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Article

*679 FERPA: ONLY A PIECE OF THE PRIVACY PUZZLE

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PREFACE

Dozens of federal laws regulate institutions of higher education. Practitioners of higher education law would likely agree that the Family Educational Rights and Privacy Act of 1974 ("FERPA") [FN1] is unique among this panoply of laws. College and university attorneys spend an inordinate amount of time deciphering the fine points of a few laws among the many, and FERPA is one of the few. [FN2]

This article argues that despite the number of hours spent deciphering FERPA, what level of protection will be given to the privacy of student records at any given institution of higher education is informed by several factors other than FERPA and case law interpreting FERPA.

The first and possibly most important factor is a code entirely different than the legal code. This other "code" is a concept presented in Code and other Laws of Cyberspace. [FN3] In Code and Other Laws of Cyberspace ("Code "), Lawrence Lessig [FN4] points out that the software and hardware used in cyberspace end up creating a set of constraints on behavior much in the same way that the legal code operates to create constraints in the physical ***680** world. [FN5] This is easiest to see in the context of copyright, as content owners have moved toward creating constraints on the use of intellectual property in cyberspace. As will be explained more fully in the article below, this additional "code" plays a critical role in what level of student record privacy is provided given that online student record systems are now ubiquitous at institutions of higher education.

A second factor that must be considered when thinking through the student record privacy issue is also a factor borrowed from the paradigm presented in Code. This factor involves a consideration of what social norms are in place at the institution. This includes policy decisions made at the university level on how the university is handling issues related to privacy. One way to think of social norms is to think of what is generally accepted as permissible at the institution. This may be a slight twist on how Lessig conceives of social norms. [FN6] Each institution will have its own subtle permutation on how much to protect confidential information. Aside from the legalities involved, does the institution take great care to guard social security numbers, or are they used as the student identifier and printed on the picture identification cards used by the students? What choices are made with respect to privacy when the online student information system is configured? These are decisions that may be influenced more by social norms than strictly by the law. Put another way, social norms influence an institution's interpretation of the law, and factor into any conversation about what level of protection to give to student record information at an institution of higher education.

While recent court decisions are not to be entirely discounted, the author argues that they play a secondary role in an institution's decision as to what level of protection to choose for student records. This article will address the recent Supreme Court cases, but will also attempt to show that while FERPA is a very visible piece of the student record privacy puzzle, other pieces to the puzzle must be recognized and given their proper place before the puzzle is complete.

This article also takes the position that privacy is something that our society continues to value. Law is an expression of our values. As long as society continues to value privacy, FERPA will continue to be a vibrant presence in the higher education legal community.

***681** I. THE BIRTH OF FERPA

FERPA came into being on May 14, 1974, as an amendment to a Federal education bill on the Senate floor [FN7] offered by Senator James Lane Buckley. [FN8] In a speech to the Legislative Conference of the National Congress of Parents and Teachers, Senator Buckley gave the following explanation of the genesis of FERPA:

> More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society. There has been clear evidence of frequent, even systematic violations of the privacy of students and parents by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations. In addition, the growth of the use of computer data banks on students and individuals in general has threatened to tear away most of the few remaining veils guarding personal privacy, and to place enormous, dangerous power in the hands of the government, as well as private organizations. It was, therefore, most appropriate that Congress saw fit to enact the Family Educational Rights and Privacy Act, as well as the landmark Federal Privacy Act of 1974, which establishes similar rights and protections of privacy to individuals on whom the federal government keeps files. [FN9]

At a time when it has been suggested that the Family Policy Compliance Office's interpretation of FERPA is contrary to the current administration's support for federalism, it is interesting to note that the man responsible for the birth of FERPA supported privacy and federalism concomitantly. Senator Buckley was not only a privacy advocate, but also an ardent supporter of federalism. [FN10]

***682** FERPA is about access and disclosure when it comes to education records. The issue that motivated Senator Buckley to offer the amendment that became FERPA was the widespread practice at the time of issuing surveys to elementary and secondary students, often without the knowledge or permission of the parents. The Congressional Record of the Senate adoption of FERPA contains copies of a number of these surveys, some of which were conducted with federal funds. [FN11] Questions included, "Do your parents say they don't love you or warn that they will stop loving you?" (asking children to rate their father and mother, on a scale from never to frequently); [FN12] "Would you like to run away from home?" [FN13] and under a section entitled "Rules we all break" children were asked to answer yes or no as to whether they had stolen "automobile parts such as hubcaps, mirrors [and] ornaments" in the past two years. [FN14] The use of these surveys had been brought to the public's attention by an article in Parade magazine. [FN15] As if the use and maintenance of the surveys was not problematic enough, the harm was compounded by the fact that the school system did not allow parents access to these files. [FN16]

Around the same time that the issue of maintenance and access to education records was becoming an issue, the issue of improper disclosure of education ***683** records was brought front and center to the attention of Congress. In the early 1970s, parents of children in the District of Columbia sued members of Congress over the release of a 450 page report which included 45 pages of supporting data dealing with the disciplinary problems of specifically named students in the District of Columbia School System. [FN17] The report had been submitted to the Speaker of the House, referred to the Committee of the Whole House on the State of the Union, and printed and distributed by the Government Printing Office. [FN18] While the Congressmen-

Committee members were found to be immune from suit under the Speech or Debate Clause, the Public Printer and the Superintendent of Documents were found not to be so immune, and the case was remanded for further proceedings. [FN19]

Getting back to the federalism issue, in terms of privacy regulation, it should be noted that the genesis for FERPA was atypical, i.e., it was a mandate for non-interference by the state, as opposed to a "claim for state interference in the form of legal protection against other individuals." [FN20] What Senator Buckley was opposed to was the use of federal funds to survey children in the classroom on issues the Senator considered of a highly personal nature. [FN21] In this sense, Senator Buckley's support for federalism could peacefully coexist with his support for privacy.

A point seldom noted is that it was not the intention of Senator Buckley to include college and university student records among those regulated. The inclusion of higher education in the Buckley amendment was the result of a drafting error. [FN22] Some of the problems the legislation presented for higher educational institutions were addressed in the amendments made by section 2 of Senate Joint Resolution 40. [FN23]

As adopted, the legislation did not take care of at least one of Senator Buckley's key goals. A section narrowly defeated on the Senate floor would have required parental consent before a child undergoes certain forms of testing or treatment, divulges sensitive personal or family information, or partakes in certain behavior or value-changing courses or activities. [FN24] Senator ***684** Buckley discussed this problem in his March 12, 1975, address to the Legislative Conference of the National Congress of Parents and Teachers, which was reprinted in the Congressional Record:

> Many schools do not ask parents' permission to give personality or psychiatric tests to their children, or to obtain data from the children on their parents and family life. Some of these tests include questions dealing with the most personal feelings and habits of children and their families. Some of this data, in personally identifiable form, is given to government agencies or to private organizations. Some of it ends up on Federal computers in the caverns of the Department of Health, Education, and Welfare. A year ago this March, a Federal office demanded information on pupil and family ethnic attitudes from over 100,000 [sic] New York City's elementary school pupils. Fortunately, the city board of education adamantly refused, even in the face of a reported threat to cut off all Federal education funds--over $200 million a year--to the city. [FN25]

In incremental pieces over the years, what Senator Buckley sought has been incorporated into the law as part of the Protection of Pupil Rights Amendment ("PPRA"). [FN26] This law, which is only applicable at the elementary and secondary level, requires prior written parental consent [FN27] for any survey, analysis or evaluation conducted "as part of any applicable program" ***685**[FN28] that involves sensitive topics such as political affiliations or beliefs, sexual behavior or attitudes, psychological problems, etc. The law was recently amended by the No Child Left Behind Act. [FN29] In this most recent amendment, the law was greatly expanded to include passive [FN30] parental consent for activities involving the collection, disclosure or use of personal information [FN31] in connection with marketing; the administration of any non-Department of Education funded survey that contains one or more of the above eight topics; or non-emergency invasive physical exams or screenings. [FN32]

With respect to surveys, there is a provision that requires the adoption of policies to give parents the right to inspect any surveys prior to administration, as well as policies to respect the privacy of students to whom a survey dealing with one of the listed topics is administered. [FN33] Unlike sections (a) and (b) of the law, which contain the limiting phrase "as part of any applicable program," section (c) of the law applies to all local educational agencies that receive funds under any applicable program. [FN34] While the PPRA does not apply at the postsecondary level, recent changes to the law are instructive in terms of the privacy debate regarding student records. To the extent that legislation continues to protect and expand upon privacy protections in the education environment, the change in the law may in turn effect a change in normative values as Lessig has noted. [FN35] This

recent legislation illustrates that privacy is still a sought after legal protection, at least with respect to education records at the elementary and secondary level.

***686** II. THE BASICS OF FERPA

FERPA applies to all schools that receive funds, (including financial aid), under an applicable program of the U.S. Department of Education. [FN36]

The major concepts of FERPA as it applies at the postsecondary level [FN37] can be easily explained. Most student records are considered "education records" that are protected by FERPA, including computer records. [FN38] The student has a right to access and review his/her education records. [FN39] All education records are confidential and cannot be disclosed unless the student consents or the disclosure fits one of the exceptions. [FN40] Directory information is one of the many exceptions to the rule of non-disclosure. [FN41] Faculty and staff may view student education records only if they have identified a legitimate educational interest in viewing the records or one of the other statutory exceptions (e.g. health and safety emergency) exists. [FN42]

Students have the right to request the correction of records that are inaccurate or misleading, and if the school denies this request, then the student has the right to a formal hearing. [FN43] If the hearing does not result in correction of the record by the school, the student may place his/her statement in the record about the information he/she believes is not accurate. [FN44]

Since changes to the FERPA regulations in 1996, institutions are no longer required to have a student record policy in place, but they must annually give students notice of their rights under the law. [FN45] As a practical matter many schools accomplish the notice requirement through a written policy specifying how student education records will be handled by the institution, and through making that policy available to all students.

***687** III. THE SUPREME COURT CASES ON FERPA

There are two camps of FERPA followers, those who believe the law is simple and clear and those who believe the law to be very unclear.

Compare the statement made by the Court of Appeals for the Sixth Circuit on June 27, 2002: "Based upon these clear and unambiguous terms, a participant who accepts federal education funds is well aware of the conditions imposed by the FERPA and is clearly able to ascertain what is expected of it."; [FN46] with the statement made by Justice Breyer on June 20, 2002:

> Much of the statute's key language is broad and nonspecific. The statute, for example, defines its key term, "education records," as (with certain enumerated exceptions) "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational ... institution." 20 U.S.C. § 1232g (a)(4)(A). This kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information. [FN47]

Those who believed the law to be unclear no doubt looked forward to a Supreme Court term with a calendar that included not one, but two cases on FERPA, the first since the law's enactment. [FN48] Unfortunately, clarity was not the end result of the Court's rulings on FERPA. [FN49]

A. Owasso Independent School District Number I-011 v. Falvo [FN50]

Court watchers have long sought out a way to predict which way the Supreme Court Justices will rule on a given case. They have also long ago realized that

predictions based along the lines of whether a particular Justice is liberal or conservative are necessarily limited. One way of divining which ***688** way a particular Justice may rule that has been in vogue over the last decade is to look at the way in which the Justices go about making their decisions. These variants on the judicial process can be described as the rules approach or the standards approach. Justices who favor a rules based approach to interpreting the law adhere to the language of the statute or constitutional provision in question. Justices who favor a standards-based approach look at the context of the law and its original purpose, asking, "what makes sense?" [FN51]

The questions asked by the Supreme Court Justices at oral argument in Owasso Independent School District No. I-011 v. Falvo present a classic case of the differing approaches to interpreting a statute. The oral argument in the Falvo case offered Justice Antonin Scalia, the "quintessential and self- defined justice of rules," [FN52] a chance to demonstrate his craft at its best. At the oral argument Justice Scalia kept bringing the questions back to the text, asking how counsels' interpretation could possibly be reconciled with the text of the statute. [FN53] To the extent there is any clarity about what constitutes an "education record" after Falvo, acknowledgment is due to the concurring opinion in the case authored by Justice Scalia and to his focus on remaining faithful to the text of the statute. [FN54]

Scalia's rules-based approach at oral argument can be contrasted with the standards-based approach favored by Justice Breyer and some of the other Justices. [FN55] They were focused on whether it made sense to give individual parents a veto on how to run the classroom or whether Senator Buckley intended to interfere in the way a teacher would run his or her classroom. [FN56]

1. The Facts and Background

Kristja Falvo, at the time of the litigation, had three children enrolled in the Owasso Independent School District in Oklahoma. Like many other school districts, Owasso used a practice known as peer grading. The variation***689** of this practice in Falvo involved students grading each other's papers and then returning the papers to the authoring student. When called upon by the teacher, the student could either call out his/her score or walk up and give the score to the teacher. [FN57]

Ms. Falvo challenged both the grading system in place at the school and the practice of calling out scores. When the school system refused her request to adopt a policy banning peer grading, Ms. Falvo brought a class action pursuant to 42 U.S.C. § 1983 against the school district, Superintendent Dale Johnson, Assistant Superintendent Lynn Johnson and Principal Rick Thomas alleging a violation of FERPA and other laws. The U.S. District Court for the Northern District of Oklahoma granted summary judgment for the defendants, holding that grades put on papers by another student do not meet the definition of education records maintained by an institution, and are thus not covered under FERPA. [FN58] This holding squared with the longstanding Family Policy Compliance Office ("FPCO") [FN59] stance that the peer grading practice does not violate FERPA. [FN60]

The case was appealed and the Court of Appeals for the Tenth Circuit generated a certain frisson in the educational community by holding that in "assisting the teacher, the correcting student becomes a 'person acting for [an educational] agency or institution."' [FN61] The court also held the scored papers were education records maintained under FERPA. [FN62] Finally, in conflict with some other courts, [FN63] the court held that a private right of action under § 1983 was available to Ms. Falvo to vindicate her claim on behalf of her minor children that FERPA had been violated. In reaching this holding, the court dismissed what many considered to be an eminently sensible letter written by ***690** the FPCO. [FN64] A petition for writ of certiorari was filed by the School District on Jan. 2, 2001, [FN65] and was granted on June 25, 2001. [FN66]

2. The Briefs

The question presented to the Supreme Court was

> Whether the Family Educational Rights and Privacy Act, which requires educational institutions to preserve the confidentiality of "education records," prohibits public school teachers of presecondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class. [FN67]

While the focus of the question was narrow, answering the question presented to the Court necessarily involved scrutiny of the phrase "education record" under the statute. To the extent the case involved the definition of an education record, it was obviously of interest to educators at the post- secondary level as well. The term "education record" is defined as follows:

> (4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which--
>
> i. contain information directly related to a student; and
>
> ii. are maintained by an educational agency or institution or by a person acting for such agency or institution. [FN68]

Several exceptions to the definition exist. Key to this case is the exception for sole possession records, which appears to carve out a very narrow exception to an otherwise broad definition. [FN69]

***691** Definitions of the term offered by opposing parties in the case ranged from the all encompassing, e.g. grades students place on the work of their classmates that have the potential to be recorded in the teacher's grade book, [FN70] to the very limited, e.g. only official institutional records. [FN71] Those parties arguing for a broad definition would have included elementary school students as agents of the school. [FN72] In an interesting twist of the federalism debate, by supporting the Respondent, the conservative [FN73] Eagle Forum was thus arguing for a definitional approach that others argued "would entail massive federal regulation of conventional classroom interactions of teachers and students." [FN74]

Significantly, the narrow definition proffered by the Department of Justice was a retrenchment and did not track the definition followed for the last ***692** decade or more by the FPCO, [FN75] nor did this narrow definition track the commonly understood definition followed by the educational community. The definition followed by the educational community was spelled out in an amicus brief in the case of Gonzaga University v. Doe [FN76] as follows:

> The breadth of this definition means that FERPA sweeps up not just transcripts and evaluations, but also any other recorded information relating to the student in an identifiable way contained in an educational institution's files. Moreover, the definition covers information recorded on any form of storage media from paper to a computer's hard drive. See 34 C.F.R. § 99.3. Because the definition is locational, if the record is "maintained by an educational agency," it does not matter who wrote it. Thus, student employment records, computer usage records, and photo files that contain information about any identifiable student of the institution are "education records." [FN77]

3. The Oral Argument

Justice Scalia made a gallant effort during the oral argument to elicit a coherent argument from counsel arguing the case. The Counsel for Petitioner, Owasso Public Schools, argued as follows:

> Your Honor, I think that what Congress is getting at with the word maintained, it goes back to what I said in the opening statement, which is, information that could have a long-term effect on the student's career .... What I would suggest the Court focus on, is this the kind of document that's going to be looked at by a college admissions officer? Is this the kind of document that's going to be looked at by a potential employer, or a governmental agency at some point down the road?

[FN78]

Not one to abandon the text for what Congress "might be getting at," Justice Scalia took issue with this position:

> But if your definition is correct, and it's that limited that it's only the stuff the school keeps that will go on into the permanent record of the student, what would be the reason for that exception that the statute contains for, you know, personal notes that a teacher makes? You ***693** wouldn't need that exception. That stuff never goes down to the central office, much less is kept for, you know, for future reference. [FN79]

Several exchanges later, with counsel for the Owasso Public Schools neither explaining nor conceding, the exchange continued with Justice Scalia once again stressing the import of the sole records possession exception to the law:

> I mean, that's the problem. Your notion of what are records maintained just does not square with the existence of that exception. I mean, sometimes Congress does more harm than good by putting in an exception, because the exception suggests that if it had not been there, the stuff would have been covered[,] ... but-- [FN80]

At this point Counsel for the Owasso Public Schools abandoned any attempt at harmonizing the statute and adopted a "just in case" theory of the text stating: "Well, I think that's an alternative possibility, Your Honor, is that it's a belt and suspenders approach that Congress never intended grade books to be covered, but just in case somebody happened to be inclined to read them that way, we're going to put this exception in as well." [FN81] As a textualist, Scalia did not react favorably to this suggestion by Counsel for the Petitioner. [FN82]

The argument for a very broad reading of the term "education record," put forward by the Respondent, was also not well received by the Court. Counsel for Respondent was asked to respond to Justice Breyer's example from his own school days, which involved a third grade teacher announcing to the future Supreme Court Justice that he was receiving a check mark in her book for lack of self- discipline. [FN83] Asked if this exchange would violate FERPA, counsel for the Respondent answered this would be a prohibited disclosure under FERPA if the teacher is making a record of the check. [FN84]

Justice Scalia once again took up the rules-based approach. When Counsel for the Respondent argued that grades called out by a fellow student are covered as education records because the teacher is using that protocol to ***694** collect the information, Justice Scalia asked: "Well, but that is not the text of the statute. You have to overcome the fact that the literal language wouldn't cover it." [FN85] When Counsel answered that there was a right to keep the information confidential, Justice Scalia made the clarifying point that there was no right per se under the statute to keep the information confidential, the statute only gives the right to keep the record confidential. [FN86] As a practical matter, schools are very aware of this distinction and in-house counsel constantly assist administrators and faculty in identifying information that is "in a record" and information obtained from some other source.

Following the standards-based approach of interpreting the law, Justice Breyer and some of his colleagues posed questions focusing on the original purpose of the law, and what would make sense in the present case. One Justice asked the following: "My question ultimately then, given our examples, is do we really think that Senator Buckley intended to so interfere with the way in which a teacher would run his or her classroom?" [FN87]

When Counsel for the Respondent suggested that FERPA be interpreted to require permission slips from parents before engaging in peer grading, and for any and all disclosure of information pertaining to a student in the classroom, even if that information did not come from a record, the sense of alarm among the Justices was palpable. Weaving back to the federalism issue, a member of the Court asked the following: "Suppose--suppose that a school district received $100 a year in Federal funds, and this act were applied in the way you said, would that to you raise any serious concerns of federalism?" [FN88]

4. The Decision

In holding unanimously that the practice of "peer grading" does not violate FERPA, a proper division between the role of the federal government vis-à-vis local units of government was the driving principle in the Court's decision, and the author of the decision, Justice Kennedy, openly acknowledged this in the decision:

> The Court of Appeals' logic does not withstand scrutiny. Its interpretation, furthermore, would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. This principle guides our decision. [FN89]

***695** Statutory considerations by the Court seemed secondary and the analysis of the statute by the Court, except for the concurrence of Justice Scalia, seemed tailored to fit the guiding principle announced above rather than the actual text of the statute. The Court first noted that the score put by a student on a student assignment is not "maintained" under the statute until the teacher records the grade or score in her grade book. [FN90] The Court was clear to note that it was not deciding whether a teacher's grade book is an education record. [FN91]

The second point made by the Court was that a student grader in the peer grading context should not be considered "a person acting for an educational institution for purposes of § 1232g(a)(4)(A)." [FN92] The Court noted with clarity that "acting for" modifies "maintain" and stated: "Even if one were to agree students are acting for the teacher when they correct the assignment, that is different from saying they are acting for the educational institution in maintaining it." [FN93]

The Court noted that other sections of FERPA conspire to reinforce this approach. [FN94] How could teachers across the country possibly be required to keep a separate record of access for students' assignments?

Those who had looked forward to Falvo as a possible source on how to interpret FERPA when the question involved something other than peer grading may have felt that the end result was a net loss rather than a net gain. In terms of certainty, predictability and definitional clarity, which are qualities lawyers tend to value (and possibly overvalue at times), the FERPA followers were left worse off.

The problem was the opinion's drift toward the narrow definition of "education record" proffered by Counsel for the U.S. Department of Justice and for the Owasso Public Schools without adequate analysis of what direction the Court was drifting toward. In dicta, the Court stated: "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." [FN95] The Court also offered in dicta a "single central custodian" theory: "By describing a 'school official' and 'his assistants' as the personnel responsible for the custody of records, FERPA implies that education records are institution records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms." [FN96]

In explaining the frailty of the Court's opinion, Justice Scalia noted in his concurring opinion:

> ***696** As the Court acknowledges, ante, at 429, 432, Congress expressly excluded from the coverage of FERPA "records of instructional ... personnel ... which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute," 20 U.S.C. § 1232g(a)(4)(B)(i). Respondent argues that this exception, which presumably encompasses many documents a teacher might create and keep in the classroom, including a grade book, would be rendered superfluous if education records included only "institutional records kept by a single central custodian, such as a registrar." We do not, of course, read statutes in such fashion as to render entire provisions inoperative. United States v. Nordic Village, Inc., 503 U.S. 30, 35-36 (1992).

The Court does not explain why respondent's argument is not correct, and yet continues to rely upon the "central custodian" principle that seemingly renders the exception for "records of instructional ... personnel" superfluous. Worse still, while thus relying upon a theory that plainly excludes teachers' grade books, the Court protests that it is not deciding whether grade books are education records, ante, at 433. In my view, the Court's endorsement of a "central custodian" theory of records is unnecessary for the decision of this case, seemingly contrary to § 1232g(a)(4)(B)(i), and (when combined with the Court's disclaimer of any view upon the status of teachers' grade books) incurably confusing. [FN97]

As Scalia points out, the Court's dicta is problematic for those who seek a clear understanding of FERPA. Not only is it contrary to the text of the statute, it is also contrary to the legislative history. Anyone who has spent time working at a post-secondary institution is aware of the non-central method of operation followed by many colleges and universities. This was a concern raised by universities at the time of the revisions to FERPA, and responded to by Senator Buckley:

> On some campuses there may be as many as fifteen to twenty separate files on a given student scattered around the campus. Some school officials have felt that the law would require them to gather all these files together and review them centrally. But this is not necessitated by the law. All that is basically required is that the student be informed, and if he makes an inquiry or request, of the existence or location of these files, and that he or she be given the opportunity to review the appropriate files within forty- five days of the request. [FN98]

As Scalia aptly pointed out in his concurring opinion, the dicta by the Court suggesting that education records include only documents kept in a central repository at the school cannot be reconciled with the express exclusion ***697** in the statute for sole possession records. In other words, if only central records are covered, this exception in the statute is superfluous. The Court's opinion also failed to address what it means to "maintain" an education record. Does an education record have a time component? Must an education record be kept more than five minutes? Five hours? Five years? Does an education record have a place component? Can anything ever kept in a classroom be considered "maintained" or must an education record be placed in the principal's office or the Registrar's office?

Both counsel for Owasso Public Schools and the United States Department of Justice failed to proffer an answer to these questions at oral argument, [FN99] and what may have led the court astray by pressing for the "institutional theory" of education records.

Even the Department of Education seemed to believe the Supreme Court had gone too far with the central custodian theory, as a spokesperson stated:

> The central custodian framework is not really workable, particularly when talking about modern technology. The preliminary view of the Solicitor General's Office is that the Court made too much of the central custodian issue. The dictum in the case regarding the central custodian issue misstates the way universities treat this information. [FN100]

For those who are struggling to define what digital education records are covered by FERPA, the decision by the Court is simply not helpful. While the Court made a cursory reference to records stored on a "permanent secure database," it was only that, a cursory reference. [FN101] The opinion did not address digital records, and did not seem to anticipate future questions about digital records. The end result of the decision in Falvo then was to generate a great deal of confusion. Those seeking clarity and following traditional legal principles (dicta is dicta, nothing more and nothing less) would most likely be ***698** telling their clients to continue without change their compliance with and interpretation of FERPA. [FN102]

Getting back to the rules versus standards approach that was evident at oral argument, one might ask, what did the Court choose in enunciating its decision? Did it choose a rules-based approach or a standards-based approach? While the Court did base its decision on the text of the statute, it would be difficult to say the Court followed a strictly rules-based approach, as relevant portions of the text were not explained or harmonized with the holding. The significance of the sole possession

record exclusion was entirely overlooked by the Court, except in the concurring opinion of Justice Scalia.

On the other hand, the Court did not really articulate a standard that could be used by lower courts or educators to weigh future fact situations. Rather, the Court decided this case by following the principle of federalism. Principles are different than rules or standards. Principles are useful as a moral or political justification for a rule or as a relevant consideration in reaching a decision but generally do not stand on their own. [FN103] In the FERPA context, the principle of federalism is especially elusive in that it may support privacy, as it did for Senator Buckley, or it may go against the privacy argument as the current administration seems to feel. [FN104]

To illustrate this point, imagine the following training session on FERPA between a university general counsel and record custodians for a university:

Record Custodian: Could you explain the sole record possession exception in FERPA again, as I am not sure I understood it?

General Counsel: You really don't need to worry about this part of the law. If you want to know if you are dealing with an education record, just be sure to remember to be guided by concerns of federalism.

***699** Against this background legal counsel for the U.S. Department of Education suggested at an annual National Association of College and University Attorneys' conference that the Department of Justice was inclined to go with at least the institutional records theory rather than the broader definition followed by the FPCO and the educational community over the years. [FN105] Lawyers are cautious creatures and after the speaker made this rather stunning announcement, counsel for colleges and universities came forth to the podium carrying with them the same text-driven FERPA questions that proliferate on the National Association of College and University Attorneys list-serv. [FN106] In other words, even if the Department of Education was planning a massive overhaul of how FERPA should be interpreted, attorneys for colleges and universities were hedging their bets.

B. Gonzaga University v. Doe [FN107]

1. Facts and Procedural Background

If one of the questions in Falvo, posed and left unanswered, was "What is an education record?", it could be said that one of the questions in Gonzaga, also left unanswered, was "Where is the education record?".

A review of the facts of the case, and of Gonzaga University's defense to the litigation at the trial court level, shows that the University made a number of arguments that should have ended the litigation, as far as the FERPA portion of the claim was concerned. Litigation, however, does not always proceed in such a neat and linear fashion, and thus the Supreme Court ended up hearing a case about FERPA in which no education record as defined under the law could be said to exist.

In October 1993, Roberta League, the "teacher certification specialist" at Gonzaga's school of education, and Dr. Susan Kyle, director of field experience for student teachers at Gonzaga, heard reports from a student that John Doe, a student in the school of education, had sexually assaulted a fellow student. [FN108] The Washington Board of Education regulations in effect at the time required a designated official at the school to consult faculty members who knew the applicant for teacher certification and swear that the designated official and consulted faculty had "no knowledge that the applicant has been convicted of any crime and ha[d] no knowledge that the applicant has a history of any serious behavioral problems." [FN109]

***700** League launched an investigation and contacted the state agency responsible for teacher certification, identifying respondent by name and discussing the

allegations against him. [FN110] The Dean of the Education School concluded that sufficient evidence of a serious behavior problem precluded her from signing the affidavit of suitability required for John Doe's teacher certification. [FN111] Respondent did not learn of the investigation, nor that information about him had been disclosed until March 1994, when he was told by League and others that he would not receive the affidavit required for certification as a Washington schoolteacher. [FN112]

Nothing in the briefs or decision indicates that the information disclosed came from an education record. Rather, the damaging information came from personal conversations, which do not constitute education records under FERPA. An attempt was made by outside counsel for the university to show the trial judge that no education record existed. This argument was made in an initial brief to the trial court and at pretrial hearings. The trial judge basically told counsel for Gonzaga he was not going to get anywhere with the argument that release of personal information not contained in an education record falls outside the purview of FERPA. [FN113]

***701** The court did not understand the clarifying point that, because the statute only gives the right to keep the record confidential, there was no right per se under the statute to keep information confidential. Thus, it followed that the court declined to accept Gonzaga's argument (on a motion for summary judgment) that no pattern or practice violated FERPA. Counsel for John Doe argued that personal information about the student in question was discussed with the Office of the Superintendent of Public Instruction ("OSPI") on more than one occasion, and those discussions formed a basis for a pattern or practice violation. Because the court believed that disclosure of any personal information violated the law, regardless of the source of the information, the court was willing to accept the argument that a pattern and practice violation was established based on testimony that Gonzaga and OSPI routinely exchanged information. [FN114]

***702** The FERPA claim was brought under 42 U.S.C. § 1983, and was premised on the theory that the Gonzaga School of Education's disclosure to OSPI was "under color of state law." Gonzaga's outside counsel also contested this theory of law, first on the ground that the requisite state action did not exist, and second, on the ground that FERPA creates no individual entitlement enforceable under § 1983. [FN115] At trial, Gonzaga moved for judgment as a matter of law on the FERPA claim, arguing that there was no right or privilege ***703** under § 1983 and that the conduct challenged was not under color of state law. [FN116]

The case went to trial and the jury returned a verdict for plaintiff on all five theories of recovery, awarding Doe a total of $1,155,000 in damages. [FN117] With respect to the FERPA claim, the jury awarded $150,000 in compensatory and $300,000 in punitive damages against Gonzaga and League. [FN118] Other amounts recovered were for defamation, invasion of privacy, breach of educational contract and negligence. [FN119]

Gonzaga appealed the denial of its motions and the judgment to the Court of Appeals and made a number of arguments under FERPA. [FN120] The argument that no education record ever existed was lost. As noted above, this argument did not make it to trial. On appeal, counsel for Gonzaga [FN121] argued that the "technical violation" of FERPA did not support an award for punitive damages. [FN122] The attorneys pursuing the appeal on behalf of Gonzaga to ***704** the Washington Court of Appeals identified thirty-three appealable errors and the dilemma was selecting which ones to pursue in the appellate court. [FN123]

The Washington Court of Appeals reversed the judgment on all five claims, but the Washington Supreme Court granted Doe's petition for review, reversed the Court of Appeals, and ordered reinstatement of the judgment except for the negligence claim. [FN124]

Gonzaga petitioned the United States Supreme Court for certiorari, raising two questions: "whether a student may sue a private university for damages under § 1983 to enforce FERPA," and "whether a private university acts 'under color of state law' when it provides information to a state official in connection with state law

requirements." [FN125]

The Supreme Court granted certiorari, and limited its grant to the first question. [FN126] While the focus of the case on appeal was the § 1983 issue and not the myriad of other FERPA issues raised in the case, the briefs filed with the Court did raise some interesting issues for those who follow FERPA closely. Probably most interesting (and in keeping with the current administration's penchant for provocative footnotes) was a footnote in the brief filed by the United States in support of Petitioners Gonzaga University and Roberta League, in which the Solicitor General made the following statement:

> We have been informed by the Department of Education that its Family Policy Compliance Office, which administers FERPA (see 34 C.F.R. 99.60(a) and (b)), has issued letters of findings applying FERPA's terms to particular factual scenarios and finding a violation of FERPA's disclosure provisions without separately inquiring whether the alleged misconduct was part of a larger policy or practice of the educational institution. In some of the letters, the existence of a policy or practice can fairly be inferred from the context .... In none of these letters, however, was the Compliance Office called upon to consider the import of the "policy or practice" language. We have lodged copies of those letters with the Clerk of Court. The Department of Education has now considered that question in the context of this case, and the position taken in this brief is the position of the Department. [FN127]

This was an odd addition to the brief, especially from the U.S. Department of Education. The footnote seemed to confuse the statutory investigative/preventive ***705** function of the FPCO [FN128] with the enforcement function of FPCO under the statute. [FN129] It would be difficult for the FPCO to tell if there is a pattern or practice without investigating the complaint. Further, if the FPCO cannot point out to schools individual failings in opinion letters, it will be difficult for schools to ascertain if they are headed in the direction of a pattern or practice violation. Voluntary compliance is the hallmark of the statute, and the wealth of opinion letters issued by the FPCO over the years has been invaluable to those seeking an understanding of just what it is the law requires.

2. The Supreme Court Decision

The Court, having been primed on the § 1983 issue in Falvo and disappointed [FN130] to find that the attorneys had not properly preserved the issue on appeal, was eager to address the § 1983 question in Gonzaga. That was indeed the main focus of the Court's holding. Chief Justice Rehnquist authored the 7-2 opinion. The Court held as follows:

> In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms--no less and no ***706** more than what is required for Congress to create new rights enforceable under an implied private right of action. FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions. They therefore create no rights enforceable under § 1983. [FN131]

Justice Breyer (joined by Justice Souter) filed a concurring opinion, stating that although he concurred with the outcome, he would not predetermine the outcome presuming that a right is conferred only if set forth unambiguously in the text and structure of the statute. [FN132] The concurring opinion dealt most directly with the substance of FERPA, stating that much of the statute's key language is broad and nonspecific. In continuing the "common sense" theme brought up in the Falvo case, Justice Breyer noted the following:

> The statute, for example, defines its key term, "education records," as (with certain enumerated exceptions) "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational ... institution." 20 U.S.C. § 1232g(a)(4)(A). This kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information. It has led, or could lead, to legal claims that would limit, or forbid, such practices as peer grading, see Owasso Independent School

Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002), teacher evaluations, see Moore v. Hyche, 761 F. Supp. 112 (ND Ala. 1991), school "honor society" recommendations, see Price v. Young, 580 F. Supp. 1 (ED Ark. 1983), or even roll call responses and "bad conduct" marks written down in class, see Tr. of Oral Arg. in Falvo, supra, O. T. 2001, No. 00-1073, pp. 37-38. And it is open to interpretations that invariably favor confidentiality almost irrespective of conflicting educational needs or the importance, or common sense, of limited disclosures in certain circumstances, say, where individuals are being considered for work with young children or other positions of trust. [FN133]

In other words, Justices Breyer and Souter took a very sympathetic stance toward educational institutions. First, the law is not clear. This ambiguity puts educational institutions in a bind. Second, besides student record privacy, a school must consider other valid issues and core values.

IV. THE LIMITS OF THE LAW

After the two Supreme Court decisions on FERPA, some predicted a major change in practice with respect to student record privacy law. On the other hand, some believed that the Supreme Court decisions on FERPA would have a minimal effect on the practice of student record privacy law as ***707** it currently exists. The premise of the remainder of this article is that the latter point of view is closer to the truth, as the law (and FERPA in particular) is only part of the puzzle that is presented by the issue of privacy for student education records.

In Code, [FN134] Lessig offers a paradigm that can be used to explain the limits of the law when making choices about sweeping issues such as freedom, privacy and intellectual property. The focus of his argument is on the not- always apparent regulation of privacy, intellectual property and free speech on the Internet.

Lessig argues that there are a number of different constraints that must be considered when analyzing how the actions of an individual or an institution are regulated. He posits four such constraints: the law, social norms, the market and architecture or code. For the purpose of the discussion in Code the law is that which is "a command backed up by the threat of a sanction." [FN135] Social norms are defined as "those normative constraints imposed not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of the community impose on each other" [FN136] while "the market constrains through price." [FN137] Architecture is the "built environment" and constrains by its mere existence. For example, a locked door will keep you out of a room, and the physical laws of the universe will not allow travel at warp speed. [FN138] In cyberspace, architecture is the computer code, or as Lessig states: "The software and hardware that make cyberspace what it is constitute a set of constraints on how you behave." [FN139]

The extent to which an entity is regulated is an ever-changing mix of these different factors, the strength of one determining in turn the current strength or weakness of another. [FN140] In analyzing the state of student record privacy at any given institution, or indeed, across the board at institutions of higher education, Professor Lessig's construct is very useful.

A. FERPA as Safe Harbor for University Policy Choices

FERPA is the law regulating privacy policy at an institution. In addition, an institution must consider any relevant state law. Recent cases dealing with ***708** the intersection of state open records law and FERPA make this painfully clear. [FN141]

A Wisconsin case, Osborn v. Board of Regents of University of Wisconsin, [FN142] aptly illustrates the intersection of the law and norms with respect to privacy. The Center for Equal Opportunity, [FN143] a named plaintiff in the case, made open records requests for records [FN144] of applicants to all public law and public

medical schools in the country, as well as perhaps one-half of the public university state undergraduate systems in the country. A number of institutions raised initial concerns, including FERPA, with respect to the records requests. The Center responded by stating it did not want personally identifiable information and that redacted records would suffice. [FN145] The University of Wisconsin was the only institution requested to provide information that litigated the issue to judgment. [FN146]

How does the law explain the fact that the University of Wisconsin was the only public school in the country to litigate the issue to judgment? While open records laws differ from state to state, there is a surprising similarity among states on open records laws. As a federal law, FERPA is the same across the board. The University of Wisconsin looked to FERPA based on its own particular policy choices regarding privacy. By investing the money and time it took to litigate the issue, the University of Wisconsin's resistance to ***709** disclosure evidenced a higher normative commitment to privacy, and some might also note, to affirmative action.

The Wisconsin Court of Appeals upheld the denial of any and all applicant records, in part on the grounds that FERPA offered protection against divulgence of the records. The regulations define student as "any individual who is or has been in attendance at an educational agency or institution ...." [FN147] The Court of Appeals gave this definition a broad spin and found it to include all records of students who had attended a high school, as well as those who took standardized tests. [FN148] In order to reach this broad interpretation, the court construed testing agencies as places the students had attended. [FN149] This construction of "student" and "education agency" was actually broader than the construction given those terms by the Family Policy Compliance Office. [FN150] The Court of Appeals also relied on Wisconsin public policy and the balancing test [FN151] to protect records of applicants, stating:

> [I]t would make no sense to conclude that the very same records of a student who applied to both UW Oshkosh and UW Whitewater, but enrolled only at the latter, could be obtained from the first institution but not the second. Additionally, we are aware of no public policy justification for having unsuccessful applicants for admission to University of Wisconsin schools or programs forfeit their right to privacy of education records submitted during the application process. [FN152]

Finally, the request for record redaction for the records of both applicants and matriculated students was denied, as it would have required the University to create a new record, in contravention of Wisconsin Stat. § 19.36(6). [FN153]

While the decision by the Court of Appeals affirmed the normative value in favor of privacy, the Supreme Court decision did not do so. The Supreme Court ruled in favor of redacting records for all applicants, both those who matriculated and those who did not matriculate at the university, and providing ***710** the redacted information to the Center for Equal Opportunity. [FN154] Per the 6-0 decision of the Wisconsin Supreme Court, [FN155] taking out personally identifiable information from a record alleviates any FERPA issues because the record is no longer a record. [FN156] In the context of this case, the result was to treat the redacted application information as a "public record" under the law.

Neither the Appeals Court nor Supreme Court decision was entirely satisfactory. While the appellate court decision seemed to lack definitional coherence, the Supreme Court decision was problematic from a privacy point of view. As the University of Wisconsin argued in its brief to the Supreme Court, removing the obvious personally identifiable information from each student record might not be sufficient to protect the confidentiality of students. For example, at some campuses in the University of Wisconsin system there may be only one native American freshman female. [FN157]

The Supreme Court decision (indirectly and without confronting the questions raised) poses the philosophical question of when a record becomes a record. In a world of digital databases, defining at what point a collection of information ceases or commences to be a record will be important.

On a practical level, requiring a public institution to use a computer database filled with thousands of records containing personal information and to comb through those records and produce the specific information in a format requested raises a huge administrative burden. The University was faced with the task of manually redacting thousands of individual records, or using the computer to generate the information in the format requested. The Supreme Court gave only cursory consideration to the imposition of this burden, noting somewhat obliquely, "the University is entitled to charge a fee for the actual, necessary, and direct cost of complying with these open records requests." [FN158] Query whether the same decision would have been made if the records were only available in paper. The Wisconsin Supreme Court decision did not address the question of whether the education records of persons who did not matriculate are protected by FERPA.

In another open records/FERPA case, the end result of litigation was a court decision strongly affirming FERPA and thereby upholding university policy choices regarding student record privacy. Two Ohio universities were left in a difficult position when the Ohio Supreme Court concluded that student disciplinary records were not education records covered by FERPA. [FN159] ***711** The Chronicle of Higher Education ("The Chronicle"), in reliance on this ruling, immediately made written requests for disciplinary records for calendar years 1995 and 1996 from both Miami University and Ohio State, requesting that the names be intact and the redaction minimal. [FN160] The two universities were left in the position of violating FERPA or refusing to comply with a ruling of the Ohio Supreme Court.

Both schools involved in the litigation informed the Department of Education of the release of the records, [FN161] the court mandate for future release of records, and the schools' quandary in trying to comply with both the Ohio Supreme Court ruling and FERPA. [FN162] In order to prevent further release of student record information, the Department of Education filed a complaint against the universities, along with a request for preliminary and permanent injunctive relief prohibiting the Universities from releasing student disciplinary records. [FN163] The Chronicle filed a motion to intervene and motions to dismiss based on standing, as well a motion for a reasonable period of time for discovery. [FN164] The DOE responded by filing its own motion for summary judgment. [FN165] The District Court determined that the student disciplinary records were in fact education records under FERPA, and the court granted the Department of Education motion for summary judgment and permanently enjoined the Universities from releasing disciplinary records in violation of FERPA. [FN166]

The Chronicle appealed. [FN167] The Sixth Circuit Court of Appeals held that the plain text of the statute [FN168] broadly construes the phrase "education record" to include those records containing information directly relating to a student which are maintained by an educational agency or institution or person acting for the agency or institution. [FN169] The court affirmed the District Court's grant of summary judgment to the Department of Education and upheld the grant of a permanent injunction and the denial of the discovery requests. [FN170]

As a matter of practice, normative decisions with respect to student record privacy are made by institutions on a day-to-day basis. While litigation may not be involved, the cumulative effect of those decisions may be equally important. While it may not be crystal clear that any one decision is mandated ***712** by FERPA, FERPA does provide a vehicle for supporting university value choices.

B. Code and the Market

Against this backdrop another student record privacy issue, once again dealing with students who had not yet matriculated, made the news. In late July of 2002 it became public that Princeton University's admission staff had "accessed" a web site set up by Yale to inform applicants if they had been admitted to Yale. [FN171] Yale University was the first to develop an online admissions notification system. [FN172] This was accomplished by inputting to the Yale website names, Social Security Numbers and birth dates of students who had applied to Yale. Princeton had this data for a number of students who had applied to both schools. [FN173] Once

this transgression was discovered, the Princeton staff claimed they were merely checking security on the Yale site.

This case, although not dealing with student records per se but with records of applicants, raises some interesting issues about student record privacy in the digital world. How much effort must a university put into electronic record security? Yale was arguably lax in setting up a system to verify the identity of those who were accessing the information in cyberspace. [FN174] On this issue the law has provided little guidance. The Family Policy Compliance Office has to date not issued guidance on digital records. The question was posed a number of years ago and universities are still puzzling over compliance in this area. [FN175]

In a fairly arrogant assessment of the breach of Yale security (or lack thereof) by Princeton, a Princeton alumnus (Walter Kirn) argued that the Ivy League schools are one of the few powerful social institutions that the "public seems loath to challenge or second guess" [FN176] and further, that "[t]here will ***713** be no populist backlash against the Princeton hacking scandal. America needs the myth of meritocracy." [FN177]

The Princeton alumnus may have underrated the value placed on privacy at least by administrators at the institution who did not want to be viewed as being lax in this area. As soon as the investigation was over, Yale quickly responded that it planned "to improve the website with additional security features to prevent unauthorized access." [FN178] Princeton responded by announcing the resignation (at the end of the year) of the top Princeton admissions official and the reassignment of the second-ranking official to an office other than the admissions office. [FN179]

However, Kirn may have a point. Will students quit applying to the Ivy League schools if they do not have adequate record security? Certainly not. Will the students who attend the schools demand adequate security for their records? Probably not. Here is where Lessig would step in and argue that when dealing with privacy issues, the market as a regulator is weak, and laissez-faire will not accomplish the goal of protecting privacy. [FN180]

Student record privacy in the digital world is thus not just up to the law, but also the norms, the market, and the code, and how they are applied at any given university.

V. THE CHALLENGE FOR EDUCATIONAL INSTITUTIONS

A review of the above cases on FERPA raises more questions than answers. Senator Buckley was somewhat prescient in 1974 when he noted that the growth of computer data banks on students posed a serious threat to personal privacy.

FERPA has been invaluable in that it promotes privacy. The law offers educational institutions a structure from within which to operate. FERPA lays the ground rules. However, if at the end of the day, you have read the law and the regulations, you have skimmed the multitude of guidance letters from the Family Policy Compliance Office, you have read the cases, you have ***714** posted your student record question on NACUANET and even the indefatigable Steve McDonald [FN181] has no answer, what advice do you give your client?

At this point a choice has to be made, a choice that will involve not just the law, but also the norms of the institution and, if the question involved an online record, the code. As Lessig argues, "[t]he latent ambiguities about the protection of privacy, for example, are being rendered patent by the evolution of technology. And this in turn forces us to choose." [FN182]

Consider this example of a student privacy issue that might arise in the digital records context. Currently, students who attend one of the District of Columbia universities that belong to the Washington Library Research Consortium may access a wealth of online resources, including LEXIS-NEXIS, from a remote location by entering a "Patron ID" on the online access page. [FN183] The Patron ID is described as follows: "Patron ID may be your Social Security Number, University ID number, or

Library User Barcode number. Enter only digits ... no spaces or hyphens." [FN184]

Several questions arise. If the student chooses to enter a Social Security Number ("SSN"), is the transfer of that information encrypted? If not, should there be a notice on the web page advising students to use their SSN at their own risk? Should this choice be given to the students at all, given that a library bar code can be easily obtained, although it would be up to the student to keep the card current? If the page is not encrypted, and the SSN falls into the wrong hands, is this a release of student record information? You could spend a lot of time puzzling over whether Falvo requires this conclusion, and decide it is probably not a release of an education record if you go along with the dicta in Falvo. As was noted above, the dicta in that decision was that the phrase "education record" should be read very narrowly and focus should be on protecting institutional records. Also, if you consider the principle of federalism enunciated by the Court, getting down to this level of regulation would seem overly broad.

There are also other federal (and perhaps state) laws that might need to be consulted. [FN185] The public institutions would want to look at the case law, if any, that is pertinent under the Privacy Act of 1974. Query whether this scholarly perusal of the law will necessarily lead you to the entire answer you want to give your clients.

***715** Consider another example that involves the intersection of computers and student record privacy. [FN186] Your university has just installed an online student record system. The system allows the user to check a box for disability, which might be useful in the admissions process if the university supports a special admissions review for students with disabilities. Query that if the admissions staff inputs this data into the system, who will remove this information once the student has matriculated. Query who may have had access to this information panel in the meantime, and if that access was appropriate. Query finally whether the best option might not be to simply disable this field, i.e. the confidentiality concerns might outweigh the convenience factor with regard to this information.

Higher education attorneys may or may not be aware of resources that are available to assist in answering questions not covered entirely by the text or regulations under FERPA. Many consider the best resource at the time on digital student record privacy issues to be a 1997 white paper entitled Privacy and the Handling of Student Information in the Electronic Networked Environments of Colleges and Universities. [FN187] This paper is timeless in that it deals with basic principles rather than specific rules. The principles included are notification, minimization, secondary use, nondisclosure and consent, need to know, data accuracy, inspection and review, information security, integrity and accountability, and education.

To a certain extent, these principles track the Code of Fair Information Practices mentioned by Senator Buckley in his address to the Legislative Conference of the National Congress of Parents and Teachers back in 1975. In that address Senator Buckley stated:

> A Commission established at the Department of Health, Education and Welfare to review automated Personal Data Systems has drawn up a "Code of Fair Information Practices" which rests on five basic principles: There must be no personal data record-keeping systems whose very existence is secret; There must be a way for an individual to find out what information about him is in a record and how it is used; There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent; There must be a way for an individual to correct or amend a record of identifiable information about him; Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data. It is in the context of the principles of Fair Information Practices ***716** that the appropriateness of the application of the law to higher education and college students becomes readily apparent. [FN188]

Higher education attorneys should not underestimate the amount of thought that has gone into the issue of online student record privacy by those creating the

information architecture system at the university. An entire subculture of privacy gurus exists in the university environment, [FN189] and they have spent countless hours trying to solve the issued student record privacy in cyberspace issue. Specifically, this group works with the development of software between the network and the applications. This software provides services such as identification, authentication, authorization, directories, and security, all issues that intersect with student record privacy.

This brings us back to the rules versus standards debate. While Scalia's rules-based interpretation of FERPA would have offered greater privacy in Falvo, a rules-based approach will not always be concomitant with greater privacy protection. [FN190] In Code, Lessig argues that the rules based approach should be abandoned by the judges when the core value would not be preserved by that approach. [FN191]

In cases of simple translation (where there are no latent ambiguities and our tradition seems to speak clearly), judges should firmly advance arguments that seek to preserve original values of liberty in a new context. In these cases there is an important space for activism. Judges should identify our values and defend them, not necessarily because these values are right, but because if we are to ignore them, we should do so only because they have been rejected--not by the court but by the people. In cases where translation is not so simple (cases that have latent ambiguities), judges, especially lower court judges, have a different role. In these cases, judges (especially lower court judges) should kvetch. They should talk about the questions these changes raise, and they should identify the competing values at stake. [FN192]

Few would disagree that privacy, or the ability to control the release of personal data, is a core value in our society. Few would disagree that the goal of FERPA is to protect this value. What remains an open question is the ***717** extent to which the principles underlying FERPA (and enunciated in both the EDUCASE white paper and the congressional record) will be faithfully adhered to in the context of online student records systems. Attorneys for institutions of higher education can play an important role in how that question is answered by going beyond the role of passive interpreters of rules. Without abdicating their responsibility to the rule of law, attorneys can highlight for policy makers at the educational institution the implicit choices that are being made by either action or inaction. In the online student records context, what the choices are necessarily involves an approach that encompasses familiarity with the law (FERPA) as well as awareness that there exists a draft of best practices for identifiers, authentication and directories. [FN193]

SUMMARY

We are left with a law that was never really intended. Higher education lawyers have spent hours and hours dealing with something that was a drafting error. However, over the years of learning to understand and comply with FERPA, a normative expectation of privacy for records of postsecondary students has been created, and as members of the bar, we are honor bound to help our clients comply with both the letter and the spirit of the law.

As lawyers we can agree that it is wise to read Supreme Court decisions that directly affect an area of your practice, even if the opinions themselves do not always yield definitive answers. Most lawyers would also agree (at least in practice) that the statute and the code of federal regulations and other sources of guidance should be consulted. Maybe even a law review article here or there.

The questions presented above regarding student records privacy may not be immediately solvable, and this is something that presents a quandary for lawyers, who are expected to come up with answers. The premise of this article is that the challenge for lawyers over the next decade with respect to FERPA may be simply to learn to ask the right questions.

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to becoming an employee of The Catholic University of America in June of 2002, the author worked as an outside counsel to the Office of General Counsel of The Catholic University of America and as an educational consultant on a short term project for the Family Policy Compliance Office. The author would like to thank Craig Parker, General Counsel, The Catholic University of America, for his comments and suggestions on this article, and for giving the author an entry into the world of higher education law.

[FN1]. 20 U.S.C. § 1232g (2002).

[FN2]. See, e.g., ARCHIVES OF NACUANET@peace.ease.lsoft.com March 8, 1996) at http://peach.ease.lsoft.com/archives/NACUANET.html (last visited Apr. 6, 2003) (A list-serv archive of the National Association of College and University Attorneys ("NACUA") dating back to June of 1993 and containing over 1,000 posts on FERPA. The NACUA listserv membership currently consists of over 1,400 college and university attorneys who post and answer higher education related legal questions).

[FN3]. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999). In the author's view, the book should be required reading for anyone charged with institutional responsibility for student record privacy.

[FN4]. Lessig is currently a Professor of Law at Stanford Law School and the Founder of the Stanford Center for Internet and Society. He clerked for both Justice Scalia of the United States Supreme Court and Judge Posner of the Seventh Circuit Court of Appeals. For an interesting article on Lessig, see Steven Levy, Lawrence Lessig's Supreme Showdown, available at http:// www.wired.com/wired/archive/10.10/lessig_pr.html (last visited Apr. 6, 2003). Lessig has also been referred to as "indisputably one of the greatest American theorists thinking and writing about the new challenges of digital technologies." Susanna Frederick Fischer, Crusading Against the Dinosaurs: A Review of The Future of Ideas, by Lawrence Lessig, 10 COMMLAW CONSPECTUS 251 (2002) (book review).

[FN5]. LESSIG, supra note 3, at 89.

[FN6]. Id. at app. 1. "Social norms constrain differently. By social norms, I mean those normative constraints imposed not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of a community impose on each other." Id.

[FN7]. The education bill was Senate Bill 1539, which, as House Bill 69, became Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974). Section 513 of Public Law Number 93-380 contains the FERPA text, 88 Stat. 484, 571. This text was further amended by Senate Joint Resolution 40, 93d Cong., 88 Stat. 1855, 1859 (1974). This later public law was the law that added the current definition of "education record." See also the legislative history of S. 1539, 93d Cong. (2d Sess. 1974), available at 120 CONG. REC. S14,579-605 (daily ed. May 14, 1974), reprinted in The Family Educational Rights & Privacy Act: A Legal Compendium (Nat'l Assoc. of Coll. & Univ. Attorneys) (Steven J. McDonald ed., 2d ed. 2002) [hereinafter NACUA COMPENDIUM].

[FN8]. U.S. Senator from New York, 1971-1977, and Senior Judge for the U.S. Court of Appeals for the District of Columbia Circuit from December of 1985 until his retirement in September of 2000.

[FN9]. 121 CONG. REC. S13,991 (daily ed. May 13, 1975) (statement of Sen. Buckley), reprinted in NACUA COMPENDIUM, supra note 7, at 92.

[FN10]. Compare Brian Jones on The U.S. Department of Education Speaks, Audio Tape: NACUA 42nd Annual Conference, held by the National Association of College and University Attorneys (June 28, 2002) ("The traditional view taken by the Family Policy Compliance Office that any document with information personal to a student maintained for any period of time becomes an education record is way too broad and flies in the face of the federalist approach this Administration has embraced.") (on file with the National Association of College and University Attorneys), with JAMES L. BUCKLEY, IF MEN WERE ANGELS: A VIEW FROM THE SENATE 82 (1974):

> The heresy that has resulted in the concentration of authority and responsibility in Washington has its source in the arrogance that assumes a majority in Congress and the central planners in the bureaucracy are better able to establish governmental priorities, design and build roads, meet social responsibilities, educate children, etc., than are the elected representatives of the several states. Democracy operates slowly, and some states are inevitably more alert than others to old and new problems. Yet if the concept of Federalism is important in the equation of American freedom-- and I profoundly believe it is--then it necessarily requires a willingness to put up with inefficiencies, with delays, and with the fact that the electorates of some states may have different views as to what constitutes social responsibility and the rights and interests of their citizens than transient majorities in the Congress of the United States.

[FN11]. 120 CONG. REC. S14,587-8 (daily ed. May 14, 1974), reprinted in NACUA COMPENDIUM, supra note 7, at 43-44:

> Much of the controversy concerning these school records centers around the use of classroom questionnaires that are financed by government grants, often the Department of Health, Education and Welfare or a similar agency at the state or local levels of government. These questionnaires are thinly disguised as "research projects" although in actuality they often amount to highly objectionable invasions of the psychological privacy of school children.

[FN12]. 120 CONG. REC. S14,602 (daily ed. May 14, 1974), reprinted in NACUA COMPENDIUM, supra note 7, at 58.

[FN13]. 120 CONG. REC. S14,588 (daily ed. May 14, 1974), reprinted in NACUA COMPENDIUM, supra note 7, at 44.

[FN14]. 120 CONG. REC. S14,597 (daily ed. May 14, 1974), reprinted in NACUA COMPENDIUM, supra note 7, at 52.

[FN15]. 120 CONG. REC. S14,581 (daily ed. May 14, 1974), reprinted in NACUA COMPENDIUM, supra note 7, at 37 (referring to an article written by Diane Divokey, How Secret School Records Can Hurt Your Child, PARADE, March 31, 1974).

[FN16]. Id.

[FN17]. See Doe v. McMillan, 412 U.S. 306 (1973).

[FN18]. Id. at 308.

[FN19]. Id. at 324.

[FN20]. See Daniel J. Solove, Conceptualizing Privacy, 90 CAL. L. REV. 1087, 1102 (2002) (quoting Ruth Gavison, Privacy and the Limits of the Law, 89 YALE L.J. 421, 438 (1980)). Solove argues that the typical claim for privacy is one for state interference in the form of legal protection against other individuals, rather than a claim for noninterference by the state. Id.

[FN21]. 120 CONG. REC. S14,582 (daily ed. May 14, 1974), reprinted in NACUA COMPENDIUM, supra note 7, at 38.

[FN22]. Interview with Sheldon Steinbach, General Counsel, American Council on Education, at the Catholic University of America, Office of General Counsel (Nov. 7, 2002). Per Mr. Steinbach, the error was discovered by the higher education community while the legislation was in conference. Id. The legislator in charge of the Education Amendments of 1974 refused to reopen the legislation due to the debates that would have ensued over the anti-busing riders attached to education bills in that era. Id.

[FN23]. See supra note 7 and accompanying text.

[FN24]. 120 CONG. REC. S13,991 (daily ed. May 13, 1975), reprinted in NACUA COMPENDIUM, supra note 7, at 92.

[FN25]. 120 CONG. REC. S13,991 (daily ed. May 13, 1975), reprinted in NACUA COMPENDIUM, supra note 7, at 92.

[FN26]. See 20 U.S.C. § 1232h (2000). For a summary of the changes through 1995, see H.R. Rep. No. 104-94, at 5 (1995), prepared to accompany the Family Privacy Protection Act of 1995, which did not pass:

> The Kemp Amendment of 1974 (P.L. 93-380, August 21, 1974) required that parents of pupils participating in Federally assisted educational "research or experimentation program[s] or project[s]" be provided access to the instructional materials used therein .... The Hatch Amendment (P.L. 95- 561, November 1, 1978) enhanced pupil protection by ... prohibit[ing] requiring pupils to participate in certain forms of testing as part of a Federally assisted education program, without the prior consent of the pupil (if an adult or emancipated minor) or the pupil's parent/guardian.

This requirement for active consent was limited to psychiatric or psychological tests or treatments that gather information on categories such as political affiliation, sexual behavior or attitudes, and other categories listed in the law if the tests had the primary purpose of revealing private information. Id. These two provisions were limited to programs for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. The Grassley Amendment, General Education Provisions Act, Pub. L. 103-227, § 439(a), 108 Stat. 125 (1994), revised the consent requirements to "any survey, analysis, or evaluation that was Federally assisted." This latter amendment still only impacted Department of Education surveys and not surveys funded by any Federal department or agency. It did contain a lower threshold for the consent requirement: "questions that happen to reveal private information." General Education Provisions Act § 439(a).

[FN27]. The PPRA transfers rights to the student at age eighteen or the age of

emancipation under State law. Thus, a high school student who turns eighteen owns the rights under the statute. 20 U.S.C. § 1232h(c)(5)(B) (2000).

[FN28]. 20 U.S.C. § 1221(c)(1) (2000):
The term "applicable program" means any program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. The term includes each program for which the Secretary or the Department has administrative responsibility under the Department of Education Organization Act [20 U.S.C. § 3401] or under Federal law effective after the effective date of that Act.
20 U.S.C. § 1221(c)(1) (2000).

[FN29]. The No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1061, 115 Stat. 1425 (2002). This law also expanded the categories for prior consent to include religious practices. For a short summary of the changes, see Recent Changes Affecting PPRA and FERPA, available at http://www.ed.gov/offices/OM/fpco/hot_topics/ht_06-20-02.html (last visited Apr. 13, 2003).

[FN30]. Passive, in the sense of notice and an opportunity to object, versus active, which requires prior written consent.

[FN31]. Personal information is defined as individually identifiable information, including a student's or parent's first and last name, home address, telephone number or social security number. 20 U.S.C. § 1232h(c)(6)(E) (2000).

[FN32]. For a copy of the legislation as originally introduced by Congressman Tiahrt, see 147 CONG. REC. H2,577 (daily ed. May 23, 2001). As drafted, the legislation was even broader, requiring prior written consent for any survey administered that dealt with the sensitive subjects listed in the law. See id.

[FN33]. See 20 U.S.C. § 1232h(c) (2000).

[FN34]. See 20 U.S.C. § § 1232(a), (b) (2000) (emphasis added).

[FN35]. See LESSIG, supra note 3, at 87 ("Thus, four constraints regulate ... [c]hanges in any one will affect the regulation of the whole. Some constraints will support others; some may undermine others. A complete view, however, should consider them together.").

[FN36]. 20 U.S.C. § § 1232g (a), (b) (2000).

[FN37]. The rights that belong to the student at the postsecondary level belong to the parents of the student at the elementary and secondary level. 20 U.S.C. § 1232g(d) (2000).

[FN38]. 20 U.S.C. § 1232g(a)(4) (2000).

[FN39]. 20 U.S.C. § 1232g(a)(1) (2000).

[FN40]. 20 U.S.C. § 1232g(b) (2000).

[FN41]. 34 C.F.R. § 99.31(a)(11) (2002). The regulations define directory information as follows:

> Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

34 C.F.R. § 99.3 (2002).

[FN42]. Id.

[FN43]. 20 U.S.C. § 1232g(a)(1) (2000).

[FN44]. 20 U.S.C. § 1232g(a)(2) (2000).

[FN45]. Annual Requirement, 61 Fed. Reg. 59,292 (Nov. 21, 1996) and 20 U.S.C. § 1232g(e) (2000).

[FN46]. United States v. Miami Univ., 294 F.3d 797, 809 (6th Cir. 2002).

[FN47]. Gonzaga Univ. v. Doe, 536 U.S. 273, 292, 122 S. Ct. 2268, 2280 (2002) (pagination is to the preliminary print of the U.S. Reports).

[FN48]. See Carolyn Hanahan, Education Law, 55 SMU L. REV. 891, 929-30 (2002) (commenting on Falvo v. Owasso Indep. Sch. Dist., 233 F. 3d 1203 (10th Cir. 2000)).

> As of this writing, the Supreme Court had not issued a decision in the appeal of this case. Its decision is expected in late Spring of 2002. However the case is decided, it will be an important one for school districts. Having the Supreme Court's view of FERPA will be of valuable guidance and may initiate a change in how the Department of Education reads the law.

Id.

[FN49]. See Kelly Nash, How the Tenth Circuit Misinterpreted The Family Educational Rights and Privacy Act in Falvo v. Owasso Independent School District, 229 F. 3d 956, (10th Cir. 2000), 25 HAMLINE L. REV. 479 (2002). In discussing the Supreme Court opinion in Falvo, Nash notes:

> In its brief opinion, the Supreme Court avoided discussing whether or not FERPA's language was ambiguous, and thereby, did not examine any [sic] FERPA's legislative history. As a consequence, the Court did the educational community and the FPCO a great disservice by failing to clarify and precisely define what rights are set forth under the statute.

Id. at 511.

[FN50]. 534 U.S. 426 (2002).

[FN51]. Linda Greenhouse, The Competing Visions of the Role of the Court, N.Y. TIMES, July 7, 2002, § 4 (The Week in Review), at 3:

> It is a debate over text versus context. For Justice Scalia, who focuses on text, language is supreme, and the court's job is to derive and apply rules from the words chosen by the Constitution's framers or a statute's drafters. For Justice Breyer, who looks to context, language is only a starting point to an inquiry in which a law's purpose and a decision's likely consequence are the more important elements.

See also, Kathleen M. Sullivan, The Justices of Rules and Standards, 106 HARV. L. REV. 22 (1992).

[FN52]. Greenhouse, supra note 51 and Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989).

[FN53]. Transcript of Oral Argument, Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (No. 00-1073), available in 2001 WL 1502860, at *7-12 (Nov. 27, 2001).

[FN54]. Falvo, 534 U.S. at 436 (Scalia, J., concurring) and Transcript of Oral Argument, Falvo, (No. 00-1073), available in 2001 WL 1502860, at * 12.

[FN55]. For more on Justice Breyer's approach to deciding cases, see Stephen Breyer, Madison Lecture: Our Democratic Constitution, 77 N.Y.U. L. REV. 245 (2002).

[FN56]. Transcript of Oral Argument, Falvo, (No. 00-1073), available in 2001 WL 1502860, at *12. "Justice Breyer: ... All right. In your view, are all those things now forbidden by Senator Buckley's statute that the teacher cannot run her class that way?" Id.

[FN57]. Falvo, 534 U.S. at 428.

[FN58]. Id.

[FN59]. This is the office within the U.S. Department of Education that is charged with enforcing FERPA. See 20 U.S.C. § 1232g(g) (2000).

[FN60]. See Letter from LeRoy Rooker, Director of the Family Policy Compliance Office, to the Labor Relations Specialist for the New York State United Teachers (July 15, 1993) (on file with the Journal of College and University Law):

> Likewise, FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

[FN61]. Id.

[FN62]. Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F. 3d 1203, 1216 (10th Cir. 2000).

[FN63]. See Gundlach v. Reinstein, 924 F. Supp. 684, 692 (E.D. Pa. 1996), aff'd, 114 F.3d 1172 (3d Cir. 1997); Norris by Norris v. Bd. of Educ. of Greenwood Cmty. Sch. Corp., 797 F. Supp. 1452 (S.D. Ind. 1992); and Meury v. Eagle-Union Cmty. Sch. Corp., 714 N.E. 2d 233 (Ind. Ct. App. 1999).

[FN64]. See supra note 60 and accompanying text. See also Amy Bennett & Adrienne Brower, "That's Not What FERPA Says!": The Tenth Circuit Court Gives Dangerous Breadth to FERPA in its Confusing and Contradictory Falvo v. Owasso Independent School District Decision, 2001 BYU EDUC. & L.J. 327 (2001); and Nash, supra note 49, at 479.

[FN65]. Falvo, 233 F.3d at 1201.

[FN66]. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 533 U.S. 927 (2001) (order granting certiorari).

[FN67]. Petitioners' Brief, Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (No. 00-1073), available in 2001 WL 1033840, at *i (Aug. 23, 2001).

[FN68]. 20 U.S.C. § 1232g(a)(4) (2000).

[FN69]. The statute defines sole possession records as "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. § 1232g(a)(4)(B)(i) (2000). The legislative history contained in the Joint Statement in Explanation of Buckley/Pell Amendment states as follows on this exception:

> The amendment makes certain reasonable exceptions to the access by parents and students to school records. The private notes and other materials, such as a teacher's daily record book, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aids would not be available to parents or students, provided they are not revealed to another person, other than in the case of a substitute who performs another's duties for a temporary period.

120 CONG. REC. S39,864 (daily ed. Dec. 13, 1974) (statement of Sens. Buckley & Pell), reprinted in, NACUA COMPENDIUM, supra note 7, at 83.

[FN70]. "The grade being 'called out' is information that is maintained by the Owasso School District, by and through its agent, the teacher." Respondents' Brief, Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (No. 00-1073), available in 2001 WL 1242059, at *8 (Oct. 12, 2001).

[FN71]. For example:

> The term "education records" in FERPA, 20 U.S.C. 1232g(a)(4)(A), refers to materials that are preserved or retained by an educational agency or institution, or someone acting for such agency or institution, as an institutional or official record of a student. That term does not include student work that is created, used, or kept in the classroom and is not made part of a student's institutional record.

Brief for the United States as Amicus Curiae, Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (No. 00-1073), available in 2001 WL 1057046, at *11 (Aug. 23, 2001).

[FN72]. "Nor is FERPA limited in scope based on the identity of the agent disclosing

the information." Brief of Eagle Forum Education and Legal Defense Fund as Amici Curiae, Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (No. 00-1073), available in 2001 WL 1222403, at *4 (Oct. 12, 2001).

[FN73]. On the Eagle Forum web page the mission statement states (in part) as follows:

We oppose all encroachments against American sovereignty through treaties (such as the International Criminal Court) and United Nations conferences (such as those aimed at imposing energy restrictions on the U.S., registering privately owned guns, imposing global taxes, or promoting feminist goals) ..... We support parents' rights to guide the education of their own children, to protect their children against immoral instruction and materials, and to home-school without oppressive government regulation.

We oppose federal control of the public school classroom through Goals 2000, School-to-Work, national tests, or national standards.

Eagle Forum was a primary factor in passing the Protection of Pupil Rights Amendment, and we strongly support its enforcement to protect children against psychological testing without parental consent.

http://www.eagleforum.org/misc/descript.html (last viewed Mar. 30, 2003).

[FN74]. Brief of Amici Curiae National School Boards Association, et al., Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (No. 00- 1073), available in 2001 WL 967470, at *4 (Aug. 23, 2001).

[FN75]. The United States argued:

Although the Department of Education previously has expressed a view of "education records" that includes student work once it is collected by the teacher ... we have concluded, on the basis of our review of the relevant statutory materials, as discussed below, that FERPA does not reach student work unless they are maintained as institutional records of the school.

Brief for the United States as Amicus Curiae, Falvo (No. 00-1073), available in 2001 WL 1057046, at *11 n.6.

[FN76]. 536 U.S. 273 (2002).

[FN77]. Brief of Amici Curiae American Association of Community Colleges et al. at 7-8, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (No. 01-679).

[FN78]. Transcript of Oral Argument, Falvo, (No. 00-1073), available in 2001 WL 1502860, at *12.

[FN79]. Id. at *13-14.

[FN80]. Id. at *17-18.

[FN81]. Id. at *18.

[FN82]. Scalia's response was "We usually don't interpret statutes that way." Id.

[FN83]. Id. at *38.

[FN84]. Id. at *37-38.
QUESTION: No, no. Let's use my examples. My example was I act up in class. The teacher says you get a check for reasoned self-discipline. She says to the whole class--that's how she keeps order in her class. That used to be true in the third grade. My teacher, Miss Rosmond--
(Laughter.)
QUESTION: --whom I recall with fondness, did--
(Laughter.)
QUESTION: All right. But now--now, what about my example? I'd like an answer to that example.
MR. WRIGHT: If she's making a record, I would say that would be a disclosure.
Id. at *38.

[FN85]. Id. at *47.

[FN86]. Id. Justice Scalia proceeded to say: "[T]hey have no right to keep information confidential. They have a right to keep the record confidential. If the information is obtained from some source other than the record, the statute does not--does not address its release." Id.

[FN87]. Id. at *39.

[FN88]. Id. at *51-52.

[FN89]. Falvo, 534 U.S. at 432.

[FN90]. Id. at 433.

[FN91]. Id.

[FN92]. Id. (internal citations omitted).

[FN93]. Id. at 434.

[FN94]. Id.

[FN95]. Id. at 433.

[FN96]. Id. at 434-35.

[FN97]. Id. at 436-37.

[FN98]. 120 CONG. REC. S36,538 (daily ed. Nov. 19, 1974), reprinted in NACUA COMPENDIUM, supra note 7, at 73.

[FN99]. See Transcript of Oral Argument, Owasso Indep. Sch. Dist. No. I- 011 v. Falvo, 534 U.S. 426 (2002) (No. 00-1073), available in 2001 WL 1502860, at *29-30 (Nov. 27, 2001). Counsel for the U.S. Department of Justice addressed the Court's pressing questions about how long a record must be kept by the school to become an education record under the statute:

> We don't think that duration is dispositive. We think because the act was designed--we point this out at pages 20 and 21 of our brief, and page 23 of our brief--was intended to reach records that the school was going to be--use to make decisions about the student in an institutional way, institutional decisions about the student, which we think are different from what goes on in the classroom in the day-to-day learning experience, and so we think that that could include records, or some materials that are kept by a principal that wouldn't necessarily go into the permanent record, but would be part of the school's overall supervision of the student for that school year, so we do not think that the duration of the period is dispositive.

Id.

[FN100]. Brian Jones, Address at the 42nd Annual Conference of the National Association of College and University Attorneys (June 28, 2002), in NACUA, 42ND ANNUAL CONFERENCE (2002).

[FN101]. Falvo, 534 U.S. at 433.

[FN102]. This is indeed what occurred. See Memorandum from Hogan & Hartson LLP, to General Counsel of University Clients (Feb. 20, 2002) (on file with author), which states in relevant part:

> Far less clear than the holding is what potential import college and university counsel should attach to the Court's broader statements which suggest that FERPA covers only "institutional records kept by a single record custodian." ... The Court's analysis appears to rest at least partly on the theory that "education records are institutional records kept by a single record custodian, such as a registrar." ... However, to conclude that FERPA no longer applies to the millions of other student records that educators handle would seem to us risky and almost certainly unwarranted at this point.

Id. (quoted with permission) (internal citations omitted) (on file with author).

[FN103]. See Cass R. Sunstein, Problems with Rules, 83 CAL. L. REV. 953, 966-67, (1995):

> Principles are not alternatives to rules, factors, guidelines or standards .... Commonly, the term "principle" in law refers to the moral or political justification behind rules .... [P]rinciples tend to bear on cases without disposing of them .... As I understand it here, a legal principle is different from a legal standard in the sense that the latter "covers" individual cases without specifying the content of the analysis in particular instances, whereas a principle is a background notion that does not by itself cover an individual case, but is instead brought to bear on it as a relevant consideration.

[FN104]. See Jones, supra note 10.

[FN105]. See id.

[FN106]. Id. Questions involved whether a public institution, who had a student complain to OCR and then to an elected official, could respond to inquires by the elected official without violating FERPA, and whether releasing required information under the new Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107-188, 116 Stat. 631 (2002), would require a waiver from the

student about whom information would be disclosed.

[FN107]. 536 U.S. 273, 122 S. Ct. 2268 (2002).

[FN108]. Petitioners' Brief at 5, Gonzaga Univ. v. Doe, 536 U.S. 273, 122 S. Ct. 2268 (2002) (No. 01-679).

[FN109]. Id. at 5-6. See also id. at 6 n.2.

[FN110]. Gonzaga, 536 U.S. at 277, 122 S. Ct. at 2272.

[FN111]. Petitioners' Brief at 6, Gonzaga (No. 01-679).

[FN112]. Gonzaga, 536 U.S. at 277, 122 S. Ct. at 2272.

[FN113]. Verbatim Report of Proceedings, 95-96, 99, Doe v. Gonzaga Univ., No. 94-2-03120-6 (Spokane County Super. Ct. May 31, 2002) (on file with the Journal of College and University Law). Mr. Cartwright is outside counsel for Gonzaga at the trial level, Siddoway is counsel for John Doe.

MR. CARTWRIGHT: Okay. I did want to address the FERPA issue. That's of some significance to the University as to whether or not every time they interact with the state agency they run the risk of violating FERPA.

THE COURT: What is it, what is the particular allegation of the FERPA violation?

MR. CARTWRIGHT: FERPA basically says that --

THE COURT: I know what it says. I want to know what the violation is. I went over these and for the life of me I can't put my finger on what exactly was given out. Is it the name to Adelle Nore, was it Mr. Sweeney's or Dr. Sweeney's putting it in the computer, or what is it we are talking about.

MR. CARTWRIGHT: My understanding was that when Susan Kyle gave John Doe's name to Adelle Nore that that was alleged to be personally identifiable information and therefore violated FERPA.

THE COURT: Is that it?

MS. SIDDOWAY: Yes, it is disclosures to Ms. Nore.

THE COURT: Not Dr. Sweeney's writing things in his computer. How come we are talking about that in both the briefs?

MS. SIDDOWAY: It is my impression that you know the basis for Mr. Cart- wright's motion. He contends the information that was disclosed was not educational records and seems to be focusing on whether there was some full embodiment of the information.

THE COURT: Okay. Okay.

...

THE COURT: I'm not saying this is--this is one case in the whole world of things. You can argue all you want what far-reaching effects this may have. In fact, everybody that has come in here has argued that. I can tell you this, I don't care what those particular ramifications are. What ought to be done is justice for the parties here in this particular case. That's one of the reasons why I am not going to give you a declaratory judgment because each case is decided on its own fact. Does that make it clear enough? Twenty seconds or you can forget that argument. Twenty seconds is up.

MR. CARTWRIGHT: Then I am done.

THE COURT: Good.

[FN114]. Id. at 102-04.

THE COURT: Mr. Cartwright, one-time history, I guess one time can be a practice; can't it?

MS. SIDDOWAY: Well, particularly --

THE COURT: If he's going to argue as one, I don't see the differences. Too clever for your own good.

MS. SIDDOWAY: If you feel comfortable that you did the right thing in that one case.

THE COURT: Do you have to have that practice like he says you have to?

MS. SIDDOWAY: There has to be policy and practice but I have two things to say about that. First I have overriding concern with Mr. Cartwright's summary judgment on FERPA. That is, I don't think his summary judgment burden under Celotex and the Baldwin case, Washington State Supreme Court addresses the Celotex burden. Celotex does say that he can come in and demonstrate to you on affidavit deposition. There does not appear to be questions of fact and I do have to come in and respond. I think there was some counsel abuse in Celotex. I think kind of a dancing cowboy motion, that Mr. Cartwright can pick up a gun, point it at my feet, start shooting and I have got to dance. Well, a summary judgment motion is a significant motion. He's asking you to throw my client out. He has the burden of doing more than picking up the gun and discharging it at my feet. He has a burden to show you something in the record that suggests that I don't have a cause of action under the FERPA claim and he hasn't given you anything in his materials that meet his summary judgment burden.

THE COURT: I think if I look at the law and the evidence in the light most favorable to Gonzaga, I could find that it's not the same; is it?

MS. SIDDOWAY: No, it isn't. I also do want his citation. The Rutgers case was very different. In that case, the University's response was 180 degrees different from what Gonzaga's has been. Response in Rutgers they did seek the summary judgment. Rutgers plaintiffs came in and said we think you violated FERPA. Oh, my gosh, we did. We are sorry, we admit we did. Well, fix it. It will never happen again.

THE COURT: I dare say it didn't happen in this case.

MS. SIDDOWAY: It didn't. Every witness said we did the right thing. We did what we always do. This is what we're required to do. So Mr. Cartwright can't tell you his case is like Rutgers. They came in on summary judgment, Your Honor. We did goof up. We admit we figured there is no policy and practice. Mr. Cartwright can't show that because Gonzaga has defended the position it has taken in this case. It said it did the right thing and said it was supposed to report it. Also, does this essentially satisfy his summary judgment burden of demonstrating to the absence.

THE COURT: His own witnesses at Gonzaga forms the basis for finding a policy or practice, if I look at the light most favorable to you.

MS. SIDDOWAY: Precisely. They admitted they do and they have no compunctions about the fact they did.

[FN115]. Id. at 93-95.

THE COURT: I would just love to get rid of this case as far as a Title 42, 1983 action and under color of state law but, boy, under a summary judgment scenario, if I have to look at all those facts in the light most favorable to the plaintiff, that's something you have got to hash out at trial whether there was some State action. I think in actuality Gonzaga does what it does and not to the direction of OSPI, but is that good enough? I don't know.

MR. CARTWRIGHT: We are going to ask the jury whether this is decided under color of state law.

THE COURT: You can get--you pick up real fast. It may very well be that after Ms. Siddoway puts on her case I will dismiss. You have got to have some evidence right now. I take your pleadings, for what they're worth and what they're worth to me, and there is nothing to show there is anything under color of state law, otherwise you would never have OSPI in [here] in the first place.

MR. CARTWRIGHT: Maybe I am not doing a very good job of explaining, but the reason OSPI is joined as a friendly party, we don't have a beef with OSPI. There is an identity of interest[;] there is a commonality of interest with OSPI. We wanted them here to tell the Court what--how they viewed this case and how they view their regulation.

THE COURT: Ms. McGuire, she's been an amicus.

MR. CARTWRIGHT: We didn't bring them to say we were just doing what they told to us do and hands off us because of that.

THE COURT: Sometimes you can get too clever for your own good. I think that is exactly what that third-party complaint does you said and you want to go and dismiss any claims. I don't think it's going to help you out much either right now in light of all the allegations you have made. That's neither here nor there. I guess that is a matter of argument. Ms. Siddoway can tell me if I am right or wrong.

MR. CARTWRIGHT: Probably tell you are right. I realize you read the briefs on the issue of color of state law and I am not going to spend much time on that.

THE COURT: I was going to grant this until I went back because your brief talked too much about it. One of those Shakespearean, Me thinks he doth protest too much. OSPI very briefly points to the art about poor faith and why I shouldn't grant this and I have to look at the pleadings in the light most favorable to the plaintiff.

[FN116]. Petitioners' Brief at 7, Gonzaga (No. 01-679).

[FN117]. Doe v. Gonzaga Univ., 24 P.3d 390, 396 (Wash. 2001), rev'd Gonzaga Univ. v. Doe, 536 U.S. 273, 122 S. Ct. 2268 (2002).

[FN118]. Gonzaga, 24 P.3d at 396.

[FN119]. Id.

[FN120]. The following FERPA related arguments were made in Appellant's brief to the Washington Court of Appeals:

Does FERPA create any "rights, privileges, or immunities secured by the Constitution and laws" within the meaning of 42 U.S.C. § 1983 (2000) where FERPA simply conditions the grant of educational funding on a school's not having a "policy or practice" of releasing educational records without parent or student consent?; Is Gonzaga liable to plaintiff under § 1983 where Gonzaga's obligations under FERPA arose only because Gonzaga was receiving federal funds and not because Gonzaga was acting "under color of state law?"; Is Roberta League liable to plaintiff under § 1983 where FERPA did not impose any duty or liability on League, as opposed to Gonzaga?; Did the trial court err in instructing the jury that Gonzaga acted under "color of state law" if Gonzaga was "in a close working relationship with state authorities"?; Was the evidence insufficient to support a finding that Gonzaga was acting under color of state law?; and Was the evidence insufficient to support an award of punitive damages?

Appellant's Brief, Doe v. Gonzaga Univ., 1999 Wash. App. LEXIS 1912 (Wash. Ct. App. 1999) (No. 43437-3-1) (internal citations omitted) (on file with the Journal of College and University Law).

[FN121]. Gonzaga was represented by different counsel on appeal at the Washington Court of Appeals.

[FN122]. Appellant Gonzaga's brief to the Washington Court of Appeals:

Gonzaga's violation of FERPA consisted of giving plaintiff's name to Adelle Nore of OSPI--nothing more. There is not a scintilla of evidence that League gave plaintiff's name "maliciously", i.e., "prompted or accompanied by ill will, or spite, or grudge", "wantonly", i.e., "in reckless or callous disregard of, or indifference to, the rights of one or more persons", or "oppressively", i.e., "in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity." This technical violation of FERPA, unaccompanied by any malice or oppressive conduct, cannot justify any award of punitive damages, let alone an award of $300,000.

Appellant's Brief, Gonzaga (No. 43437-3-I) (internal citations omitted) (on file with the Journal of College and University Law).

[FN123]. E-mail from Attorney Jerry Cartwright, Partner, Evans, Craven & Lackie, Trial Court Counsel for Gonzaga University, to Margaret O'Donnell, Assistant General Counsel, The Catholic University of America (Nov. 12, 2002, 02:07 EST) (on file with author).

[FN124]. Doe v. Gonzaga Univ., 24 P.3d 390 (Wash. 2001), rev'd Gonzaga Univ. v. Doe, 536 U.S. 273, 122 S. Ct. 2268 (2002).

[FN125]. See Petitioners' Brief at 9, Gonzaga (No. 01-679).

[FN126]. Gonzaga Univ. v. Doe, 534 U.S. 1103 (2002) (order granting certiorari).

[FN127]. Brief for the United States as Amicus Curiae Supporting Petitioners at 16 n.6, Gonzaga Univ. v. Doe, 536 U.S. 273, 122 S. Ct. 2268 (2002) (No. 01-679) (internal citations omitted).

[FN128]. 20 U.S.C. § 1232g(g) (2000):
Office and review board; creation; functions. The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

[FN129]. 20 U.S.C. § 1232g(f) (2000):
Enforcement; termination of assistance. The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

[FN130]. Transcript of Oral Argument, Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (No. 00-1073), available in 2001 WL 1502860, at *4-5 (Nov. 27, 2001):
QUESTION: Did you take the position in the court of appeals that there is no private contract?
MR. RICHARDSON: We did not raise that issue in the court of appeals, Your Honor. No, we did not.
QUESTION: The court of appeals discussed it.
MR. RICHARDSON: The court of appeals raised it sua sponte, and it has been raised in amicus briefs submitted--in fact, three amici have discussed it.
QUESTION: Why didn't you raise the issue? Why isn't that more important than what you did raise?
MR. RICHARDSON: Candidly, Your Honor, we didn't raise it for a number of reasons. Number 1, because in the district court there was a Fourteenth Amendment claim which clearly was actionable under section 1983. Number 2, quite honestly we believe the merits argument regarding FERPA was stronger than the section 1983 argument. Remember--
QUESTION: Well, I just don't know if it's a good practice for you to force us to reach an issue you think is important if there's no cause of action anyway. That just doesn't seem to me an orderly way to proceed.

[FN131]. Gonzaga, 536 U.S. at 289, 122 S. Ct. at 2279.

[FN132]. Id.

[FN133]. Id. at 292, Id. at 2280.

[FN134]. See LESSIG, supra note 3.

[FN135]. Id. at 235.

[FN136]. Id.

[FN137]. Id. at 236.

[FN138]. Id.

[FN139]. Id. at 89.

[FN140]. Lessig states:
> I've described four constraints that I've said "regulate" an individual. But these separate constraints obviously don't simply exist as givens in a social life. They are neither found in nature nor fixed by God. Each can be changed, though the mechanics of changing each is complex. Law can have a significant role in this mechanics, and my aim in this section is to describe that role.

Id. at 90.

[FN141]. See United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002); and Osborn v. Bd. of Regents of Univ. of Wis., 634 N.W.2d 563 (Wis. Ct. App. 2001).

[FN142]. 634 N.W.2d 563 (Wis. Ct. App. 2001).

[FN143]. The Center for Equal Opportunity describes itself:
> As the only think tank devoted exclusively to the promotion of colorblind equal opportunity and racial harmony, the Center for Equal Opportunity is uniquely positioned to counter the divisive impact of race conscious public policies. CEO focuses on three areas in particular: racial preferences, immigration and assimilation and multicultural education.

Center for Equal Opportunity, About CEO, at http://www.ceousa.org/ (last visited April 14, 2003).

[FN144]. The court stated:
> The records sought and refused were alleged to contain standardized test scores, grade point averages and high school or undergraduate class rank of each individual applicant. The request also sought each applicant's extracurricular activities, preferred undergraduate areas of study, state of residence, location of residence within the state, race, sex and whether the applicant had a parent or another relative who was a graduate of the school for which admission was sought. Additionally, Osborn requested enrollees' first-year grade point averages, whether any enrollees were classified as remedial students, whether any enrollees were placed on academic probation the first year and whether the grade point averages of

any enrolled applicants were "adjusted." Osborn, 634 N.W.2d at 565 n.3.

[FN145]. Id. at 565.

[FN146]. Telephone conversation with Roger Clegg, Vice President and General Counsel for the Center for Equal Opportunity (Aug. 26, 2002). In addition, "[o]fficials of the center said that they had obtained admissions data from 47 public colleges' undergraduate schools throughout the nation, as well as six public medical schools and three law schools, and they had never encountered as much resistance as was offered by Wisconsin." Ways & Means, THE CHRON. OF HIGHER EDUC., July 19, 2002, at A19.

[FN147]. 34 C.F.R. § 99.3 (2002).

[FN148]. Osborn, 634 N.W.2d at 570.

[FN149]. See id. at 569.

[FN150]. The Family Policy Compliance Office has generally taken the position that records sent by the student to the university are not protected as education records unless/until the student matriculates. In contrast, records about a student sent directly from the high school to the university would be covered as education records regardless of whether or not the student matriculates. Finally, educational testing agency records sent about a student would not be protected unless the student matriculates, as the student was not in attendance at the agency, and thus the FERPA confidentiality provision did not attach at the time of taking the test, unlike the case with records created by a high school. See Opinion letter from FPCO to Bill Reedy, Vermont Department of Education (Jan. 30, 2001) (defining educational agency or institution) (on file with author).

[FN151]. As the court stated in Osborn, "[t]he circuit court did not conduct a balancing of the applicants' privacy and reputational interests with the public's interest in disclosure to determine whether, on balance, public policy favored access to or denial of the records." 634 N.W.2d at 566.

[FN152]. Id. at 571.

[FN153]. Id. at 572.

[FN154]. Osborn v. Bd. of Regents of Univ. of Wis., 647 N.W.2d. 158, 161 (Wis. 2002)

[FN155]. Chief Justice Shirley Abrahamson did not participate as her husband is a Professor Emeritus at the University of Wisconsin.

[FN156]. Osborn, 647 N.W.2d at 168 n.11. "We focus on the scope of FERPA regarding personally identifiable information because once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student." Id.

[FN157]. Brief for the Defendant-Appellant-Cross-Respondent at 15-16, J. Marshall Osborn & Ctr. for Equal Opportunity v. Bd. of Regents of the Univ. of Wis. Sys., 647 N.W.2d 158 (Wis. 2002) (No. 00-2861).

[FN158]. Osborn, 647 N.W.2d at 161.

[FN159]. State ex rel. Miami Student v. Miami Univ., 680 N.E.2d 956 (Ohio 1997).

[FN160]. See United States v. Miami Univ., 294 F.3d 797, 804 (6th Cir. 2002).

[FN161]. The law requires an educational agency or institution that determines it cannot comply with FERPA due to a conflict with state or local law to notify the Family Policy Compliance Office within 45 days, giving the text and citation of the conflicting law. 34 C.F.R. § 99.61 (2002).

[FN162]. Miami Univ., 294 F.3d at 804 (internal citations omitted).

[FN163]. Id.

[FN164]. Id. at 804-05.

[FN165]. Id. at 805.

[FN166]. Id. at 804-05.

[FN167]. Id. at 805.

[FN168]. 20 U.S.C. § 1232g(a)(4)(A) (2000).

[FN169]. Miami Univ., 294 F.3d at 812.

[FN170]. Id. at 816.

[FN171]. See Mary Leonard, Yale Accuses Princeton of Web Prying: Admissions Data at Issue: Dean Placed on Leave, BOSTON GLOBE, July 26, 2002, at A1.

[FN172]. See Michael Barbaro, Bush Niece's File Among Targets of Alleged Princeton Snooping, WASH. POST, July 27, 2002, at A4.

[FN173]. Id.

[FN174]. Sheldon Steinbach, the General Counsel for the American Council on

Education was quoted in the Washington Post as stating, "Princeton got information that your grandmother could have gotten if she was interested and adept." Id.

[FN175]. On March 8, 1996, an anonymous posting on NACUANET asked the following question:

> Has anyone researched the issue whether, under FERPA, an institution may release a transcript and other information from a student's educational record, either to that student or to a third party, pursuant to an electronic request from the student via the Worldwide Web? Or does FERPA require a student's written consent before any such information may be released? Also, has anyone sought (and obtained) an advisory opinion from LeRoy Rooker (of the Family Policy Compliance Office) on this issue?

Posting of Anon. to NACUANET@peach.ease.lsoft.com (March 8, 1996) at http://www.nacua.org/nacuanet (last visited Apr. 15, 2003). As of the date of this writing, the third party portion of the question has not been answered.

[FN176]. Walter Kirn, The Way We Live Now, N.Y. TIMES MAGAZINE, Aug. 25, 2002, at 15.

[FN177]. Id. at 16.

[FN178]. Levin lauds Princeton president for her response to web violation, YALE BULLETIN & CALENDAR (Aug. 30, 2002), available at http://www.yale.edu/opa/v31.n1/story5.html (last visited April 14, 2003). See also Robert A. Frahm, Princeton Probes Hacking into Yale Website, HARTFORD COURANT, July 27, 2002, at B1. "At Yale, officials planned to beef up security on the website, said spokesman Tom Conroy." Id.

[FN179]. See Catherine E. Shoichet, Princeton Reassigns Official who Broke into Yale Web Site, THE CHRON. OF HIGHER EDUC., Sept. 6, 2002, at A52.

[FN180]. Lessig states:

> Individuals may want cyberspace to protect their privacy, but what would push cyberspace to build in the necessary architectures? Not the market. The power of commerce is not behind any such change. Here, the invisible hand would really be invisible. Collective action must be taken to bend the architectures toward this goal, and collective action is just what politics is for. Laissez-faire will not cut it.

LESSIG, supra note 3, at 163.

[FN181]. Steve McDonald, General Counsel for the Rhode Island School of Design, the editor of NACUA COMPENDIUM, supra note 7, cited throughout this article. Attorney McDonald is widely acknowledged as the higher education FERPA guru on NACUANET. He has been known to cite chapter and verse of the FPCO Opinion letters.

[FN182]. LESSIG, supra note 3, at 149.

[FN183]. Washington Research Library Consortium, Aladin Patron Validation, at http://www.aladin.wrlc.org/ (last visited March 30, 2003).

[FN184]. Id.

[FN185]. See, e.g., the Financial Services Modernization Act of 1999, 15 U.S.C. § 6801 (2000).

[FN186]. In this instance several federal laws are involved: FERPA, the Americans with Disabilities Act, and The Rehabilitation Act.

[FN187]. Published by CAUSE (now EDUCASE) in conjunction with the American Association of Collegiate Registrars and Admissions Officers. CAUSE, Privacy and the Handling of Student Information in the Electronic networked Environments of College and Universities, available at http:// www.educause.edu/ir/library/pdf/pub3102.pdf (last visited March 30, 2003).

[FN188]. 120 CONG. REC. S13,991 (daily ed. May 13, 1975) (statement of Sen. Buckley), reprinted in NACUA COMPENDIUM, supra note 7, at 92.

[FN189]. To learn what universities are doing in terms of student record privacy, see Internet 2 Middleware, Areas of Activity, at http:// middleware.internet2.edu/overview/areas-of-activity.html (last visited Mar. 30, 2003).

[FN190]. See, e.g., Kyllo v. United States, 533 U.S. 27 (2001) (holding that warrantless use of thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat, and thus marijuana growing under high intensity lamps, constitutes an unlawful search within the meaning of the Constitution's Fourth Amendment). In this case, while ruling for greater privacy, Scalia abandons his rules-based approach and adopts a standards-based approach to reach the same level of privacy against the government that existed when the Fourth Amendment was adopted.

[FN191]. LESSIG, supra note 3, at 118.

[FN192]. Id. at 222-23.

[FN193]. Internet 2 Middleware, Identifiers, Authentication, and Directories: Best Practice for Higher Education, at http:// middleware.internet2.edu/internet2-mi-best-practices-00.html (last visited Mar. 30, 2003).

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