

Scans and Searches: Challenges to Privacy and Academic Integrity in Higher Education

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ABSTRACT

Universities have a vested interest in academic integrity in online courses to maintain accreditation and institutional standards. Universities have increasingly utilized online proctoring software to monitor testing procedures. Proctoring software may use biometric technology along with computer hardware to scan test environments, allowing universities to collect personal data from learners. In 2020, proctoring software usage rose as many universities adapted to Covid-19 restrictions by implementing fully online instruction. Consequently, instructional and testing options that excluded scanning and biometric collection were not widely available. In response, certain learner and faculty constituents alleged privacy violations and filed lawsuits regarding biometric data collection and unreasonable searches under the U.S. Constitution's Fourth Amendment.

In this article, the authors explore how a U.S. federal court weighed the Fourth Amendment rights of learners against a university's interest in academic integrity in the 2022 Ogletree v. Cleveland State University case, which held that the learner's constitutional rights were violated when an unreasonable search was conducted via a bedroom scan with online proctoring software. Despite the university's notice to appeal the decision, higher education gains valuable insight from the court's analysis, as the pressing issues of privacy and academic integrity remain a contentious, constitutional matter that should be proactively navigated. This article evaluates the legal implications of Ogletree for universities and faculty, shares twelve practical considerations for administrators and faculty based on the federal court's rationale for its decision, and addresses further implications of additional laws governing biometric data in the United States.

Keywords: proctoring software, biometric data, academic integrity, Fourth Amendment, privacy

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INTRODUCTION

Academic integrity in face-to-face courses and online learning environments supports the foundation of career preparation, workplace ethics, and accreditation standards. Defined as “acting with the values of honesty, trust, fairness, respect and responsibility in learning ...,” academic integrity fosters accountability in educational and professional settings as learners matriculate and move toward their career paths (Peters, 2019, p. 753). When properly applied, learners may become employees and administrators who promote ethical, well-balanced, and safe workspaces (Malik et al., 2022; Fierke, 2018). Global and regional accreditation boards, such as the Association to Advance Collegiate Schools of Business (AACSB) and the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC), both embody integrity among their cardinal tenets for programs within higher education (AACSB, 2020; SACSCOC, 2018).

As an integral characteristic of academic integrity, assessment is the educational composition for how learners receive, appraise, and apply course details (Mate & Weidenhofer, 2022; AACSB, 2020; SACSCOC, 2018). Even further, quality online assessment is essential for educational and programmatic brands (Holden et al., 2021). In face-to-face classes, professors and teaching assistants may personally monitor or use campus testing services to observe and maintain academic integrity during the completion of course assessments like exams and quizzes. However, the intricacies of teaching, comprehension, and assessment in synchronous and asynchronous online courses have presented diverse integrity challenges that academic societies have worked to resolve for decades (Holden et al., 2021; Schwartz & Michelson, 2021). A singular, continual dilemma in maintaining academic integrity centers on “online assessment” for learners (Kearns, 2012, p. 198; Peters, 2019). This dilemma intensified in 2020 due to the Covid-19 pandemic and its corresponding mandates, resulting in a plethora of educational institutions abruptly moving courses online (Holden et al., 2021; Lee et al., 2022; Schwartz & Michelson, 2021). As a result, universities and colleges were forced to address how to provide quality education, achieve course learning objectives, and assess learners while supporting the tenets of academic integrity.

A segment of professors and learners believe that academic dishonesty, functioning in part as the illegitimate accessing of course-related content to complete assessments, escalates and may be more facile in online courses (Newton, 2020; Dendir & Maxwell, 2020). Despite the ongoing discourse on the pervasiveness of dishonesty in face-to-face, online, and other delivery modes, the general academic consensus helms that appropriate assessment proctoring is necessary regardless of the instructional forum (Dendir & Maxwell, 2020). Additionally, the potential for fraudulent acts, such as an unapproved person taking an exam for an undergraduate learner registered for a course, may bolster in online locales and thereby require learners to engage in enhanced assessment protection procedures by presenting official identification, having their likeness and other personal data obtained, and agreeing to scans of their assessment areas (Dendir & Maxwell, 2020; Newton, 2020).

These long-standing academic dishonesty dilemmas partially led to innovative technology advancements in proctoring software (Topuz et al., 2022). In particular, “biometric technology”, as a form of “artificial intelligence”, encompasses the comprehensive means of seizing and “analyzing physical or behavioral characteristics specific to each individual to authenticate their identity” (Hernandez-de-Menendez et al., 2021, p. 366). Utilized in financial, medical, and other industries, “biometric technology” seizes and catalogs data signifying

biological references, “including DNA, retinal, iris, ... facial images, fingerprints, and handprints” (Hernandez-de-Menendez et al., 2021, pp. 366-368) and “behavioral” references like “voice, ... signature, ...” and “keystroke” (Okada et al., 2019, p. 863) by using one or more forums to associate persons with their corresponding descriptions (Hernandez-de-Menendez et al., 2021). Learners grant university-approved proctoring software permission to access, view, scan, and catalog the areas where their assessments are completed (Okada et al., 2019). In higher education, these biometric references and scanning mechanisms have been incorporated by numerous online proctoring software to promote academic integrity (Okada et al., 2019).

From one vantage point, online proctoring software boasts accessibility with safeguards for those in higher education (Hussein et al., 2020). For more accessible, simplified assessment processes, faculty may use university-preferred online proctoring software or direct learners to schedule testing times for on-campus proctoring. Arguably, safeguarding academic integrity and assessments may be supported through camera scans and biometric references. However, some disputants of online proctoring software assert privacy considerations regarding unreasonable searches in violation of the Fourth Amendment of the U.S. Constitution and biometric accumulation (Ogletree Complaint, 2021; Ogletree Opinion, 2022; Schropp, 2016). One disputant, Aaron Ogletree, sued Cleveland State University (CSU) for allegedly violating his Fourth Amendment rights by conducting an unreasonable search when his bedroom was scanned before he took an online assessment (Ogletree Complaint, 2021). In the 2022 Ogletree v. CSU (Ogletree) decision, the federal court held in favor of the plaintiff; in turn, CSU filed a notice of appeal. Regardless of whether the appellate outcome supports Aaron Ogletree or CSU, legitimate issues in learner privacy rights and academic integrity remain and demand resolution. Moreover, multiple U.S. states and municipalities have passed legislation to protect users and learners and issue guidelines on biometric technology, further impressing the need for effective action in light of the persistence and significance of the unresolved tension between privacy and data collection.

The purpose of this qualitative article is two-fold: 1. to reduce the gap in literature exploring legal issues, in part with the U.S. Fourth Amendment, biometric technology, and privacy challenges, with the use of online proctoring software in higher education, and 2. to provide university administrators and faculty with practical considerations given these legal concerns. While ample research exists on academic integrity and biometric technology, there is limited literature on U.S. Fourth Amendment government action and its impact on learners’ privacy in relation to online proctoring software in American higher education as well as academic considerations on how to navigate these issues. Herein, the authors explore the following sections: I. biometric technology in higher education; II. academia’s legal issues concerning unreasonable searches and “reasonable expectations of privacy” under the Fourth Amendment; III. implications for academia with accompanying administrative and pedagogical considerations for universities and faculty in view of the legal issues addressed in section II; and IV. further implications related to privacy and biometric references.

BIOMETRIC TECHNOLOGY & ITS ROLE IN HIGHER EDUCATION

The biometric logistics utilized in online proctoring software at universities consist of biological and “behavioral” references, such as “retinal” and “voice” impressions, obtained from learners to confirm who they are to protect academic integrity (Hernandez-de-Menendez, 2021, p. 367; Okada et al., 2019, p. 863). In fact, it encompasses a type of artificial intelligence that gathers and catalogs said biological and “behavioral” references, along with integrating a

sequence of passwords and school-issued badges to affirm identity (Maguire, 2009; Hernandez-de-Menendez, 2021).

Before online assessment commences, proctoring software often instructs learners to display a university badge parallel to their countenances while simultaneously stating their names (Honorlock, 2021; University of Florida, 2023; Hernandez-de-Menendez, 2021). The relevant proctoring software then compares the stored biological and “behavioral” references of the learner with those secured authentically through “face” and “voice recognition technology” to affirm that the likenesses are definite (Hernandez-de-Menendez, 2021, p. 366). Scans of the assessment setting may occur as well to determine if unapproved course materials are present (Honorlock, 2023). Furthermore, biometric references can be collected passively without a person’s knowledge or consent, unlike other access protocols such as passwords (Hernandez-de-Menendez, 2021). For instance, proctoring software uses artificial intelligence to note questionable actions during an assessment. These actions may include a learner’s visual and physical motions and placements, which are cataloged for perusal by faculty and assessment proctors (Honorlock, 2023). Importantly, biometric content persists, which is troublesome for individuals whose information is accessed for illicit purposes (Illinois General Assembly, 2008).

Proctoring software also takes advantage of the low cost of hardware (University of Florida, 2023). It uses inexpensive and widely available computer-related technologies, such as webcams and voice amplifiers, to gather private information (University of Florida, 2023). Universities incorporating biometric references may replace passwords and school-issued access badges for learners to enter assessment locales for assignment completion (Hernandez-de-Menendez, 2021). “In addition to identifying students, access control, and personal data management, [biometric technology] has critical applications to improve teaching/learning processes” (Hernandez-de-Menendez, 2021, p. 369) and champion academic integrity, thus supporting its consistent and broad adoption in higher education institutions.

FOURTH AMENDMENT SEARCHES, REASONABLE EXPECTATIONS OF PRIVACY, AND PUBLIC SCHOOL ENVIRONMENTS

The Fourth Amendment of the U.S. Constitution states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” (U.S. Constitution, 2022). The Fourth Amendment presents the courts with the ongoing responsibility of balancing the personal freedoms of “individual privacy against certain kinds of governmental intrusion” (Katz, 1967, p. 350) regarding its ability to search and seize individuals and items (Maclin, 1993; Silva, 2020). In particular, the “reasonableness” of a search may be discovered in certain situations by applying the two-prong Katz test: 1. “a person ... exhibited an actual (subjective) expectation of privacy and ...” 2. “that the expectation be one that society is prepared to recognize as ‘reasonable’”, as noted by Justice John Harlan in the 1967 U.S. Supreme Court case Katz v. United States (p. 361). Therefore, a search may occur if federal or state government entities in the United States supersede a person’s “reasonable expectation of privacy” based on “whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment” (California, 1986, p. 211; Katz, 1967). An example of such “personal and societal values” (California, 1986, p. 211) is one’s home; persons sustain the utmost “expectation of privacy” in their homes when those expectations are conspicuous and

adjudged “reasonable” (Crocker, 2020; California, 1986; Authenticated, 1992; Silva, 2020).

The Fourth Amendment pertains to state government entities, including public schools, through the Fourteenth Amendment of the U.S. Constitution (Jane Doe, 2004; New Jersey, 1985; Authenticated, 1992). The Fourteenth Amendment guides such state entities to properly administer the rights and constrain the negation of those rights for everyone, including learners at public schools (Johnson, 2017; Stefkovitch, 2012). The academic workforce, such as administrators, faculty, and staff in public K-12 and higher education institutions, are subject to follow Fourth Amendment processes for searches and seizures because they are state government agents (Jane Doe, 2004, New Jersey, 1985; Waggoner, 2021; Authenticated, 1992). Detached from the requirements that “law enforcement” must follow, said workforce, however, is not bound by probable cause or warrants to execute searches; instead, they may move forward based on “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” (New Jersey, 1985, p. 342; Waggoner, 2021; Schropp, 2016).

More structure was added to a court’s analysis of searches and seizures “in a public school environment where the State is responsible for maintaining discipline, health, and safety” (Board of Education, 2002, p. 830). Under these circumstances, the following elements are assessed pursuant to the “special needs exception” for Fourth Amendment probable cause and warrant benchmarks: 1. “scope of the legitimate expectation of privacy at issue”; 2. “character of the intrusion that is complained of”; 3. “nature and immediacy of the governmental concern at issue”; and 4. “the efficacy of the means employed for dealing with it” (Vernonia School District, 1995, p. 654-666).

The use of online proctoring software with scanning capacities and biometric accumulation in higher education has been far-reaching and catapulted even further due to Covid-19 (Coghlan et al., 2021). With such high-tech evolution, learners have presented legal complaints against universities regarding their “expectations of privacy” (Ogletree Complaint, 2021; Schropp, 2016; Powell, 2022). Despite de facto laws governing privacy, searches, and biometrics, clear benchmarks for processes in educational institutions have been obscure (Schropp, 2016). In the recent Ogletree decision, the federal court applied the preceding four elements from Vernonia School District and articulated how universities may be legally responsible for executing searches of learners’ homes when using online proctoring software during assessments.

The Ogletree v. Cleveland State University Case

In August 2022, the Ogletree court ruled for Plaintiff Aaron Ogletree (Plaintiff), an undergraduate learner at Defendant Cleveland State University (Defendant/CSU), after the parties filed summary judgment petitions requesting that a decision be rendered based on the following abbreviated, uncontested facts (Ogletree Opinion, 2022).

The Defendant availed an assortment of online course selections for CSU learners prior to and in the midst of the Covid-19 pandemic (Ogletree Opinion, 2022). In 2017, the Defendant distributed the CSU “Required Procedures & Recommended Practices to Address Security and Quality of eLearning Courses” manual to inform university personnel and learners of their duties in promoting and maintaining its institutional virtues of online assessment and fraud prevention (Ogletree Complaint, 2021). Detailing both advised and requisite assessment protocols, the CSU manual necessitated that learners who signed up for online course selections upload pictures to

the university network for assessment identification; despite this directive, all CSU learners did not comply, nor did CSU compel compliance (Ogletree Opinion, 2022).

The Defendant incorporated a mixture of online proctoring software, namely Respondus and Honorlock, in its arsenal of anti-deception devices (Ogletree Complaint, 2021; Ogletree Opinion, 2022). Respondus, which integrated a “LockDown Browser” to preclude unauthorized internet capabilities, taped and cataloged actions that could indicate academic dishonesty via cameras activated by learners (Ogletree Complaint, 2021, pp. 4-5). In addition, Honorlock dispatched a “scan” of learner exam venues to expose items that could aid academic dishonesty (Ogletree Complaint, 2021). “Under the [CSU] room scan policy, students must show the professor or proctor the entire room they are in for visual inspection. CSU requires students to do this by scanning their webcams around a full 360 degrees” (Ogletree Complaint, 2021, p. 6). The locale in question may also be seen by fellow learners completing assessments (Ogletree Opinion, 2022; Ogletree Complaint, 2021). CSU faculty used these online proctoring software, including “scans”, based on personal preference and also may have engaged other means, such as limiting exam periods and modifying question patterns, to counter deceptive efforts (Ogletree Complaint, 2021; Ogletree Opinion, 2022).

In the spring of 2021, the Plaintiff had to register for online courses due to personal immunity concerns given Covid-19 (Ogletree Complaint, 2021; Ogletree Opinion, 2022). In connection with these concerns, the Plaintiff was ineligible to complete face-to-face assessments (Ogletree Complaint, 2021; Ogletree Opinion, 2022). In January of said semester, a course syllabus, in part, informed the Plaintiff that “[t]he proctors and [professor] reserve the right to ask any student, before, during, or after an exam to show their surroundings, screen, and/or work area”, but this section in the course syllabus was deleted less than a week after the Plaintiff shared his grievances about it (Ogletree Opinion, 2022, p. 6).

Roughly four weeks later, the Plaintiff was set to complete an online assessment in the same course when he received a CSU notification for a “room scan” (Ogletree Complaint, 2021; Ogletree Opinion, 2022). The Plaintiff was situated in “his bedroom” in his home, where private paperwork was displayed (Ogletree Complaint, 2021; Ogletree Opinion, 2022). Three relatives who resided at the Plaintiff’s residence were present elsewhere in the home on the assessment date and time (Ogletree Opinion, 2022). With the presumption that the “room scan” had been deemed null and void due to being deleted from the course syllabus, the Plaintiff apprised CSU about the paperwork and that “there [was] not enough time to secure them” (Ogletree Opinion, 2022, p. 7). Nonetheless, the Plaintiff agreed to the “scan”, which was under sixty seconds, so that he could complete his assessment (Ogletree Complaint, 2021; Ogletree Opinion, 2022). Observations of the Plaintiff’s assessment and “scan” were submitted and cataloged using online proctoring software (Ogletree Opinion, 2022).

In part, the issue presented for the court to resolve was whether the Defendant executed an unreasonable search when the Plaintiff’s bedroom was scanned (Ogletree Opinion, 2022). First, when assessing if the Defendant executed a search via the “room scan”, one must decide whether the Plaintiff’s “expectation of privacy” in his room was conspicuous and acknowledged to be “reasonable” (Ogletree Opinion, 2022; Katz, 1967). Because the “scan” amounted to a “virtual intrusion” of the Plaintiff’s residence where he had an “expectation of privacy ... that society recognizes as reasonable,” the court classified it as a search (Ogletree Opinion, 2022, p. 9). Second, the “reasonableness” of this Fourth Amendment search is evaluated according to Vernonia School District’s “special needs exception”; here, the four elements of “scope of the legitimate expectation of privacy at issue”, “character of the intrusion”, “nature and immediacy

of the governmental concern”, and “efficacy of the means employed” are addressed (Ogletree Opinion, 2022). If a search completed by the Defendant is categorized as “unreasonable”, then Fourth Amendment protections apply to the Plaintiff (Katz, 1967; Ogletree Opinion, 2022).

A court’s analysis of “reasonableness” balances personal liberty with the justifiability of government actions when enacting a search (Katz, 1967). For the first element of “scope of the legitimate expectation of privacy”, the court opined that “a visual intrusion [was] conducted through remote technology” via online proctoring software even though CSU personnel did not tangibly invade the Plaintiff’s residence (Ogletree Opinion, 2022, p. 19). With the second element of “character of the intrusion”, the court compared numerous aspects, including the search locale, accessibility of varying, non-scanning examination modes, Covid-19 restrictions influencing the Plaintiff’s ability to register for courses at other universities or complete assessments at CSU, CSU deviations in adhering to assessment protocols, faculty individually opting whether to use online proctoring software, the duration and depth of the “room scan”, and use of CSU proctoring stipulations (Ogletree Opinion, 2022). Ultimately, the Defendant’s deviations in adherence to its protocols as well as the search execution in the Plaintiff’s residence with limited advanced warning and no assessment alternatives collectively led the court to rule against the Defendant in the second element (Ogletree Opinion, 2022). Next, the court acceded CSU’s substantial educational interest in combatting academic dishonesty for the third “nature and immediacy of the governmental concern” element (Ogletree Opinion, 2022). Finally, with the “efficacy of the means employed” element, the court determined that the CSU “room scan” was not requisite or proficient in combatting academic dishonesty due to the scope of other, less invasive modes and also since it was not obligatory for CSU faculty to use them (Ogletree Opinion, 2022).

THE OGLETREE DECISION: IMPLICATIONS AND CONSIDERATIONS FOR HIGHER EDUCATION

In response, the university filed a notice to appeal in the Sixth Circuit of the U.S. Court of Appeals to contest the Ogletree holding, which is currently only legally binding on CSU (Pacer Monitor, 2022; U.S. Courts, 2023, Georgetown, 2017). Appellate outcomes vary and follow different case trajectories. Constitutional challenges and appellate processes can beget varying results along with lengthy, timely, and costly measures for plaintiffs and defendants. Regardless of the potential appellate outcomes in the case, the Ogletree decision sets the stage and highlights the need for further intentional dialogue and action from U.S. public universities on privacy, the use of biometrics, and online proctoring software. In actuality, the Plaintiff’s success in Ogletree presently may serve as “persuasive authority”, specifically legal decisions that parties optionally add to support their claims in litigation; such “persuasive authority” may apply for similar cases filed by learners attending public educational institutions in Michigan, Ohio, Kentucky, and Tennessee, as they lie in the same federal court circuit as CSU (Georgetown, 2017, p. 1; U.S. Courts, 2023). Additionally, lawsuits filed in state courts, the Sixth Circuit, and federal jurisdictions outside of the Sixth Circuit may apply Ogletree as “persuasive authority” to support their arguments unless the case is overturned in a higher court (Georgetown, 2017; U.S. Courts, 2023).

While Ogletree represents a single case in one federal jurisdiction, it holds current “persuasive authority” and thus provides astute legal analysis and acts as an impetus for future cases weighing the “reasonable expectations of privacy” of learners with the interests of higher

education in protecting academic integrity (Georgetown, 2017; U.S. Courts, 2023). A learner's "reasonable expectation of privacy" is not only higher at his residence but also, while admittedly lower, is not entirely removed on a college campus because learners do not relinquish their "constitutional rights" at universities (Ogletree Opinion, 2022, p. 20). Given this, one central question examines how universities and colleges move forward in using "room scans" and other protocols based on this case, as it may not be feasible or practical for certain institutions to remove their use entirely. Poignantly, Ogletree further amplifies concerns about the erosion of "constitutional rights" and ongoing challenges related to privacy and biometric technology (Ogletree Opinion, 2022). Therefore, universities and colleges, with the assistance of general counsel, academic affairs, centers for teaching and testing, faculty, and learners, should be proactive by engaging in the critical reflective analysis of institutional needs and processes, discussing potential impact and implications, and making the necessary changes to their campus protocols and settings. Below are six administrative and six pedagogical points for universities and faculty respectively to consider as they prepare new and updated online proctoring measures.

Administrative Considerations 1 – 6

1. Discuss the Ogletree decision and its institutional impact with key administrators and personnel.

2. Identify the appropriate online proctoring software and how scanning mechanisms will be utilized.

In Ogletree, the court detailed the Defendant's use of online proctoring software, including Respondus and Honorlock, and its chronicling of learner data and locales (2022). The court held that the "scan" of the Plaintiff's bedroom, which was his assessment venue, was a search (Ogletree Opinion, 2022). Due to this outcome, the Defendant must make changes in its assessment processes and procedures as directed by the court (Ogletree Opinion, 2022). Consequently, related to administrative considerations 1 and 2, universities and colleges should determine which online proctoring software is currently utilized at their institutions and what appropriate customizations, including how scanning mechanisms will be administered during online assessments, align with institutional goals. In this process, they also may evaluate implementing restrictions on assessment venues either to exclude learner residential areas and require on-campus or community assessment sites only or possibly mandate that learners submit signed consent forms agreeing to any searches that may be executed when registering for courses with online modalities. Institutional distinctiveness in size and resources lends to each university determining the best process for its circumstances.

3. Establish clear, consistent online proctoring protocols for all personnel.

4. Update campus course offerings prior to registration to specify which classes will use scanning mechanisms.

To address administrative considerations 3 and 4, university personnel must carefully evaluate the relevant online proctoring software and methods available for faculty and proctors. In Ogletree, the court noted CSU faculty's personal preferential use of online proctoring software, which supported the position that CSU did not solely rely on "scan" usage to guard against academic dishonesty because other "less intrusive" avenues were implemented by faculty (2022, p. 19). If scanning mechanisms remain, these steps may be completed: 1. identify and implement clear, consistent protocols, which are inclusive of acceptable assessment venues and applicable to all relevant courses; and 2. create a course schedule to pinpoint what courses will

use scanning mechanisms.

In its analysis and findings concerning the “character of the intrusion” element of “reasonableness”, the court scrutinized the absence of learner “choice” with course selections that did not use scanning mechanisms for assessments (Ogletree Opinion, 2022). For instance, in spring 2021, the Plaintiff could not venture onto campus due to the Covid-19 pandemic and his immunity concerns (Ogletree Complaint, 2021; Ogletree Opinion, 2022). The CSU manual denoting requisite and advised protocols for online assessments and proctoring was distributed to personnel and learners in 2017, with faculty preference as the deciding component to use “scans” (Ogletree Opinion, 2022). In Ogletree, the court stated that the CSU scanning section was deleted from the course syllabus after the Plaintiff contested (2022). Even more, CSU faculty could continue to accept a learner’s assignments absent a “scan” (Ogletree Complaint, 2021; Ogletree Opinion, 2022).

Generally, in higher education, it is possible that some learners may not know how a professor will implement online proctoring protocols until after registration and course syllabus discussions. A learner who disagreed or protested, like the Plaintiff, and desired a course in which scanning was not utilized for assessments could be hindered by not having other course selections. The chance to empower and enhance learner selections during registration periods may be optimized hereby initially identifying which courses will use scanning mechanisms for online proctoring on a semester or annual basis and then clearly stating that learners who register for those courses consent to “scans” that will be executed. Scanning and consent protocols should be on file for each learner and added to course syllabi. University general counsel should review and approve all protocols prior to implementation.

5. Create a university online proctoring tool kit of available software and other techniques to counter academic dishonesty.

6. Direct university centers for teaching to support faculty in developing online testing variety.

Administrative considerations 5 and 6 focus on harnessing campus resources to support university teaching and learning standards. Both parties in Ogletree recognized the “legitimate purpose in preserving the integrity of” academic processes and “proctoring of tests ... [to] ensure academic fairness and integrity” (Ogletree Opinion, 2022, p. 22). This interest aligns with accreditation as well as institutional missions and branding. In their service to the university as well as distinct departments and colleges, faculty and staff often lead charges as chairs, program coordinators, and in other capacities to revamp and update curricula to remain current and innovative. With the recent Ogletree holding, institutions now have a prime opportunity to provide pedagogical guidance and support efforts to empower learner course selections, address faculty and learner privacy concerns, and protect constitutional rights while developing varied online assessments. Universities may afford additional time to faculty for their respective teaching centers to help create such assessments and avoid scanning mechanisms if such online proctoring software is institutionally permissible.

Additional curriculum and course development training, plus assessment brainstorming and design sessions, may be scheduled during college or department meetings. As available, instructional designers may work with individual faculty and groups within the same or cross-disciplines to reevaluate course goals and learning objectives. They also may plan corresponding assessments and grading rubrics that are appropriate for online implementation. Finally, centers for teaching, curriculum developers, or instructional assistants may aid in orchestrating a well-organized course section in a university-designated learning management system (LMS), such as Blackboard or Canvas, for serviceability, uncomplicated review of materials, and learning

enrichment (Muller et al., 2019; Dao & Ochola, 2019; Bradley, 2021). This may serve as a part of the initial steps toward constructing settings for better online experiences and assessments. “Student learning outcomes assessment must be part of quality course design and instruction whether a course is delivered face-to-face or online; many best practices for face-to-face assessment also apply to online learning assessment” (Muller et al., 2019, p. 3). The subsequent considerations for faculty offer six development and assessment ideas for online platforms that may be utilized in multi-level undergraduate and graduate courses in which scanning may or may not be implemented.

Pedagogical Considerations 1 – 6

1. Build well-organized, interactive LMS course content.

Synchronous LMS course shells may be designed similarly to those in asynchronous sections to proactively prepare for instruction, learning, and assessment in non-emergency and emergency situations, such as learner absences, university travel, natural disasters, or pandemics. Learners benefit from accessing course materials regardless of the situation and time when fashioned in this manner. In turn, faculty may reduce the work hours and effort spent disseminating missed instruction and materials. In the section below, the authors share an example of how they create organized spaces and tables of content as a guide for learners in their LMS course shells:

- A. Introduction: This section serves to greet learners and introduce the instructor.
- B. Course Orientation: The orientation area may house the syllabus, delivery mode, semester schedule, class policies, online monitoring software policies, textbook information, navigation instructions, and communication guidelines.
- C. Class Announcements: Instructors may post announcements to notify learners of changes in class meetings, friendly reminders, upcoming deadlines, and updates.
- D. Learning Modules: Unit folders contain distinct chapters. Pre-recorded lectures, presentation slides, handouts, outlines, practice questions, and additional information are available.
- E. Assignments: Instructors may place any assignments, such as homework and projects, in this section to ensure that learners know where to locate documents.
- F. Academic Support: Place links to academic resources internal and external to the university in this area. Some examples are links to the library, LMS assistance, technical support, writing labs, and citation formatting.
- G. Campus Support: Include links to campus safety, career development centers, counseling services, financial aid, and student activities.

The remaining five considerations for faculty proffer cross-disciplinary assessment ideas that may serve as a minor assignment grade and a major project instead of a midterm or final examination that may require scans through online proctoring software. These assessment approaches require learners to apportion course theories and cultivate ingenuity and “critical thinking” (McClendon et al., 2010; Bull Schaefer & Crosswhite, 2018; Rodriguez-Dono & Hernandez-Fernandez, 2021; Piergiovanni, 2014).

2. Incorporate Negotiation/Role-Play Scenarios.

Role-plays and negotiations advance adeptness and professional readiness (McClendon et al., 2010; Widmier, Loe, & Selden, 2007; Rodriguez-Dono & Hernandez-Fernandez, 2021). Certain negotiation topics, such as salaries and benefits, are cross-disciplinary and appropriate for undergraduate and graduate students. Depending on class size, instructors may assign two- or

three-party negotiation teams to prepare and record their negotiations. Learners may engage in negotiation sessions recorded in Zoom or another virtual platform and submit the link to instructors for grading. The chart below provides a list of free or fee-based negotiation resources containing various scenarios for a range of disciplines.

“As indicated in Table 1 (Appendix)”

3. Assign a Digital Newsletter, Business Pamphlet, Blog, or Website Creation Project.

Incorporating high-tech unit activities and projects may elevate dexterity in areas like “critical thinking” (Zimmermann et al., 2017). Instructors may give learners a list of chapter-aligned projects or permit them to identify what they would prefer to investigate for a newsletter, business pamphlet, blog, or website creation.

4. Engage in Case/Pitch Competitions or Artistic Mini-Showcases/Demonstrations.

Case and pitch tournaments are regularly held for business learners; however, they accommodate diverse team structures, skill sets, and career aspirations. Inherently, learners may build “communication”, “teamwork”, “critical thinking”, and “problem-solving” acumen (Marcel & Mahon, 2019, pp. 101-102). Learners may participate in local, state, regional, or national cases or pitches, or instructors may select a previously conducted case located online. The following table contains a few examples of former competition documents. Furthermore, learners in dance, art, music, and other performance disciplines may showcase their knowledge of technique and concepts by conducting a class or individual demonstration of randomly selected terms or movements. Learners may also, individually or through teams, develop and present a creative portrayal of a selected topic.

“As indicated in Table 2 (Appendix)”

5. Present a Career Workshop.

Public speaking proficiency is desired in multiple specialties and fields (Sonnenschein & Ferguson, 2020). For the career workshop, learners, individually or in small groups, present in a format similar to industry recruiters. The workshop may consist of five segments: introduction/attention grabber; agenda; discussion with accompanying audience handout; extended career commercial; and closing. The extended career commercial of two-three minutes is comprised of career requirements, advice, work conditions, potential earnings, and projected five-to ten-year growth. Instructors also may ask learners to submit a short research paper on the presentation content and a link to the recorded presentation if it is not facilitated in a classroom.

6. Compose Brief Article, Reflective, or Video Assignments.

Research papers may be opportune for some disciplines or courses; however, faculty who have larger classes or do not issue lengthy writing assignments may be more interested in adding brief article responses, reflective papers, or video assignments in which self-assessment occurs. “Self-assessment is widely implemented in pedagogical practices ... through different tools, including questionnaires and reflection journals” (McDonald et al., 2022, p. 410; Ferguson et al., 2016). For article responses, learners may evaluate an article by addressing its contributions and main points or its individual impact and personal impressions in a one-page typed response or reflection. As a matter of choice, instructors may opt that learners record and submit a succinct reflective video using platforms like Panopto or Screencast-O-Matic.

Overall, the aforementioned developmental and assessment suggestions yield faculty with varied pedagogical options to implement over more traditional online assessments that require online proctoring software and scanning mechanisms.

Further Implications and Conclusion

Online education fosters numerous positive aspects through flexible, convenient schedules, technology and innovation, and varying delivery modes. However, scanning mechanisms and biometrics in online proctoring software present compelling legal concerns with privacy and their chronicling of learner data. Institutions that embark on restructuring their online assessment protocols and guidelines face drawbacks and multi-year challenges with reorganization as well as the investments in time, resources, and budgets necessary to accomplish this endeavor. Yet, it is a task that should be addressed to protect learner rights and educational institutions.

Beyond Ogletree, biometric technology also raises privacy concerns outside of protections in the Fourth Amendment of the U.S. Constitution. “[I]n 2008, ...” the State of Illinois passed the Illinois Biometric Information Privacy Act (BIPA), which “imposes strict consent requirements on entities that collect, use, and store biometric information ...” and the possibility of extensive monetary benefits for successful petitioners with stiff consequences for respondents (Nolan, 2021, p. 1). Additional venues, in particular Portland, New York City, Texas, and Washington, have passed more legal parameters for biometric references to shield privacy (Nolan, 2021). Furthermore, in 2022, the Student Test Taker Privacy Protection Act was enacted by the California Legislature (Student Act, 2022). Meanwhile, institutions like the University of Illinois Urbana-Champaign (UIUC) have opted not to extend online proctoring software transactions due to objections from learners and personnel in 2021 (Chin, 2021).

Correspondingly, various learner and professorial factions objected and started litigation, such as the 2021 claim against Northwestern University, while attending and working at particular educational entities using online proctoring software during and before the Covid-19 pandemic (Nolan, 2021; Paul, 2020; Long, 2021). As more lawsuits, including class actions, have been filed, the pressure increases for institutions and software companies to acknowledge and respond to learner, faculty, and community concerns. Even so, not all litigation will yield success for plaintiffs. In 2022, an Illinois federal district court in Cody Powell v. DePaul University ousted the case submitted by learner plaintiffs “alleging that defendant’s use of Respondus Monitor, an online remote proctoring tool ... violates ... ‘BIPA’” (Powell, 2022, p. 1). However, the court disagreed with the plaintiff’s perspective and categorized the university as “a financial institution that is subject to Title V of the Gramm-Leach-Bliley Act of 1999 (GLBA)”; “GLBA defines a financial institution as ‘any institution ... engaging in financial activities’” (Powell, 2022, p. 2). In part, BIPA does not oversee higher education institutions operating the U.S. Federal Student Aid Program (Powell, 2022). Consequently, the defendant’s identification as a “financial institution” falls under BIPA’s exception; therefore, the accusations brought forth were not applicable (Powell, 2022, p. 3). Lastly, some learners of color have claimed incidents of discrimination and prejudice based on unsupported allegations of academic dishonesty when using online proctoring software (Asher-Schapiro, 2020).

With this article, the authors’ contribution to literature promotes a systematic scholarly review of the intersection of legal and university issues on balancing learner privacy and academic integrity. By dissecting the court’s holding and rationale in Ogletree v. Cleveland State University, the authors provide academic stakeholders with critical takeaways on legal analysis and applicable laws, the potential broader impact of the federal case, and valuable insights on institutional processes that could lead to litigation. Moreover, the authors set forth twelve administrative and pedagogical considerations for university personnel to evaluate as they

navigate and problem-solve relatable challenges. The ongoing usage of online proctoring software increases the likelihood of more lawsuits against universities. Comprehensively, current litigation, state and municipal legislation, and other legal efforts spearheaded by learners, elected officials, and community members against universities deal with Fourth Amendment challenges and biometric data in connection to privacy. It is in the best interests of higher education institutions to proactively establish clear, consistent online proctoring guidelines that better address and protect both privacy and integrity.



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APPENDIX

Table 1: Sample Resources for Negotiations/Role-Plays

Area(s) of Focus	Negotiation/Role-Play
Agriculture/Land	“Mountain View Farm” from the Program on Negotiation at Harvard Law School
Criminal Justice	“Search and Seizure: <u>U.S. v. Drayton</u> Role-Play” from Street Law
Computer Science	“Role-Playing Paper-Reading Seminars” from Raffel Blog
Education	“Fallsburg School Negotiations Simulation” from the Society for Human Resource Management
Engineering	“Using Simulation to Teach Negotiation to Environmental Engineers” from the <u>Research Journal for Engineering Education</u>
Management/Business	“Developing Negotiation Skills in the Classroom: A Case Simulation” from the <u>Journal of Human Resources Education</u>
Medicine/Health Care	“Negotiation as Relationship-Building in Healthcare Organizations: A Case Study Exercise” from the <u>Journal of Health Administration Education</u>
Social Work	“Teaching Note – Using Group Role-Play Exercises to Build Advocacy Skills and Achieve Equal Opportunity and Justice for All” from the <u>Journal of Social Work Education</u>

Table 2: Case/Pitch Competition Examples

Area(s) of Focus	Case/Pitch Competition
Business/Languages	Case Clearinghouse Cases and Teaching Notes from the Center for International Business Education and Research at The George Washington University
Business/Supply Chain Management	2021 Case Materials from the Association for Supply Chain Management
Business/Entrepreneurship	Cartier Women’s Initiative Awards Startup Pitch Competition
Business/Entrepreneurship and Investment	U.Pitch National Pitch Competition