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## The Dual Role of the Campus Police Officer at Public Institutions of Higher Education

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## THE DUAL ROLE OF THE CAMPUS POLICE OFFICER AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION

Anne Walther\*

### INTRODUCTION

The role of campus police officers at public institutions of higher education is multifaceted and not so clearly defined. Campus police officers are there to enforce the law, protect the students, and ensure campus safety. However, these officers also have to manage the responsibilities and priv-

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ileges that come with holding the dual role as both a law enforcement officer and a school official. For example, while police officers at these institutions carry out many traditional police functions such as investigating criminal offenses, making arrests, and enforcing the law; they often also have additional responsibilities that fall outside of those typical law enforcement duties, such as serving on a college or university's Threat Assessment Team or internal disciplinary council. As a result, campus police officers and departments often have to make difficult judgement calls when it comes to balancing this functional dual role. Minimal guidance exists to assist these officers, which further exacerbates the issue.

To facilitate the duties that such officers must fulfill in their role as a school official, they are given access to student records that are otherwise protected by The Family Educational Rights and Privacy Act (FERPA) through their role as a school official with a legitimate educational interest. Additionally, school officials have the authority to enter university students' dorm rooms at any time if they have an administrative need to do so, such as a safety concern. Although evidence found by a school official during a "search" of a student's room in this capacity cannot be used directly to obtain information for a law enforcement purpose, the campus police officer could learn information during this type of search and be unable to separate that knowledge and stop themselves from applying it to law enforcement matters.

This functional dual role presents ethical and operational questions for public institutions of higher education and their police departments across the country. How can a campus police officer or department internally create a wall between information they gained access to while completing school official duties and information obtained through methods more consistent with typical law enforcement and criminal investigation requirements? Is that separation possible and practical? Should campus police department have to develop internal policies that help protect students, police departments, and the school from the misuse of students' personally identifiable information (PII)?

For the public universities across the country, these questions have not yet been answered. Unfortunately, there is a glaring lack of federal policy or guidance to help determine an appropriate protocol for these universities and campus police departments. Furthermore, there is an altogether lack of federal recognition of this functional dual role held by campus police officers. Some public institutions of higher education may have internal policies to help mitigate these risks, but many do not.

This Note will define and explain the dual role of campus police officers and the issues that come along with it. First, Section II will explain the complicated dual role held by campus police at public institutions of higher education as both law enforcement officers and school officials.

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Section III gives a brief explanation of the FERPA and how it protects student records and regulates access to those records. Next, Section IV explains the issues with FERPA as it is currently written, including its overly broad scope and lack of enforcement mechanism. Section V provides an overview of how campus police officers operating under the unaddressed dual role impacts the search of student dorms. Then, Section VI explains the root of the need to define the dual role as it pertains to the student's fundamental right to privacy. Section VII will provide a recommendation for how these issues can be solved or mitigated. Lastly, Section VIII will summarize the conclusions of this Note.

## EXPLAINING THE DUAL ROLE

Duties of campus police officers that would traditionally be considered law enforcement functions include criminal investigations. Some functions related to campus safety could fall either into the category of a school official duty or a law enforcement duty. Duties of a school official are those that are related to furthering the educational goals of the institution and are not related to law enforcement.<sup>1</sup> For context, an example of a

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<sup>1</sup> See *Who Is a "School Official" Under FERPA?*, U.S. DEP'T OF EDUC., <https://studentprivacy.ed.gov/faq/who-%E2%80%9Cschool-official%E2%80%9D-under-ferpa> (last visited May 5, 2020).

group that easily and clearly falls into the category of school officials would be professors. As it stands, while completing school official duties, campus law enforcement officers often are given access to FERPA protected material.<sup>2</sup>

There is very minimal guidance for campus law enforcement for how they should treat student records. The Department of Justice provides guidance for campus police in how they use and disclose student information.<sup>3</sup> It advises the following:

[C]ampus law enforcement should be educated on the definition of ‘law enforcement records’ and what the definition means for sharing information. Privacy laws limit the information that can be shared from health or educational records . . . if law enforcement classifies a record as a ‘law enforcement record,’ it can be shared between law enforcement agencies to assess threats. Therefore, all officers who deal with potential threats on and around campus should be aware of the consequences of NOT deeming a particular report a ‘law enforcement record’.<sup>4</sup>

The purpose, functionality, and text of FERPA will be explained in Section III.

## FERPA

The Family Educational Rights and Privacy Act, commonly

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<sup>2</sup> See *Frequently Asked Questions*, U.S. DEP’T OF EDUC., <https://studentprivacy.ed.gov/frequently-asked-questions?audience=29&topic=472&page=1> (last visited May 1, 2020).

<sup>3</sup> See William J. Bratton, *Campus Security Guidelines*, BUREAU OF JUST. 1, 39 (Sept. 2009), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/MCC\\_CampusSecurityGuidelines.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/MCC_CampusSecurityGuidelines.pdf).

<sup>4</sup> *Id.*

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known as FERPA, is a federal law that protects the privacy of certain student education records for students that attend a school that receives funds through the U.S. Department of Education or through an applicable program of the U.S. Department of Education.<sup>5</sup> FERPA specifically protects PII and includes the following types of information in the definition of PII: A student's name; the name of the student's parents or other family members; the address of the student or student's family; personal identifiers such as a social security number, student number or biometric record; other indirect identifiers such as birthday, place of birth, and mother's maiden name; and other information that alone or in combination is linkable to a specific student and would therefore allow a reasonable person in the school community who does not have personal knowledge of the relevant circumstances to identify the student with reasonable certainty; or information requested by a person who the education agency or institution reasonably believes knows the identity of the student to whom the education record relates. FERPA generally prohibits educational institutions from disclosing PII from education records.<sup>6</sup>

Additionally, FERPA allows certain types of information labeled as "directory information" to be disclosed to anyone without the student's

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<sup>5</sup> *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP'T OF EDUC. (Mar. 1, 2018), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

<sup>6</sup> See 34 CFR § 99.

affirmative consent, offering a lower level of protection than that given to personally identifiable information.<sup>7</sup> The “Directory Information” exception outlined in 34 C.F.R. § 99.3 and 99.37 explains that directory information can be disclosed to third parties without the consent of the eligible student as long as the following conditions are satisfied: (1) The institution gives public notice of the types of information it categorizes as “directory information”; (2) The institution informs the eligible student of their right to restrict the disclosure of such information; and (3) The institution provides the time frame in which the eligible student can notify the school that they wish to limit disclosure of this information.<sup>8</sup>

Once students attend post-secondary school, they have certain rights with respect to their educational records.<sup>9</sup> Schools must have written permission from the eligible student to release information from a student’s educational record, subject to some exceptions.<sup>10</sup> Under FERPA, schools are able to disclose student records, without needing the student’s consent to the following:

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<sup>7</sup> See George C. Hlavec Esq. and Edward J. Easterly, Esq., *FERPA Primer: The Basics and Beyond*, NAT’L ASS’N OF COLLS. & EMPS. (Apr. 1, 2015), <https://www.nacweb.org/public-policy-and-legal/legal-issues/ferpa-primer-the-basics-and-beyond/>.

<sup>8</sup> See 34 C.F.R. §§ 99.3–99.37.

<sup>9</sup> *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP’T OF EDUC. (Mar. 1, 2018), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

<sup>10</sup> See *id.*



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- (1) School officials with a legitimate educational interest;
- (2) Other schools to which a student is transferring;
- (3) Specified officials for audit or evaluation purposes;
- (4) Appropriate parties in connection with financial aid to a student;
- (5) Accrediting organizations;
- (6) To comply with a judicial order or lawfully issued subpoena;
- (7) Appropriate officials in cases of health and safety emergencies; and
- (8) State and local authorities, within a juvenile system.<sup>11</sup>

The exception most implicated in this Note is item (1) “School officials with a legitimate educational interest.” Having been categorized as a school official does not in and of itself allow access to student information under FERPA. The school official must also have a “legitimate educational interest” in the information.<sup>12</sup> 34 C.F.R. § 99.31 explains further that: “[a]n education agency or institution may disclose personally identifiable information from an education record of a student without . . . consent . . . if the disclosure meets one or more of the following conditions: The disclosure is to school officials, including teachers, within the agency or institution whom the agency or institution has determined to

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<sup>11</sup> *See id.*

<sup>12</sup> *See* 34 C.F.R. § 99.31 (2012).

have a legitimate educational interest.”<sup>13</sup>

This provision requiring a legitimate educational interest is vague for any school official potentially accessing and using FERPA protected records for their job. Are there any limits? The National Center for Education Statistics (NCES) gives guidance that agencies or schools maintaining personally identifiable data about students should have written criteria for determining which school officials have a legitimate educational interest in specific education records.<sup>14</sup> NCES also clarifies that identifying a person as a “school official” does not automatically grant them unlimited access to education records, and that a legitimate educational interest may need to be determined on a case-by-case basis.<sup>15</sup>

The Department of Education issued guidance that a school’s law enforcement officers can be considered school officials with a legitimate educational interest if they are subject to the requirements in 99.33(a). Specifically, the Department of Education advises that the personally identifiable information can only be used for the purpose for which the disclosure

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<sup>13</sup> *Id.*

<sup>14</sup> *Forum Guide to Protecting the Privacy of Student Information: State and Local Education Agencies*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/pubs2004/privacy/section\\_4b.asp](https://nces.ed.gov/pubs2004/privacy/section_4b.asp) (last visited May 5, 2020).

<sup>15</sup> *See id.*

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was made, citing that the promotion of school safety and the physical security of students are included in these permissions.<sup>16</sup>

This creates a problematic blurred line for campus police officers, who most likely consider investigating criminal offenses and arresting potentially dangerous individuals necessary to promote school safety and the physical security of students. As a result, campus police officers could use this FERPA loophole to circumvent traditional constitutional search requirements on college campuses.

An important issue is when, if, and how campus police officers should be able to use and have access to student records for school official duties that are not squarely law enforcement related. These officers still have law enforcement duties and now have access to information that law enforcement would otherwise not be able to access without a warrant.<sup>17</sup> Situations where campus police officers most clearly have a “legitimate educational interest” may include student conduct or disciplinary proceedings. Duties specifically involving the safety of the campus and its students could arguably fall into the category of a “legitimate educational interest” but are also traditionally functions of law enforcement.

One example of a school official duty that falls under campus safety

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<sup>16</sup> *Frequently Asked Questions*, U.S. DEP’T OF EDUC. <https://studentprivacy.ed.gov/frequently-asked-questions?audience=29&topic=472&page=1> (last visited May 1, 2020),.

<sup>17</sup> *See generally* U.S. CONST. amend. IV.

are Threat Assessment Teams.<sup>18</sup> Threat Assessment Teams often include a number of school officials along with representatives from campus police.<sup>19</sup> During Threat Assessment Team meetings, a student's FERPA protected PII is shared freely without needing the student's consent, due to the legitimate educational interest of campus safety.<sup>20</sup> However, if there is a potentially dangerous student on campus that is the subject of an ongoing criminal investigation, could law enforcement officers have a coinciding goal to criminally investigate, arrest, and assist in the prosecution of that individual? Again, student and campus safety are paramount to a successful learning environment and are therefore of legitimate educational interest, but criminal investigations, arrests, and prosecutions are functions that fall into the category of law enforcement duties. Foreseeably, campus police officers could learn information about a student during a Threat Assessment Team meeting, and that student could then later become the subject of a criminal prosecution.

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<sup>18</sup> *What Is a Threat Assessment Team?*, U.S. DEP'T OF EDUC., <https://studentprivacy.ed.gov/faq/what-threat-assessment-team> (last visited May 1, 2020).

<sup>19</sup> *See id.*

<sup>20</sup> *Does FERPA Permit the Sharing of Education Records with Outside Law Enforcement Officials, Mental Health Officials, and Other Experts in the Community Who Serve on a School's Threat Assessment Team?*, U.S. DEP'T OF EDUC., <https://studentprivacy.ed.gov/faq/does-ferpa-permit-sharing-education-records-outside-law-enforcement-officials-mental-health> (last visited May 1, 2020).

Although the U.S. Department of Education advises that a student's PII may only be used for the purpose for which the disclosure was made, it is practically impossible to do that as it would require the following: (1) the untangling of the inextricably intertwined duties of school protection and securing student safety and the investigation and prosecution of criminal offenses; and (2) police officers having to mentally compartmentalize information they gain from fulfilling these "school official" duties and not intentionally or unintentionally apply the information to law enforcement strategy.

Law Enforcement records are treated differently under FERPA and carry less protections than student records.<sup>21</sup> Among other categories of information, records of a law enforcement office include those created and maintained by a law enforcement unit for a law enforcement purpose.<sup>22</sup> Records of a law enforcement office do not include: "records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of an educational agency or institution other than the law enforcement unit; or records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution."<sup>23</sup>

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21 *See* 34 C.F.R. § 99.8 (b)(1) (2023).

22 *See id.*

23 *See id.* at (b)(2)(i) and (ii).

Information about students gathered on the scene from individuals involved or witnesses would not qualify as FERPA protected information. Information that may fall under the category of protected personally identifiable information that is learned through an acceptable method (such as interviewing a witness) would be technically “created by law enforcement” and could be maintained by law enforcement and used and treated as a law enforcement record rather than an education record.

It could be argued that due to this blurred line, police officers at public institutions of higher education should be categorized and treated as solely law enforcement rather than school officials. Furthermore, it could also be argued that this proposition is intended to be baked into FERPA itself. Specifically, FERPA explicitly provides that a campus police department “does not lose its status as a law enforcement unit if it performs other, non-law-enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.”<sup>24</sup> In this provision, FERPA is essentially implying that campus police officers should always be regarded solely as law enforcement officers, and they should not be able to enjoy the same FERPA access as traditional school officials with legitimate educational interests.

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24 34 C.F.R. § 99.8 (a)(2) (2023)

34 C.F.R. § 99.8 (c)(2) provides that “education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to [FERPA], including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.”<sup>25</sup> Updated guidance from the U.S. Department of Education or at least college or university-wide policy would assist police officers and departments in drawing these difficult lines.

Part of the reason why more campus police departments do not have a policy in place, at least in regard to campus police having access to student records, is because there is no viable FERPA enforcement mechanism.<sup>26</sup> There is no incentive for universities to create cumbersome policies that slow down law enforcement when there is little to no risk of FERPA being enforced by the U.S. Department of Education. These concerns will be addressed and further examined in Section IV, where this Note will point out some of the specific characteristics of FERPA that make the Act difficult to enforce or comply with.

#### ISSUES WITH FERPA AS WRITTEN

Combined with the over-inclusiveness of FERPA, the lack of an

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<sup>25</sup> 34 C.F.R. § 99.8 (c)(2) (2023).

<sup>26</sup> See Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interests*, 44 J. LEGIS. 22, 31–32 (2017).

effective enforcement mechanism essentially creates a law without consequences. This Section will detail the lack of government enforcement of FERPA and FERPA's lack of an individual enforcement mechanism, along with FERPA's over-inclusiveness and a recommendation to narrow its scope.

*I. Lack of Government Enforcement or Individual Enforcement Mechanism*

While FERPA does provide procedures for DOE intervention after an alleged violation, such procedures are rarely employed. FERPA allows aggrieved parties to file a complaint with the Department of Education's Office of Chief Privacy Officer, detailing the alleged FERPA violation that occurred.<sup>27</sup> The Department of Education then notifies the institution of higher education, potentially leading to a further investigation of the alleged violations.<sup>28</sup> If a violation is found, the office can ask the institution to comply voluntarily; and, if the school refuses, the department can initiate proceedings to withhold federal funds. Theoretically, this should serve as a significant deterrent factor, but these proceedings are almost never initiated.<sup>29</sup>

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<sup>27</sup> *See id.*

<sup>28</sup> *See id.*; 34 C.F.R. § 99.66(b) (2016).

<sup>29</sup> *See Greenberg & Goldstein, supra* note 26.



In addition to the lack of an effective government enforcement mechanism, there is also no individual enforcement mechanism under FERPA to help students protect their privacy rights as it pertains to their school records. Specifically, there is no individual private right of action under FERPA.<sup>30</sup> Furthermore, the Supreme Court held in *Gonzaga University v. Doe* that an aggrieved party cannot enforce FERPA by suing under 42 U.S.C. § 1983, which parties can often use to enforce constitutional rights or rights provided by federal statute.<sup>31</sup> In *Doe*, the Supreme Court said that a right can only be vindicated through 1983 if it was unambiguously provided as such in the text of the statute.<sup>32</sup> After this case, it is clear that private parties are unable to bring lawsuits to enforce FERPA. Since the individual cannot enforce, and the federal government essentially refuses to enforce, a large enforcement gap exists.

## *II. Over Inclusivity and Recommendation to Narrow the Scope*

FERPA is overly inclusive and broad. It claims to protect information, making it burdensome for Campus Police to comply with its requirements and difficult for the Department of Education to enforce. FERPA, at its core is about student privacy and records protection.

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<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

FERPA's protection of the broad umbrella of personally identifiable information is overly arduous and therefore encourages noncompliance. The enforcement of privacy rights is traditionally subject to limitations. The Restatement Second of Torts limits the privacy rights to disclosures that a "reasonable person would feel justified in feeling seriously aggrieved by it."

Because FERPA protects too much information and there is no enforcement mechanism, it functionally protects nothing and nobody. What can be done to solve this issue? The legislature should decrease the amount of information covered under FERPA so compliance is easier and the Department of Education would perhaps more readily enforce compliance. Section V will explain how the dual role held by campus police officers functionally impacts searches by campus police.

#### HOW THE UNADDRESSED DUAL ROLE AFFECTS SEARCHES BY CAMPUS POLICE OFFICERS

In addition to implicating FERPA concerns, the dual role held by campus police officers also implicates issues pertaining to searches of students and their dorms. A school official has a lesser standard that they must meet in order to search a student's room than a law enforcement officer.<sup>33</sup> This begs the questions of if, and when, campus police can search a room

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<sup>33</sup> See generally U.S. CONST. amend. IV.

under the lower school official standard if they are completing a duty that falls within their school official role.

Because the legislature and Department of Education have failed to recognize the functional dual role of campus police officers, this Note will look to caselaw to help address this issue as it pertains to searches. First, this Section will turn to the seminal case of *New Jersey v.*

*T.L.O.* to examine the search privileges and requirements of a school official compared to the search privileges and requirements a school resource officer as applied in a high school setting.<sup>34</sup> This Section will then look to the few cases pertaining to searches specifically in the context of higher education. Lastly, this Section will address why the method of gathering evidence and searching student dorms matters as it pertains to the fruit of the poisonous tree doctrine.

### *I. New Jersey v. T.L.O.*

In 1985, the Supreme Court held the Fourth Amendment does apply to students attending a public high school.<sup>35</sup> However, the Court recognized that those rights are addressed differently in such a setting due to the responsibilities of school officials to provide a safe learning environment for

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<sup>34</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>35</sup> See *id.*

students.<sup>36</sup> The Court explained that neither a warrant nor probable cause is required for a search of students by school officials.<sup>37</sup>

The Supreme Court held that searches by school officials are justified if: (1) the search was justified from its inception, meaning that there were reasonable grounds to suspect that the search would find evidence of violating the law or school rules; and (2) the search conducted was reasonably related in scope to the circumstances which justified interference in the first place.<sup>38</sup> The second prong is met when the measures are reasonably related to the objectives of the search and not excessively intrusive in light of the age of the student and the type of infraction.<sup>39</sup>

To summarize, in a public school setting, the standard for a justified search by a school official of a student is different from a typical law enforcement officer in two ways: (1) a warrant is not required for the search; and (2) probable cause is not required.

## *II. Search Standards of School Officials and Police Officers as Applied to Institutions of Higher Education*

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<sup>36</sup> *See id.*

<sup>37</sup> *See id.* at 326.

<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 342.

A few cases have addressed this issue, at least in part. *Piazzola v. Watkins* held that a student who occupies a college dormitory room enjoys the protection of the Fourth Amendment.<sup>40</sup> *State v. Hunter* held that university officials have the authority to enter students' rooms without a warrant if they "need to do so to perform routine maintenance, address safety concerns, or have some special administrative need not connected to law enforcement."<sup>41</sup> However, in *Commonwealth v. Carr*, the Massachusetts Supreme Court held that law enforcement must have a warrant or affirmative consent to search a student's room.<sup>42</sup>

The problem here is clear: school officials have search privileges and lower standards to meet, whereas searches by law enforcement may typically have higher standards. When the campus police officer has privileges and responsibilities outside the law enforcement function that mixes with school official duties, this search standard becomes blurred. For example, if a law enforcement unit goes to a dorm room for a safety concern—acting as a school official and completing a school official duty—would they be able to enter the room without a warrant under the *State v. Hunter* standard? What if later on a criminal investigation takes place, and information learned while previously entering the student's room helped provide probable cause for other intrusive searches? Information obtained

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40 See *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971).

41 *State v. Hunter*, 831 P.2d 1033, 1037 (Utah Ct. App. 1992).

42 See *Commonwealth v. Carr*, 936 N.E.2d 883 (Mass. 2010).

by the campus police officer operating under this lower search standard could indirectly or directly aid in a criminal prosecution. Although this dual role is not recognized, it is apparent that its existence implicates issues relating to the fruit of the poisonous tree doctrine.

### *III. Why it Matters: The Exclusionary Rule and the Fruit of the Poisonous Tree Doctrine*

Generally, the Exclusionary Rule precludes the government from using evidence that was obtained in a way that violates the United States Constitution and the defendant's constitutional rights.<sup>43</sup> The Supreme Court has long upheld this remedy for Fourth Amendment violations. The exclusionary rule applies to evidence obtained through an unreasonable search or seizure, and this evidence cannot be used by the government in a criminal prosecution.<sup>44</sup> A "search" for Fourth Amendment purposes occurs in one of two circumstances: (1) the government trespasses in "persons, houses, papers, or effects" in an attempt to find something or to obtain information;<sup>45</sup> or (2) when government conduct violates a subjective

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43 Cornell L. Sch., *Exclusionary Rule*, LEGAL INFO. INST. (June 2017), [https://www.law.cornell.edu/wex/exclusionary\\_rule](https://www.law.cornell.edu/wex/exclusionary_rule).

44 *See Mapp v. Ohio*, 367 U.S. 643 (1961).

45 U.S. CONST. amend. IV.

expectation of privacy and an objective reasonable expectation of privacy.<sup>46</sup>

As written, the Fourth Amendment only applies to searches. Therefore, if the government's conduct does not meet one of the two criteria to be categorized as a search then there is no Fourth Amendment question or requirement.<sup>47</sup> So, this begs the question: when does the conduct of a campus police officer at a public college or university qualify as a "search," and, therefore, must comply with Fourth Amendment standards? Section VI addresses the reasonable expectation of privacy held by students, the right to privacy generally, and how this helps us answer the question of what constitutes a search of a student's room.

## PRIVACY

Both the issue of warrantless searches and the issue of having access to students' FERPA protected personally identifiable information implicate the idea of privacy. As previously discussed, determining the reasonableness of student searches in the world of K-12 education depends on a number of factors, including, but not limited to, the searcher's status of a school official or law enforcement personnel and the extent of

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<sup>46</sup> Katz v. United States, 389 U.S. 347 (1967).

<sup>47</sup> See Andrew Kloster, *Supreme Court Decision in 'Jones' and Students' Fourth Amendment Rights*, FIRE (Jan. 27, 2012), <https://www.thefire.org/supreme-court-decision-in-jones-and-students-fourth-amendment-rights/>.

the search relative to a student's expectation of privacy.<sup>48</sup>

However, it could be argued that a heightened expectation of privacy exists for students enrolled in post-secondary education. Albeit minimal, there is some guidance from caselaw that details what expectation of privacy exists for students in higher education.

The Supreme Court recognized a constitutional right to privacy in *Griswold*.<sup>49</sup> This right was found in the penumbras of other explicitly stated constitutional protections in the First, Third, Fifth, and Ninth Amendments, and the Court found that when considered together, these amendments create a "zone of privacy".<sup>50</sup> At the time, this holding was narrowly tailored and only explicitly applied to married couples seeking contraception.<sup>51</sup> However, it was part of an era of jurisprudence that recognized, valued, and upheld individual privacy rights.<sup>52</sup>

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

49 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

50 See *id.* at 481–86.

51 See *id.* at 481.

52 It should be noted for the reader that more recently, since the original drafting of this article, the U.S. Supreme Court defined and, in many ways, limited, the scope of the rights to privacy in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 142 S.Ct. 2228 (2022). At the time of publication, the right to privacy as discussed in this article is intact, aside from its effects on abortion. However, Justice Thomas, in his concurring opinion in *Dobbs*, called for a reexamination of the Supreme Court's substantive due process jurisprudence. Although this call seemed to be more targeted toward the right to use contraception, the right to engage in private consensual sexual acts, and the right to gay marriage, this reexamination could be broader than that, potentially impacting the Fourth Amendment's protection against unreasonable searches and seizures. The Fourth Amendment only expanded to contemplate the right to privacy in *Katz v. United States*, moving away from a textual and property-based conception of the Fourth Amendment. If *Katz* would be called into question, the right to privacy would not protect



In *Eisenstadt v. Baird*, the Supreme Court not only extended the right to privacy to married couples but founded a protected and inherent right or privacy in the individual.<sup>53</sup> This idea of a nationally recognized and constitutionally provided individual right to privacy was further reinforced more recently in *Lawrence v. Texas*, when Justice Kennedy opined that: “The Petitioners are entitled to respect for their private lives. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”<sup>54</sup>

In *Katz v. United States*, the Supreme Court held that it is unconstitutional under the Fourth Amendment to conduct a search and seizure without a warrant *anywhere* that a person has a reasonable expectation of privacy, not just a specific place (barring certain exceptions).<sup>55</sup> This was further extended in *United States v. Jones*. Under Justice Scalia’s majority opinion in *Jones* “trespass” by government actors, including not only police but also campus security, administrators, and even resident assistants, also count as “searches” under the Fourth Amendment when undertaken for “the purpose of obtaining information,” and a lack of a “reasonable expectation of privacy” is not alone enough to automatically strip

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any area that was not specifically enumerated in the Constitution. (See also *Kamin, Sam, Katz and Dobbs: Imagining the Fourth Amendment without a Right to Privacy* (July 8, 2022) <https://ssrn.com/abstract=4156992>.)

53 See *Eisenstadt v. Baird*, 405 U.S. 438, 439 (1972).

54 *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

55 See *Katz v. United States*, 389 U.S. 347 (1967).

a student of their rights under the Fourth Amendment.<sup>56</sup>

Before *Jones*, a number of cases across the country had held that Fourth Amendment protections may be invoked to exclude evidence obtained from a warrantless search of student dorms.<sup>57</sup> In *Piazzola v. Watkins*, the court held that a University regulation cannot be “constructed or applied so as to give consent to a search for evidence for the primary purpose of criminal prosecution.”<sup>58</sup> In *State v. Houvener*, evidence was held to be properly suppressed because it was obtained unlawfully when an officer searched the interior hallways of a dormitory without a warrant.<sup>59</sup> In *Houvener*, the State argued that no search occurred because students do not enjoy a reasonable expectation in their hallways.<sup>60</sup> The trial court disagreed with this reasoning, and so did the Washington Court of Appeals.

Under this framework, the student should be protected from a warrantless search—even if the campus police officers are considered to be acting in their capacity as school officials completing an official school duty. However, this is not always the case. Common practice and university policies often allow resident assistants and other school officials to search a student’s room without permission or a warrant. The

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<sup>56</sup> See Kloster, *supra* note 47.

<sup>57</sup> See, e.g., *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971); *State v. Houvener*, 186 P.3d 370 (Wash. Ct. App. 2008).

<sup>58</sup> *Watkins*, 442 F.2d at 289.

<sup>59</sup> *Houvener*, 186 P.3d at 376.

<sup>60</sup> See *id.*

common practice of allowing school officials to search without permission or a warrant makes it urgent and important to clearly define the role of the campus police officer. Section VII discusses this Note's recommended solution to the issues implicated by the dual role.

RECOMMENDATIONS: ADOPT THE NARROWED SCORE AND  
STRICT CATEGORIZATION METHOD

In summary, the two issues that come from the functional dual role of campus police officers at institutions of higher education are the following: (1) the misuse and over-disclosure of FERPA protected student records; and (2) the unclear search requirements as it pertains to campus police officers that also complete duties which are outside of direct law enforcement functions and are more traditionally performed by school officials. This Note suggests a method to mitigate or eliminate these issues: *The Narrowed Scope and Strict Categorization Method*.

*The Narrowed Scope and Strict Categorization Method* involves narrowing the scope of FERPA's protected information to only information that is a true invasion of privacy. As mentioned in Section IV, the Act covers extraneous student information that is not truly private.<sup>61</sup> As a result, there is a lack of an effective enforcement mechanism to protect

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<sup>61</sup> See *supra* Section IV.

students and their personally identifiable information.<sup>62</sup> This method requires, in part, that the scope of FERPA be narrowed to only protect information that is truly private (e.g., social security numbers). This method also would allow all school officials to better understand what information is FERPA protected personally identifiable information, and, therefore, help them more easily comply with FERPA and avoid the misuse or improper disclosure of protected information.

Narrowing FERPA's scope to only protect truly private information would encourage an increased compliance with FERPA. Without narrowing FERPA's scope, due to the lack of individual enforcement mechanism or actual enforcement by the government, the incentive to comply with the overly broad and burdensome Act is little to none.

Second, under this method campus police officers at public institutions of higher education would be clearly categorized as law enforcement. They would not have the dual role of a school official, and it should be explicitly recognized that all aspects of their job are to be completed as law enforcement officers. This addresses not only the police officer's unfettered access to education records as presumptive school officials with a legitimate educational interest, but it also clarifies the appropriate standards and requirements that police officers need to meet in order to search a student's dorm. Legislation or guidance from the U.S. Department of

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<sup>62</sup> *See id.*

Education would require these campus police officers to use methods that are traditionally used by law enforcement officers to access FERPA protected education records that contain personally identifiable information. Categorizing campus police officers at institutions of higher education as strictly law enforcement provides clear expectations as it pertains to student record access under FERPA, along with clearer expectations for what standards apply for these campus police officers to search a student's dorm.

### CONCLUSION

The functional dual role of campus police officers at institutions of higher education, coupled with the current lack of policy in this area, creates an unclear standard for campus police departments and officers at public institutions of higher education. The blurred line between these dual roles can cause an undue infringement on a student's privacy rights as it pertains to FERPA protected student records, as well as their personal effects in their dorm room. To implement any solution, the Department of Education, along with college and university officials, must balance the practical need for campus police to do their job efficiently with the need to protect student privacy in their personal effects and records. To mitigate or solve this issue, this Note recommends that the U.S. Department of Education adopt sweeping, clear guidance that defines the role of the campus

police officers as law enforcement only, and encourages individual colleges and universities to train their police officers accordingly. Additionally, FERPA needs to be amended to allow for easier compliance by public institutions of higher education and enforcement by the U.S. Department of Education.