249. See sources cited *supra* note 247.

250. *Boyd v. U.S.*, 116 U.S. 616, 635 (1886).

251. J. Ellen Stephens, *Privacy Lost: The Effect of Katz on Personal Data*, 59 U. LOUISVILLE L. REV. 571, 579–80 (2021); see also Fedders, *supra* note 1, at 1683–84; Skowronski, *supra* note 3, at 1224–25.

constitutional rights of students, as individuals, must stand unwavering and undeterred by these shifts.

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