Stanford Law Review

Volume 75 June 2023

ARTICLE

The Private Life of Education

Fanna Gamal*

Abstract. Every one of the nearly 50 million students enrolled in the U.S. public school system has a permanent record. These records contain private information about academic performance, residency, physical and psychological health, and disciplinary history. Federal information privacy law governs these records and protects student privacy by ensuring that educational records are not disclosed to unauthorized third parties outside the school.

This Article challenges the legal construction of information privacy in public education. It argues that the law's narrow focus on nondisclosure of information outside schools neglects information privacy violations that emerge within schools themselves. It further shows how the outcome of these privacy violations is often increased precarity for students along the lines of gender, race, class, and disability.

By examining the intersection of information privacy law with multiple marginalized identities, this Article complicates an assumption embedded in the law that governs student records: That the schools that create, collect, and document student information should also be trusted to protect student privacy. This Article calls for an expanded understanding of information privacy to inform legal thought and action—one that accounts for the contested nature, purpose, and future of both official records and of public education.

* Assistant Professor of Law, UCLA School of Law. This Article has benefitted tremendously from the valuable insights of many people. I am especially thankful to the following individuals for helpful comments, conversations, and for reading earlier drafts: Devon Carbado, Julie Cohen, Doron Dorfman, Jessica M. Eaglin, Ingrid Eagly, Blake Emerson, Jay Gillen, Jonathan Glater, Kyle Halle-Erby, Cheryl Harris, Jasmine Harris, Jerry Kang, Dave Marcus, Bill McGeveran, Dorothy Roberts, Aaron Saiger, Andrew Selbst, Seana Shiffrin, Scott Skinner-Thompson, Rebecca Stone, Eugene Volokh, Lindsey Wiley, Noah Zatz, and Elana Zeide. Thanks are also due to the participants of the Culp Colloquium at the University of Chicago, the UCLA School of Law Critical Race Studies Faculty Workshop, the Privacy Law Scholars Conference, the UCLA Junior Faculty Workshop, the American Constitution Society Junior Scholar Workshop, and the Advanced Critical Race Studies Workshop, who all provided invaluable thoughts on earlier drafts. For excellent research support I thank the UCLA Law Library team, Elizabeth Kim, Isaiah Zeavin-Moss, and Linhchi Nguyen. For stellar editorial support I thank Katurah Hutcheson, Tess Bissell, Hannah Hunt, and all the editors at the *Stanford Law Review*. This paper received the Reidenberg-Kerr Award for Outstanding Scholarship by a Junior Scholar at the 2022 Privacy Law Scholars Conference.

Table of Contents

Introduction

Public education is one of the oldest and largest systems of state data collection.[1] Every one of the nearly 50 million students enrolled in U.S. public schools has a permanent record.[2] These records can contain sensitive information about virtually all aspects of students' lives: their grades and test scores, their medical history, names and addresses of important people in their lives, psychological evaluations, disciplinary history, photos, mental health records, and financial information.[3]

Educational recordkeeping, like all recordkeeping, is not independent of the system in which it exists.[4] These records reflect the pressures placed on schools[5]—both internally and externally—to fulfill myriad functions, including education, social sorting, discipline, and the provision of social services. To protect student information privacy, federal law has developed to regulate the transmission of these records outside the school.

The Family Educational Rights and Privacy Act (FERPA),[6] the primary piece of federal privacy legislation governing student records, is largely configured around the principle of nondisclosure of information to third parties outside schools.[7] Under FERPA, schools cannot disclose student information to third parties without seeking consent from a parent or a non-minor student; to do so would be a violation of students' information privacy.[8] Although FERPA grants parents and eligible students the right to inspect and challenge student records, its mechanism for challenging records is quite deferential to school officials, such that the statute effectively collapses

1. *See infra* Part I.A.
2. *See Fast Facts: Back-to-School Statistics*, NAT'L CTR. FOR EDUC. STAT., https://perma.cc/E3GZ-NM8V (archived Apr. 29, 2023).
3. *See What Is an Education Record?*, U.S. DEP'T OF EDUC., https://perma.cc/8CNS-VYDX (archived Apr. 29, 2023).
4. David A. Goslin & Nancy Bordier, *Record-Keeping in Elementary and Secondary Schools*, *in* ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE 29, 30 (Stanton Wheeler ed., 1969).
5. *Id.*
6. Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571-74 (1974) (codified at 20 U.S.C. § 1232g).
7. Congress enacted FERPA in order to give parents and students access to their records and prevent their transfer without knowledge and consent. 120 CONG. REC. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment).
8. By information privacy I mean "confidentiality, secrecy, data protection, and control over personal information." *See* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 723-24 (1999) (distinguishing between the right to control information about oneself and other forms of privacy like decisional privacy). For discussion on the distinctive study of information privacy, see Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1089 (2006) (reviewing DANIEL J. SOLOVE, THE DIGITAL PERSON: PRIVACY AND TECHNOLOGY IN THE INFORMATION AGE (2004)).

information privacy into the right to prevent disclosure of information outside schools.[9] By configuring the right to information privacy primarily around nondisclosure, the law imagines the threat to student privacy as originating beyond the school itself. In this formulation, schools are the imagined information privacy protector, acting in alignment with and in the best interest of student information privacy.

This Article tells a different story, one where information privacy law permits schools to invade student privacy and where these privacy violations further disadvantage students along the lines of gender, race, class, and disability. This Article shows how FERPA reinforces schools' power over educational records by giving schools great authority over the "life cycle of information,"[10] meaning the creation, collection, and documentation of student information. When information privacy law protects the internal information practices of educational institutions from legal scrutiny, schools gain immense power over the official archives that shape students' lives. By describing the consequences that this power can hold for transgender students, students of color, students living in poverty, and students with disabilities, this Article challenges information privacy law's impulse for institutional trust and preservation. It argues that protecting student privacy within the constantly contested institution of public education requires an expanded definition of information privacy, and it offers several high-level principles to inform legal thought and action.

This Article proceeds in four parts. Part I maps the legal construction of information privacy in American schools by examining FERPA and arguing that FERPA equates information privacy with the nondisclosure of educational records.[11] This emphasis on nondisclosure should not be considered unique in American information privacy law. Instead, this emphasis permeates American information privacy statutes and jurisprudence.[12] To demonstrate this broader trend, this Part also charts the prominent position that nondisclosure plays in constitutional information privacy law.

While the Supreme Court has avoided any explicit recognition of a constitutional right to information privacy, in discussing the right hypothetically, the Court has reasoned that information privacy is protected when individuals' information is prevented from unauthorized disclosure.[13]

9. *See infra* Part I.A.

10. The term "life cycle of information" is taken from the concept of the "life cycle of data," originally put forward by William McGeveran to examine data practices in connection with the flows of data through organizations and the internal policies in place at each step. *See* WILLIAM MCGEVERAN, PRIVACY AND DATA PROTECTION LAW 325 (2016).

11. *Infra* Part I.A.

12. *Infra* Part I.

13. *See infra* Part I.B.

Although privacy scholars have long argued that the meaning of privacy is multidimensional and, at times, elusive, the legal production of the right to information privacy leans heavily on the idea that information privacy is achieved when an individual's information is protected against unwarranted disclosure. Part I maps the principle of nondisclosure in constitutional information privacy law and shows how this dominant understanding of privacy is rearticulated in federal law governing student information.

Part II explores the problems with narrowly defining student information privacy as a right to nondisclosure of information. While FERPA emphasizes the harms of unauthorized data disclosure, the statute inadequately protects students from the privacy violations that occur at other stages of the life cycle of information—namely, data creation, collection, and documentation. Part II challenges two assumptions embedded in FERPA: first, that students have no privacy interest at these other stages of the life cycle of information; and second, that students suffer no significant material or ethical consequences if their privacy is invaded at these other stages. Not only do students experience privacy violations in data creation, collection, and recording, but the outcome of these privacy violations is often increased subordination for students along the lines of gender, race, class, and disability.

Part II begins by examining the information creation stage. To speak of educational recordkeeping is to speak of one of the oldest and most robust systems of state information creation. Public education is arguably the most important arm of United States social policy and the records schools produce take on the authority of a state-sanctioned archive.[14] The information contained therein assumes an aura of truth, becoming the near-uncontestable fact of the matter. This power to create truth about young people—facts that follow them throughout their educational and adult lives—heightens the need for school records to be an accurate representation of students' personhood. Yet FERPA gives schools the overwhelming legal authority to determine what that truth is, with the consequences of this legal regime falling heavily on the most marginalized students.[15]

FERPA's regulatory scheme gives parents and students weak mechanisms to challenge student records that are inaccurate or misleading. If students or families disagree with information contained in the permanent record, FERPA grants them a right to a hearing to amend student records.[16] But schools have great authority in these hearings, since students and parents must convince a

14. *See infra* Part II.A.

15. *See infra* Part II.B.

16. 34 C.F.R. § 99.21 (2023).

school to overturn its own recordkeeping decisions.[17] FERPA's procedural safeguards assume that meaningful participation in school-run hearings can occur without altering any existing power imbalances between schools and families.[18] Part II discusses the material and ethical consequences that flow from this assumption.

For trans and gender-variant students, and for trans students of color in particular, recordkeeping about gender identity and disciplinary history can falsely construct their identities. These false constructions often have lasting and negative consequences for trans people, interfering with their attempts to self-define. When legal frameworks narrow trans students' information privacy rights to the prevention of unwanted disclosure, they are left with little ability to control how they are represented in educational records.[19] Trans students, who experience the most extreme consequences of this narrow definition of information privacy, are also among the most likely to encounter discrimination.

Yet the story told in this Article is not simply one about biased school officials, or the ways in which individual acts of transphobia, racism, and other forms of discrimination calcify in educational records. Rather, this is a story about how law ignores the myriad forces that shape recordkeeping within schools before these records are ever disclosed to anyone else.

As I have argued elsewhere, public schools have come to occupy a central place in the American welfare landscape.[20] As other state services are cut back or eliminated, public schools are left to bear the cost of diminished economic and social services.[21] As many privacy scholars argue, the distribution of state-funded welfare is a powerful impetus for increased and often degrading forms of data collection.[22] Building on the work of legal scholars who trace the interwoven relationship between state surveillance and public welfare, Part II highlights the underexamined privacy implications of deregulating the collection of information in public schools given the central role schools play in an otherwise anemic welfare landscape.

---

17. *Id.* § 99.21(b)(1) (stating that after the hearing, the educational agency or institution decides whether the challenged information is inaccurate, misleading, or in violation of the privacy rights of the student).

18. *See* LaToya Baldwin Clark, *The Problem with Participation*, MOD. AM., Summer 2013, at 20, 21-22 (arguing that parental participation is most effective for parents who have higher status, which allows them to claim educational resources).

19. *See infra* Part II.A.

20. *See generally* Fanna Gamal, *The Miseducation of Carceral Reform*, 69 UCLA L. REV. 928 (2022) (arguing that public schools are key sites where social and economic services are coordinated and dispensed).

21. *See infra* Part II.B.

22. *See infra* Part II.B.

The deregulation of information collection in schools reflects a troubling assumption that schools collect information like grades and test scores merely to fulfill their task of providing education to the public.[23] But FERPA's deregulation of data collection is especially worrying given that schools are key sites where state welfare services are both coordinated and dispensed, exposing students and families to heightened and sometimes intrusive data-collection techniques.[24]

Finally, Part II considers the privacy-invading practices of information documentation in schools that are sidelined by a narrow focus on information nondisclosure. I discuss how the approximately 7.2 million students who receive special education services under the Individuals with Disabilities Education Act (IDEA) are legally required to submit documentation in order to access their education.[25] A definition of privacy organized around the nondisclosure of information *outside* schools ignores the legal forces that ultimately make it impossible for disabled students to secure privacy *from* their schools. Compared to their non-disabled peers, their school records contain documentation about their medical, psychological, social, and physical conditions.[26] Even as their most personal information is documented by their schools, students with disabilities must contend with a definition of information privacy that is wholly insensitive to the privacy intrusions that they experience regularly in order to access needed educational resources.

The privacy intrusions that accompany this document-driven approach to validating disability reflect a fear that limited educational resources may be allocated to undeserving young people—or, a fear of the "disability con."[27] But the ability to secure necessary documentation is, in fact, a poor proxy for disability and, accordingly, for worthiness of educational resources. Instead, the document-driven approach to allocating disability resources entrenches inequities within the community of disabled people.

Taken together, an examination of trans, disabled, and low-income students' experiences with school recordkeeping reinforces and extends a key insight of privacy scholarship: Although the meaning of privacy is contested and elusive,[28] robust information privacy protections remain central to the

23. *See infra* Part I.A.

24. *See infra* Part II.B.

25. NAT'L CTR. FOR EDUC. STAT., NCES NO. 2022-144, CONDITION OF EDUCATION 2022: STUDENTS WITH DISABILITIES (2022), https://perma.cc/652Q-NGCQ; 34 C.F.R. § 300.306(a) (2023) (noting that a determination of eligibility under the IDEA requires "the administration of assessments and other evaluation measures").

26. *See infra* Part II.C.

27. Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1052-54 (2019).

28. *See infra* Part I.A.

pursuit of equality across multiple axes of difference. Indeed, it is a lack of information privacy that so often results in increased subordination of those given relatively less privacy.[29]

Part III considers how a narrow legal construction of information privacy shapes power relations between the institution of public education and the students and families who exist within and often struggle against schools. By constructing information privacy narrowly as the right to prevent the disclosure of information outside schools, FERPA shields the internal information practices of schools from legal scrutiny and reinforces schools' authority over the official archives that shape students' lives.

Examining the experiences of subordinated groups within schools challenges a liberal faith embedded in FERPA. It suggests that, when educational institutions are given vast legal authority to control their internal information practices, they may use this authority to intrude on student privacy and, consequently, reproduce relations of domination within schools. FERPA's impulse for institutional trust and preservation relies on a flattened portrait of public education, one that neglects its role as a constantly contested site where the state, the family, and the child collide.

Finally, Part IV considers what normative insights my analysis holds for legal thought and action. Claiming an expanded definition of information privacy in education requires collaboration and solidarity between previously siloed groups, key amendments to FERPA, and a redistribution of power over schools' internal information practices.

I. Constructing Information Privacy in Schools

The term privacy refers to a range of mental states, purposes, and rights.[30] This range acknowledges that people's desire to secure their physical and bodily integrity, their need to make decisions about their intimate lives, or their ability to place limits on who has information about them are often expressed with reference to privacy.[31] Information privacy can be understood as a species of privacy existing beneath the wide canopy that privacy casts in American law.[32]

29. *See infra* Part III.A.

30. *See* ANITA L. ALLEN & MARC ROTENBERG, PRIVACY LAW AND SOCIETY 4-6 (3d ed. 2015).

31. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 125-31 (2004).

32. *See* ALLEN & ROTENBERG, *supra* note 30, at 5-6.

Among privacy theorists, there is no universally accepted definition of "information privacy."[33] Those who have attempted to define such a capricious, elastic, and contested concept often relate it to the ability to restrict access to one's information and experiences, or the ability to control information about oneself regardless of who has access to it.[34] Others have defined information privacy as privacy that concerns "an individual's control over the processing—i.e., the acquisition, disclosure, and use—of personal information."[35]

As is true with privacy law more generally, the law of information privacy is not located within a single statute or constitutional provision.[36] Information privacy law draws upon common law privacy torts, state and federal privacy legislation, and constitutional protections. But the notion that private information should not be unduly released to third parties permeates across these various sources of information privacy law.

Take, for example, common law privacy torts, the roots of which can be found in the late nineteenth century.[37] In Samuel Warren and Louis Brandeis's landmark article, "The Right to Privacy," they loosely define the right as the "right to be let alone," which secures "the right of determining, ordinarily, to what extent [one's] thoughts, sentiments, and emotions shall be communicated to others."[38] Preventing the unwanted disclosure and communication of information to others occupies an essential place in their theorization of privacy's meaning. This early-established notion—that privacy is realized when one can prevent the disclosure of information—is central to the legal construction of privacy in schools.

A. FERPA and Information Privacy as Nondisclosure

The principle of nondisclosure effectively states that privacy is achieved when "designated information is not disseminated beyond a community of authorized knowers."[39] Rules governing who or what qualifies as an

33. *See* Richards, *supra* note 8, at 1089 (describing the effort of scholars to identify a law of "information privacy" as a collective and ongoing project and pointing to agreements and disagreements within this field).

34. For a full treatment of the access and control theories of privacy, see ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 11-30 (1988).

35. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1203 (1998).

36. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 10 (7th ed. 2020).

37. *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) (laying the foundation for the common law tort of public disclosure).

38. *Id.* at 193, 198.

39. ALLEN, *supra* note 34, at 24.

authorized knower, and how schools may gather, document, and maintain student information, are defined in FERPA.[40]

FERPA protects student privacy through two mechanisms. First, as a condition of federal funding, schools must ensure that parents and eligible students have the ability to inspect and contest information contained in their school records.[41] Second, FERPA requires schools to ensure that student information is not disclosed to unauthorized third parties outside the school without parental knowledge and written consent.[42] Later on, this Article details the particular mechanisms FERPA grants to inspect and contest records, which disproportionately advantage schools over parents and students contesting records.[43] This Subpart, however, focuses on FERPA's approach to protecting privacy by ensuring that school records are not disclosed without parent or student consent.

Under FERPA, invasions of privacy result from the undue release of information collected by schools to unauthorized third parties. But FERPA contains several exceptions that permit disclosure of student information outside schools without parental consent.[44] Schools can disclose information

40. 20 U.S.C. § 1232g.

41. *Id.* § 1232g(a)(1)(A). The law provides that:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.

Id. § 1232g(a)(1)(A). The law further specifies that:

> No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records.

Id. § 1232g(a)(2).

42. *Id.* § 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents to any individual, agency, or organization.").

43. *See infra* Part I.B.

44. Student records may be released without parental consent if the requestor fits into one of nine specified categories: (1) school officials, including teachers, with "legitimate educational interests" in the student records; (2) officials of other schools or school systems when the student transfers; (3) representatives of the Comptroller General, the Secretary of Education, federal auditors, and the Attorney General; (4) officials in connection with a student's application of receipt of financial aid; (5) state or local officials given access under a state statute if the disclosure concerns the juvenile justice system and the nondisclosure to third parties is certified in writing; (6) organizations conducting studies for the purpose of developing predictive tests or improving education; (7) accrediting organizations; (8) appropriate persons in connection with an emergency to protect the health or safety of the student or others; and (9) officials in connection with a subpoena. 20 U.S.C. § 1232g(b)(1)(A)-(J); 34 C.F.R. § 99.31 (2023).

to educational auditors, financial aid offices, law enforcement, testing organizations, emergency personnel, and accrediting organizations, among others.[45]

Importantly, under an exception to FERPA, schools can disclose information to other school officials without seeking parental consent so long as the school determines that the official has a legitimate educational interest.[46] FERPA not only understands privacy to mean the nondisclosure of information, but also understands disclosure to refer specifically to the disclosure of information *outside* of schools.

To understand why the original proponents of FERPA focused on preventing the flow of student information outside schools, it is important to recognize that creating and collecting information about students and families is a central feature of American schooling.[47] This function is, in part, a response to historical pressures that emerged within the institution of public education.[48] As school systems grew more complex, diverse, and resource-intensive, data collection became a major focus for early twentieth-century educational bureaucrats.[49]

Many of the early architects of school recordkeeping, such as Arch O. Heck, Leonard P. Ayres, and Horace Mann, believed that schools should strive to replicate procedures of quantification and classification widely used in American factories and business settings.[50] They supported integrating developing modes of business administration—which included extensive recordkeeping—to ensure the economic efficiency of American education.[51]

---

45. 20 U.S.C. § 1232g(b)(1)(A)-(J).

46. FERPA contains an exception to the nondisclosure rule for "other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required." 20 U.S.C. § 1232g(b)(1)(A).

47. Goslin & Bordier, *supra* note 4, at 29.

48. *See id.* at 30 ("Record-keeping procedures do not emerge independently of the system in which they exist. They arise as a consequence of pressures within the system and they, in turn, often lead to changes in it.").

49. *See* Stephen P. Walker, *Child Accounting and 'the Handling of Human Souls,'* 35 ACCT. ORGS. & SOC'Y 628, 628-29, 632-36 (2010).

50. *See* Arch O. Heck, *A Study of Child-Accounting Records*, 2 OHIO ST. UNIV. STUD., no. 9, at 9, 13 (Bureau of Educ. Rsch., monograph no. 2, 1925) ("Business procedure in the matter of records indicates two common-sense principles that ought to be applied to school records: the one deals with checking up the efficiency of employees; the other, with reports which should be made to the stockholder."); *see also* DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 35-44 (1974) (articulating how leading educators, such as Horace Mann, sought to implement a pedagogical model based on statistical organization and efficiency).

51. *See* Heck, *supra* note 50, at 9-19.

Much of the data schools collect about students relates to educational progress, including grades, test scores, and academic achievements.[52] But schools also collect information about where and with whom students live, their medical history, their psychological and physical wellbeing, their disciplinary history, their home language, their living conditions, and their family history.[53] A school record can include information about a student's political beliefs or a teacher's anecdotal recollections of student behavior.[54] The widespread shift to virtual school as a result of the COVID-19 pandemic and the expansion of new information technologies in the classroom has also broadened the realm of information created by common educational activities.[55] Take, for example, popular remote proctoring platforms like Honorlock, ProctorU, and Proctorio, which collect information about student test-takers such as IP addresses, browser types, facial recognition, audio, videos, and biometric measurement.[56] Given the nature and extent of school recordkeeping, it is no surprise that FERPA aims to ensure that this information is not disclosed to anyone not authorized to receive it.

52. *See* Goslin & Bordier, *supra* note 4, at 30-34.

53. *What Is an Education Record?*, *supra* note 3; *see also* Gregory Riggs, *Taking HIPAA to School: Why the Privacy Rule Has Eviscerated FERPA's Privacy Protections*, 47 J. MARSHALL L. REV. 1047, 1053-54, 1062 (2014). For information pertaining to students' disciplinary history, see, for example, 603 MASS. CODE REGS. 53.14 (2022) (requiring all school principals to periodically review discipline data by selected student populations, including race, ethnicity, gender, and socioeconomic status); Emma B. Bolla, Note, *The Assault on Campus Assault: The Conflicts Between Local Law Enforcement, FERPA, and Title IX*, 60 B.C. L. REV. 1379, 1389-90 (2019) (describing how a student's record includes their disciplinary records). For student records pertaining to home language or their families, see Stacie Hunt, Note, *Data Collection on School-Aged Children Through Common Core*, 12 I/S: J. L. & POL'Y FOR INFO. SOC'Y 305, 319-20 (2016). For student records pertaining to their living conditions, see MISS. CODE ANN. § 37-3-85 (2022) (requiring school districts seeking a grant under the state's Support Our Students program to submit information related to the percentage of students with two working parents and the incidence of juvenile crime in their neighborhood).

54. Diane Divoky, *Cumulative Records: Assault on Privacy*, LEARNING, Sept. 1973, at 18, 18-23, *as reprinted in* 120 CONG. REC. 36,528-31 (1974); Goslin & Bordier, *supra* note 4, at 46.

55. *See, e.g.*, Ogletree v. Cleveland State Univ., No. 21-cv-00500, 2022 WL 3581569, at *9 (N.D. Ohio Aug. 22, 2022) (holding that a university's use of a camera to scan a student's room for impermissible objects during an online exam violated the student's Fourth Amendment rights).

56. *See, e.g.*, Anna Campbell, *From Detecting Phones to Using Decoy Sites, Honorlock Raises Online Test Surveillance Concerns*, STATE PRESS (Jan. 3, 2022, 12:21 PM MST), https://perma.cc/S7TH-9XWF. For further information about the specific proctoring platforms, see, for example, Jason Kelley, *Stop Invasive Remote Proctoring: Pass California's Student Test Taker Privacy Protection Act*, ELEC. FRONTIER FOUND. (Mar. 24, 2022), https://perma.cc/7X7W-SWJN (advocating for legislation to improve user security in the context of remote proctoring platforms); Emma Bowman, *Scanning Students' Rooms During Remote Tests Is Unconstitutional, Judge Rules*, NPR (updated Aug. 26, 2022, 3:11 PM ET), https://perma.cc/5QSG-5TF2 (describing the *Ogletree* decision).

Importantly, this focus on preventing the undue release of information is not atypical in information privacy law.

B. Nondisclosure in Context

FERPA may be counted among the number of federal and state statutes prohibiting disclosure of personal information.[57] This emphasis on nondisclosure reflects the law's commitment to information privacy based on the Fair Information Practices (FIPs) principles, which seek information privacy through transparency in data collection and storage, but otherwise do not constrain the manner in which data is gathered.[58] Guided by the FIPs principles, FERPA takes as a given the act of collecting and recording information, configuring the right to privacy around protection from unauthorized release of personal records.[59]

Courts also play a key part in reinforcing the importance of nondisclosure in information privacy. When squarely confronted with the question, the Supreme Court has avoided explicitly recognizing a right to information privacy. Yet in discussing whether a hypothetical right to information privacy exists, and in finding that it has not been violated by state action, the Court leans heavily on the idea that privacy is respected when information is protected from unwarranted disclosure.

While a complete discussion of how federal courts understand the right to information privacy is beyond the scope of this Article, understanding the Court's information privacy jurisprudence contextualizes any analysis of FERPA. Below, I highlight a pattern of judicial reasoning about the significant role that nondisclosure plays in securing information privacy to show how this reasoning is pervasive, enduring, and rearticulated in the legal construction of information privacy in schools.[60]

---

57. *See* PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 5-7 (1995) (describing various laws protecting privacy, including several that protect against the unauthorized disclosure of information).

58. *See* Robert Gellman, Fair Information Practices: A Basic History 5-6 (Apr. 6, 2022) (unpublished manuscript), https://perma.cc/8HDK-T6WG; *see also* Woodrow Hartzog, *The Inadequate, Invaluable Fair Information Practices*, 76 MD. L. REV. 952, 966 (2017).

59. Elana Zeide, *Student Privacy Principles for the Age of Big Data: Moving Beyond FERPA and FIPPs*, 8 DREXEL L. REV. 339, 358-59 (2016).

60. Myriad state laws also govern student information. *See, e.g.*, IOWA CODE § 22.7 (2023) (allowing for the disclosure of student records following a court order or an order "by the lawful custodian of the records, or by another person duly authorized to release such information"); OHIO REV. CODE ANN. § 3319.321 (LexisNexis 2023) (providing for the release of students' records so long as there is parental consent); CAL. EDUC. CODE § 76243 (West 2023) (allowing a community college or community college district to permit access to students' records without student consent once the college or district has received a judicial order). This Article focuses its attention on federal law in an

footnote continued on next page

In *Whalen v. Roe*, the Court considered the constitutionality of a New York statute requiring that anyone prescribed a designated category of drugs submit private medical and personal information that would then be recorded in a state computer system.[61] A group of patients who were prescribed the drugs—which had both lawful and unlawful uses—challenged the constitutionality of the statute, arguing that the collection of information violated their right to privacy and that inclusion in the government database stigmatized them as "drug addicts."[62] The Court disagreed, writing that controlling the distribution of dangerous drugs was within the state's police powers.[63] While the Court never explicitly recognized a right to information privacy, it acknowledged an individual interest in avoiding the disclosure of private information to unwanted third parties.[64] But ultimately, the Court held that New York law did not compromise this privacy interest because the state took measures to prevent the undue disclosure of private information.[65]

While *Whalen* has become recognized for charting a hypothetical "constitutional right to information privacy,"[66] that right did not address the issue that the plaintiffs in *Whalen* cared about: Namely, the plaintiffs feared that their records would misrepresent them as stigmatized "drug addicts" rather than individuals in need of medical treatment.[67] They did not simply care about the unwarranted disclosure of their information; rather, they sought to challenge the collection and documentation of their information because it marked them as inherently suspicious.[68] These two processes—information collection and documentation—both occur before disclosure and therefore fall outside the bounds of the Court's privacy concern.[69]

In *Nixon v. Administrator of General Services*, the Supreme Court again reified a conception of information privacy organized around nondisclosure.[70] There, a resigned President Nixon challenged the constitutionality of a federal law, which allowed the government to take control of all his presidential

---

effort to narrow its focus to the privacy requirements all schools in the nation must fulfill and because many state-level laws also rely heavily on nondisclosure as an organizing principle of information privacy in schools.

61. Whalen v. Roe, 429 U.S. 589, 591 (1977).

62. *Id.* at 591, 595-96.

63. *Id.* at 598.

64. *Id.* at 598-600, 599 n.25.

65. *Id.* at 603-04.

66. SOLOVE & SCHWARTZ, *supra* note 36, at 36.

67. *Whalen*, 429 U.S. at 595.

68. *See id.* at 600.

69. *Id.* at 593, 602-03.

70. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457-59 (1977).

materials and have them screened by a government archivist before returning materials deemed personal to the former president.[71] Among other challenges, Nixon argued that the screening process violated his right to privacy because the seized materials contained private information.[72] Citing the decision in *Whalen*, the Court held that Nixon's asserted interest was comparatively weaker because the government's information practices ensured that there was little chance of unwanted disclosure to a third party.[73]

In 2011, the Supreme Court extended the nondisclosure-focused conception of information privacy in *NASA v. Nelson*.[74] There, the Court upheld the constitutionality of a highly intrusive government-employee background check, which allowed the government to obtain private information from schools, employers, and others about a potential employee's honesty, trustworthiness, and unlawful behaviors.[75] Citing both *Whalen* and *Nixon*, the Court framed the information privacy right as an interest in avoiding the unwanted disclosure of private information.[76] Finding that the sensitive employee information would be shielded by statute from unauthorized disclosure, the Court sanctioned the government's broad and invasive collection of personal information.[77]

Taken together, these cases demonstrate that, in the developing law of information privacy, the Supreme Court has repeatedly emphasized the central role of protecting individuals against unauthorized disclosure. When nondisclosure dominates legal constructions of privacy, data subjects are often afforded little authority to influence the creation, collection, recording, and flow of their information within the institutions that gather it.

The role of law under this configuration of information privacy as nondisclosure is to act as a barrier preventing the free flow of information beyond the institutions, agencies, and systems authorized to collect and record data. But beneath this idea—which assumes that the primary goal of information privacy law should be to prevent the release of private information to unauthorized knowers—is a narrow conception of the threat to information privacy. Rather than locate the threat in corporate or government entities collecting and recording personal data, courts and legislatures pinpoint the primary risk to information privacy in allowing third-party actors to unduly receive information.

---

71. *Id.* at 429-31.

72. *Id.* at 440.

73. *Id.* at 458-59.

74. NASA v. Nelson, 562 U.S. 134, 138 (2011).

75. *Id.* at 154-55.

76. *Id.* at 156-57.

77. *Id.* at 156-59.

C. Emphasizing Nondisclosure

Against the backdrop of Supreme Court information privacy jurisprudence, one can see how FERPA similarly focuses its regulatory power on the unauthorized release of student data beyond schools.[78] In *Owasso Independent School District No. I-011 v. Falvo*, the Supreme Court described the boundary between information protected by FERPA and information that falls outside the borders of privacy protection.[79] At issue in *Owasso* was an educational practice of peer grading, which allowed a student to see the score of another student in the process of grading their classmate's work.[80] A parent sued the school district, arguing that the peer-grading scheme embarrassed students and violated FERPA by disclosing student information—in this case, a student's grade—without parental consent.[81] The Supreme Court disagreed. In interpreting FERPA, the Court reasoned that the student score did not become an "educational record" until the teacher physically recorded the grade in her ledger.[82] And because FERPA only protects educational records that are maintained by the school, school officials were under no legal obligation to keep the students' grades private.[83]

Owasso makes clear that a student's information privacy rights under FERPA are not implicated until the information has been collected by school officials and entered into a school-maintained record. Within this interpretation, the creation, collection, and documentation of information are not independent privacy concerns that must also be regulated; rather, they are prerequisites to the right of information privacy. Only after their information is collected and recorded do students secure privacy rights to prevent the disclosure of this information.

It is important to mention, however, that parents also have a right under FERPA to inspect and request changes to students' records.[84] The power to inspect and amend records introduces a system of checks and balances by which the authority to collect and record student information is not concentrated in the hands of schools alone. Once a school has recorded student information, parents and students can review and theoretically amend records, providing an administrative check on a school's internal information practices. But this administrative check on school recordkeeping practices grants schools

78. *See* Bauer v. Kincaid, 759 F. Supp. 575, 590 (W.D. Mo. 1991).

79. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 428-29 (2002).

80. *Id.* at 429.

81. *Id.* at 429-30.

82. *Id.* at 436.

83. *Id.*

84. 20 U.S.C. § 1232g(a)-(b).

great authority to determine what should be included, excluded, and amended in the permanent record.

When a student or family disagrees with something contained in the educational record, they can request a hearing to challenge the contested information.[85] Following this request, an educational agency must hold this hearing in a reasonable time frame, and the hearing may be conducted by a school official with no "direct interest in the outcome of the hearing."[86] There are no specific guidelines on this provision of the hearing, but the legislative history suggests that schools should be offered wide flexibility, such that even a school official who makes the initial decision not to amend an educational record is not automatically disqualified from conducting the hearing.[87]

This mechanism places students and parents in the vulnerable position of appealing to school officials to overturn their own documentation decisions, as school officials serve as both a party in the dispute and as its final adjudicator. If a parent is unable to convince a school to amend the child's records, the parent can insert a written explanation of their disagreement into the record, but the school's account of the information remains permanent.[88]

Such a strong favoring of school discretion may offend basic due process principles,[89] but it is less surprising when one considers the well-established

85. *Id.* § 1232g(a)(2):

> No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

86. 34 C.F.R. § 99.22(a)-(c) (2023).

87. In particular, the joint statement of Senators Buckley and Pell, who sponsored major amendments to FERPA in 1974, explains:

> The law is not specific concerning the format, procedure, or mechanism for the conduct of such a hearing at the local level. It is the intent of the sponsors of these amendments that again a rule of reason would be followed by those participants involved. Since the hearing is to be conducted at the local level, a detailed specification of procedures cannot be drawn that could possibly apply to each of the thousands of school districts and colleges across the nation. . . . In some cases, a school district might wish to offer the parent a hearing at the district level; in other instances, disputes about the content of records might be better handled at the local school level. It is not the intent of the Amendment to burden schools with onerous hearing procedures.

120 CONG. REC. 39,862 (1974).

88. 20 U.S.C. § 1232g(a)(2).

89. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (holding that a welfare official who made an initial determination now under review should be barred from acting as decisionmaker).

legal tradition of deference to localism in American education law,[90] as well as the potential administrative burden of providing fairer hearings at the local level. Yet the impact of this approach to information privacy is to overwhelmingly align official records with the school's version of student behaviors, progress, and significant events. A student's permanent record—a record that will follow them throughout their educational trajectory—can easily be over-determined by school officials. The narrow conception of information privacy as nondisclosure permits schools to exercise this degree of power over the creation, collection, and recording of student data.

II. Information Privacy Beyond Disclosure

When the right to information privacy is understood narrowly as protection from unwarranted disclosure, law obscures the full spectrum of threats to student information privacy. Under FERPA, school conduct is regulated at the point of information disclosure. But the statute is less concerned with the privacy violations that take place at other stages of the life cycle of information; namely, information creation, collection, and documentation. The worrying assumption advanced by FERPA, therefore, is that students experience no significant information privacy violations at these other stages, or that when they do experience a privacy violation, it results in no material or ethical consequences.

The aim of this Part is to challenge these assumptions. Not only do students experience privacy violations at other stages of the life cycle of information beyond disclosure, but the outcome of these privacy violations is often increased vulnerability for students along the lines of gender, race, class, and disability. When left unregulated by FERPA, the process of information creation, collection, and documentation can serve as a powerful catalyst for social subordination and educational stratification.

A. Data Creation and Misrepresentation

Schools' control over their internal information practices is no small power. The records schools produce narrate students' pasts but also structure

90. *See* Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *see also* Erika K. Wilson, *The New School Segregation*, 102 CORNELL INT'L L.J. 139, 183 (2016) ("Classic localism is a highly regarded value in public education. In the public education context, it plays out to mean that although states are responsible for providing education, the actual legal and political authority to provide public education is decentralized down to local governments known as school districts.").

their futures, becoming the ground truth for higher education institutions, employers, and courts who later use these records. With the authority of a state-sanctioned archive, the information contained in educational records assumes an aura of certainty, becoming the near-uncontestable fact of the matter.[91] When the information recorded in a student's educational record comes into conflict with the student's own narration of their identity, the record usually has the final word.

This was the case for Gavin Grimm, an eighteen-year-old transgender student in Gloucester County, Virginia, whose school refused to acknowledge his male gender.[92] Grimm filed suit to challenge two actions. First, he challenged a school policy that prevented students from using any bathroom that did not correlate with the sex assigned to them at birth.[93] Second, he challenged the school's refusal to amend his records to reflect his deeply felt sense of gender identity.[94] The result was an opinion celebrated by many civil rights advocates.[95]

In *Grimm v. Gloucester County School Board*, the Fourth Circuit held that both the bathroom policy and the refusal to amend Grimm's records constituted unlawful sex discrimination in violation of Grimm's rights under the Equal Protection Clause and Title IX.[96] In June 2021, the Supreme Court allowed the Fourth Circuit decision to stand.[97] By then, Grimm had graduated from his Virginia school, but his school record was eventually changed.[98] The

91. Divoky, *supra* note 54, *as reprinted in* 120 CONG. REC. 36,529-30 ("[A]s [school] records began to contain more detailed and varied information, they took on lives of their own; they became, somehow, more trustworthy and permanent than the quixotic people they represented.").

92. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020).

93. *Id.*

94. *Id.*

95. *Id.* at 594 (explaining that "most people do not have to think twice about which bathroom to use. That is because most people are cisgender, meaning that their gender identity—or their 'deeply felt, inherent sense' of their gender—aligns with their sex-assigned-at-birth"); Alex Cooper, *SCOTUS Decision on Trans Youth Gavin Grimm Is Major LGBTQ+ Victory*, ADVOCATE (June 28, 2021, 1:57 PM EST), https://perma.cc/AY3P-45Q2.

96. *Grimm*, 972 F.3d at 611, 615 (holding that transgender people constitute a quasi-suspect class, facing "high rates of violence and discrimination in education, employment, housing, and healthcare access," and writing that the school's bathroom policy was "marked by misconception and prejudice" against Grimm and other transgender youth) (first quoting Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730, 749 (E.D. Va. 2018); and then quoting Nguyen v. INS, 533 U.S. 53, 73 (2001)).

97. Cooper, *supra* note 95; Grimm v. Gloucester Cnty. Sch. Bd., 141 S. Ct. 2878 (2021) (mem.).

98. *See Grimm*, 972 F.3d at 601, 619; *see also* Press Release, ACLU, Gloucester County School Board to Pay $1.3 Million to Resolve Gavin Grimm's Case (Aug. 26, 2021), https://perma.cc/X6M5-34C5.

irony in Grimm's case, however, is that although the school was ultimately required to amend his records, no technical violation of FERPA occurred.[99]

Not once in Grimm's multiyear ordeal did information privacy law recognize that the school's misidentification may have violated Grimm's informational rights. In other words, there was no conflict between Grimm's information privacy and the school's intentional misrepresentation of his information. While Grimm ultimately won his struggle against these recording practices through an antidiscrimination lawsuit, students who may not be able to mobilize an entire civil rights machinery or whose claims may fall outside narrow categories of protected classes recognized within traditional American equal protection analysis are still vulnerable to misrepresentation and its pernicious afterlife.[100] The need for an accessible and just mechanism to challenge misrepresentation in the school record is only heightened by the power that these records have over students' presents and futures.

Under FERPA, Grimm's only recourse to challenge the school's misrepresentation was to request a hearing before a hostile school board, a procedural safeguard unlikely to yield any substantive change to the record since FERPA allowed the school to police its own practices.[101] Even the Fourth Circuit stated that the right to a hearing to amend his records would have no real benefit to Grimm "when the [school] Board continue[d] to deny his request in the face of both a court order stating that his sex is male and a declaration from the State Registrar affirming the validity of his new birth certificate."[102] The court implicitly recognized that, because FERPA permits schools such broad authority to conduct their own hearings, the hearing would be irrelevant in the face of the school's hostility towards Grimm's transgender identity.[103]

Although the court ultimately held that Grimm's school acted in a discriminatory manner by selectively recording his sex assigned at birth, this discrimination was facilitated by FERPA's narrow conception of information privacy.[104] FERPA's weak mechanisms to amend records through a school-run

99. *Grimm*, 972 F.3d at 606.

100. Take, for example, a hypothetical student who was erroneously accused by their school of gang membership and the false information was then recorded in their educational record. Not only would it be unrealistic to expect the accused student to expend the time and resources needed to bring an antidiscrimination claim against their school, but it is difficult to imagine how such a claim would fare under the rigid typologies of equal protection law.

101. 20 U.S.C. § 1232g(g) (establishing that a school board shall be designated for the purposes of "investigating, processing, reviewing, and adjudicating . . . complaints which may be filed concerning alleged violations").

102. *Grimm*, 972 F.3d at 606.

103. *See id.*

104. *See* Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1857 (2022). *See generally id.* (offering a genealogy of the term "sex assigned at birth" and a discussion of

footnote continued on next page

hearing allowed Grimm's school to selectively create information that served its own values and beliefs about Grimm's gender. And the statute's narrow focus on nondisclosure sidelined important considerations about who gets to determine what information is created, recorded, and circulated through the educational record.

Importantly, the struggle over Grimm's educational record was not a trivial dispute over administrative documents. Control over Grimm's permanent record was an important tool in the school's fervent attempts to deny his right of self-determination for years to come. Even after he graduated, whenever Grimm was required to furnish a transcript to a college or potential employer, "he had to provide a transcript that identified him as 'female.'"[105] His inaccurate record became the truth of his personhood, a stark, everyday reminder of how the boundaries of normative gender can be constantly secured and maintained through documentation.[106]

Grimm's multiyear ordeal to have his acts of self-definition legally recognized demonstrates how a definition of privacy organized narrowly around nondisclosure ignores students' struggles against rigid, discriminatory, or binary thinking about gender. While Gavin Grimm's story is a high-profile example of how recordkeeping practices create the "truth" of gender—even when that truth intentionally subjugates students' self-definition—his experience as a white trans teen still obscures the full effect of misrepresentation in the official record for non-white students. In addition to constructing the truth about their gender identity, for trans students of color, school recordkeeping is also a productive tool of racial identity construction.

Focusing on the disproportionate exposure that Black students have to punitive discipline in schools,[107] legal scholar Najarian Peters argues that the same bias that suspends, expels, and arrests Black students at higher rates than

---

the practical and theoretical implications of the terms usage for transgender rights and legal inquiry).

105. Grimm v. Gloucester County School Board, ACLU, https://perma.cc/PFA4-JRK4 (last updated Oct. 6, 2021).

106. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 738 (2008).

107. The use of punitive discipline has been identified as one of the nation's most critical civil rights issues by leading legal advocacy organizations, including the following:

> [T]he Advancement Project; Advocates for Children; American Civil Liberties Union; Bazelon Center; Charles Hamilton Houston Institute at Harvard Law School; Children's Defense Fund; Children's Law Center; Civil Rights Project at UCLA; Education Law Center; Juvenile Law Center; NAACP Legal Defense and Education Fund, Inc.; National Disabilities Rights Network; National Economic and Social Rights Initiative; National Juvenile Defender Center; Southern Poverty Law Center; Texas Appleseed; and the Youth Law Center, among many others.

Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned From* Antoine v. Winner School District, 54 N.Y.L. SCH. L. REV. 955, 956 n.1 (2010).

their non-Black peers is later codified in their disciplinary records.[108] These bias-inflected records, which Peters identifies as "dirty data," become the ground truth upon which a host of other decisions about students' educational and personal lives are made.[109] Their school records inform decisions about higher education[110] and criminal legal involvement.[111] Some school records serve as raw data inputs to the predictive technologies that increasingly structure our lives.[112] Even if the student's race is not explicitly known or considered when these downstream decisions are made, information about race is reflected in (and reproduced by) school records through patterns of disciplinary documentation.[113]

The production of these patterns is what Simone Browne deems "racializing surveillance," referring to "surveillance practices, policies, and performances [that] concern the production of norms pertaining to race."[114] Browne's theory of racializing surveillance underscores the ability of information practices to create the "truth" of identity in the process of monitoring, watching, and documenting subjects. The prefix of "racializing" to the term surveillance "signals those moments when enactments of surveillance reify boundaries, borders, and bodies along racial lines, and where the outcome is often discriminatory treatment of those who are negatively racialized by

108. Najarian R. Peters, *The Golem in the Machine: FERPA, Dirty Data, and Digital Distortion in the Education Record*, 78 WASH. & LEE L. REV. 1991, 2006 (2022) (writing that "flawed perceptions codified in the education record mean that inaccuracies in the record may abound.").

109. *Id.* at 2017.

110. Although the Common Application stopped requesting disciplinary records in 2021, many higher education institutions still request this information. *See* F. Chris Curran, *Ban the Discipline Box? How University Applications that Assess Prior School Discipline Experiences Relate to Admissions of Students Suspended in High School*, 63 RSCH. HIGHER EDUC. 1120, 1124-25 (2022).

111. *See* Fanna Gamal, *Good Girls: Gender-Specific Interventions in Juvenile Court*, 35 COLUM. J. GENDER & L. 228, 253 (2018) (explaining that mandatory school attendance is a virtually standard term of juvenile probation).

112. Monte Reel, *Chronicle of a Death Foretold: Predicting Murder on Chicago's South Side*, HARPER'S MAG. (Mar. 2014), https://perma.cc/63V8-PB8B (explaining that algorithms designed to predict a child's likelihood of being a victim of gun violence rely on data archived by schools, such as attendance records and test scores).

113. While working as an education attorney in a legal aid office, I understood this dynamic even if I was not able to articulate it. I saw how the negative ways students of color were watched and documented produced a distinctive trail of data. Before opening a student's file, I could predict what a student's race would be by the thickness of the file. Students of color would usually have a very thick file, replete with disciplinary documentation and highly subjective notations. Or they would have an extremely thin file, containing just a few pieces of information and a note that they had fallen through the cracks.

114. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 16 (2015).

such surveillance."[115] In other words, racializing surveillance points to the power of school recordkeeping practices not only to exacerbate racial inequities through misrepresentation, but also to create the category of race in the process.

For a Black trans student, misrepresentation in the official record can happen along multiple axes. Racism can contribute to false narratives that manifest in their disciplinary records, while transphobia can undergird misrepresentation in their gender documentation. Yet information privacy law is poorly positioned to address the full scope of this vulnerability, and antidiscrimination law has historically failed to adequately confront these encounters with overlapping race and gender discrimination.[116] Indeed, it is the broad informational authority that FERPA gives to schools that permits educational institutions to codify misrepresentations in the educational record, while giving students few meaningful tools to resist these misrepresentations.

While *Grimm* is just one case of the material and ethical consequences students face when they are given little control over their educational records, the case should not be considered an outlier. *Grimm* should be considered a harbinger of the informational struggles to come as increased desire for gender-affirming care and information clashes with staunch political efforts to prohibit or outlaw transgender identity.

A 2022 study conducted by the UCLA School of Law's Williams Institute found that, "among youth ages 13 to 17 in the U.S., 1.4% (about 300,000 youth) identify as transgender."[117] Nevertheless, at the time of this writing, access to lifesaving gender-affirming care and information is systematically targeted by state legislatures and politicians. In just the first few months of 2020, "legislators in at least fifteen states introduced bills that would have prohibited and, in many cases, criminalized providing gender-affirming healthcare services to minors."[118] As of April 2023, legislatures introduced more than 400 such bills, contributing to the avalanche of anti-trans legislation.[119]

---

115. *Id.*

116. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141-52 (critiquing the ways courts fail to address overlapping encounters with race and sex discrimination).

117. JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O'NEILL, WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 1 (2022), https://perma.cc/GAC7-3PQY.

118. *Developments in the Law—Outlawing Trans Youth: State Legislatures and the Battle Over Gender Affirming Care*, 134 HARV. L. REV. 2163, 2164 (2021).

119. Annys Shin, N. Kirkpatrick & Anne Branigin, *Anti-trans Bills Have Doubled Since 2022. Our Map Shows Where States Stand.*, WASH. POST (Apr. 17, 2023), https://perma.cc/SDU5-556F.

Schools have been at the frontline of political and cultural battles over transgender rights.[120] Legislatures pass restrictions aimed at prohibiting trans participation in school sports, and outlawing gender affirming care for minors.[121] Lawmakers and school boards target material that engages LGBTQ identities, experiences, and expression for curricular exclusion.[122] Across the nation, students whose appearance or behavior may not comport with binary or medically based thinking about dichotomous male/female sex categories are "often confronted by schools that are ill-equipped to support them."[123]

This context suggests that, rather than serving as a neutral archive of student information, the school record can be a useful mechanism through which the state imposes its values about appropriate gender expression. Those values may be openly hostile to trans students—such was the case for Gavin Grimm—but even in cases where schools aim to support transgender students, their policies may still undermine student acts of self-definition.[124]

In a comprehensive multistate analysis of policies governing the regulation of transgender and gender-variant students in public schools, legal scholar Scott Skinner-Thompson finds that, even in jurisdictions with comparatively progressive policies, schools still impose significant bureaucratic hurdles on trans students living their gender identity.[125] In many jurisdictions, before trans students can use sex-segregated bathrooms or participate in sex-segregated athletics in ways that align with their gender identity, they must overcome procedural hurdles that take into account the

120. Harper Benjamin Keenan, *Unscripting Curriculum: Toward a Critical Trans Pedagogy*, 87 HARV. EDUC. REV. 538, 543 (2017) (explaining how the regulation of the bodies of trans people in schools is at the center of media and debate).

121. Shin et al., *supra* note 119.

122. Kimberlé Williams Crenshaw, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1718-19 n.32 (2022) (discussing the interrelated nature of efforts to censor antiracist education and efforts to exclude materials about gender identity and expression from the school curriculum).

123. Elizabeth J. Meyer & Harper Keenan, *Can Policies Help Schools Affirm Gender Diversity? A Policy Archaeology of Transgender-Inclusive Policies in California Schools*, 30 GENDER & EDUC. 736, 736 (2018).

124. *See, e.g.*, Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. 657, 659 (2022) ("[E]ven in schools with comparatively permissive approaches to defining and embodying gender, the identities of transgender and gender variant students are governed by intricate and often inaccessible regulatory protocols."); *see also* Meyer & Keenan, *supra* note 123, at 737 ("When institutions develop policy in the name of trans inclusion, they run the risk of simultaneously codifying what it means to be trans and limiting whose gender expression may be protected by such policies.").

125. Skinner-Thompson, *supra* note 124, at 684.

input of adults who may not support the student's felt identity.[126] Skinner-Thompson refers to this phenomenon as "identity by committee."[127]

Without meaningful regulation of a school's internal information practices, schools can use their authority over the official record to erase, police, and otherwise discipline trans student identity. But current information privacy law affords trans students, or their supportive parents, inadequate legal mechanisms to challenge these distortions.

Ultimately, FERPA's weak mechanisms to challenge or alter records reflect the worrying illusion that students have a diminished information privacy interest at the stage of information creation, and that any informational disputes between students and schools can be settled harmoniously without altering any existing power imbalances between the two. Yet the process of information creation is inherently comprised of subjective determinations, each of which provokes struggles between parties vying to have their views represented in the official record.[128] FERPA's procedural safeguard—a hearing that is largely controlled and conducted by the school—is effectively an attempt to intervene in that struggle between the parties, and to do so in a way which settles any conflict of interest at the expense of the documented party.

By organizing privacy narrowly around nondisclosure, FERPA facilitates the misrepresentation of students at the pre-disclosure stage, when a school can choose to selectively create information that aligns with its values or beliefs. For trans and gender-variant students—and especially trans students of color—FERPA's construction of information privacy, combined with schools' investment in binary gender categories, can transform students' school records into an inaccurate representation of their personhood.

---

126. *Id.* at 684, 690.

127. *See generally id.*

128. *See* Spade, *supra* note 106, at 738 (discussing the documentation of gender, its relation to state power, and "how chances at life and death are produced at the population level through registers like race, gender, and disability, and distributed through administrative governance"); *see also* Skinner-Thompson, *supra* note 124, at 664 (discussing how the construction of transgender as a category demonstrates the "power of discourse to create, enshrine and control"); Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 68 (2021) (articulating that reliance upon health care providers and medical records converts the supposed "interactive process" of documentation into one that is "steeped in the medical model of disability"); Saidiya Hartman, *Venus in Two Acts*, SMALL AXE, June 2008, at 1, 10 (confronting the methodological and epistemic constraints placed on scholars of the transatlantic slave trade—who must work within and through a partial archive whose "violence determines, regulates and organizes the kinds of statements that can be made about slavery and . . . creates subjects and objects of power").

B. Data Collection and School Welfare

The individual decisions of school officials are not the only forces shaping educational records at the pre-disclosure stage. Structural forces that are beyond the school's direct control also contribute to information privacy violations within schools. In particular, the structural role that public schools are tasked with playing in America's welfare state increases pressure on them to collect greater amounts of student information.

Therefore, a second consequence of defining privacy narrowly as nondisclosure is that FERPA places the process of information collection beyond its legal regulation. Given the role public schools play in responding to economic and social inequality, this deregulation of the data-collection process exposes students and families to heightened and intrusive data collection.

State welfare institutions regulate the lives of the most marginalized,[129] and privacy scholars have long argued that this regulation can occur through heightened and stigmatizing means of data collection.[130] In an ethnographic study of poor women receiving state-funded reproductive care, Khiara Bridges shows how primarily poor women of color are routinely subject to information-gathering techniques that are intrusive, embarrassing, and trample on their dignitary interests.[131] In exchange for critical state-funded prenatal care, these women experience state-sponsored data-collection techniques that include invasive interrogation and disproportionate drug screening compared to wealthy pregnant people.[132] Through the experiences

129. *See, e.g.*, Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 151-52 (2011); *see also* Nathalie A. Augustin, *Learnfare and Black Motherhood: The Social Construction of Deviance*, *in* CRITICAL RACE FEMINISM: A READER 144, 144-45 (Adrien Katherine Wing ed., 1997). Augustin explains the structure of Learnfare, or public assistance conditioned on school attendance records:

> When a family is applying for AFDC [Aid to Families with Dependent Children] or when a family's eligibility is periodically redetermined, an AFDC caseworker reviews any teenage family member's school attendance records from the most recently completed semester. If the teenager has had more than ten unexcused absences during that time, he or she will be required to meet a monthly attendance requirement for his or her family to continue to qualify for the full AFDC amount.

Id. at 144-45; *see also* Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. Rev. 1540, 1565-66 (2012) (explaining how the distribution of public housing benefits subjects black women to increased surveillance).

130. *See, e.g.*, KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 2-5 (2017); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432-33 (1991) (explaining how hospitals serving poor and minority communities disproportionately implement prenatal drug testing of pregnant woman).

131. BRIDGES, *supra* note 130, at 168.

132. *Id.* ("A poor mother may experience [an] interrogation as doubly painful both because it facilitates social control while at the same time revealing her as the type of person that

footnote continued on next page

of pregnant women, one sees how the process of information collection can itself be a privacy invasion—one that serves a disciplining function in the lives of pregnant women.[133] Depending on the amount and manner in which information is collected, the privacy invasion can also reinforce harmful beliefs about the poor; namely, that they are inherently suspect and must therefore be subject to greater social surveillance.

When concern about the reputational harms of private information's disclosure dominate privacy law and policy, the material and psychological harms that flow from invasive information gathering are mistakenly sidelined.[134] Especially for the poor seeking state-funded social services, heightened and intrusive methods of information collection reveal and reinforce their easily demeaned and inherently suspicious position in the social order.[135] Extending the scholarly critique of information gathering in American welfare into the education context is immensely important given public education's centrality to the welfare state.

In other work, I discuss the role of public education in the landscape of American welfare as a theoretical frame for understanding America's system of public schooling.[136] This framework is rearticulated below to consider the implications school welfare has for student information privacy. In the welfare landscape of the United States, public schools are the only compulsory and universal institution of state-funded services.[137] While some may assume that schools collect student and family information in the service of teaching and learning, schools increasingly collect student information to execute their unique welfare function.[138]

In the United States, almost 1 in 5 children, over 10 million, live below the poverty line.[139] The nation consistently ranks among the countries with the

society wants to control."); *id.* at 123 (explaining that poor pregnant mothers are disproportionately screened for drugs because they rely on public hospitals that are more likely to test infants at birth for the presence of drugs).

133. *Id.* at 1-5 (showing how pregnant women seeking prenatal care through public assistance programs are subject to heightened government intrusion and invasions of privacy).

134. Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1410-11 (2012).

135. *Id.* at 1422 ("[P]oor people . . . suffer the stigmatization and humiliation that occur when information is collected.").

136. Gamal, *supra* note 20, at 932.

137. *See id.* at 947.

138. *See, e.g.*, Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1194 (2006) (discussing requirements for school lunch programs that involve sensitive student and household information).

139. HEATHER KOBALL, AKILAH MOORE & JENNIFER HERNANDEZ, NAT'L CTR. FOR CHILD. IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN: CHILDREN UNDER 18 YEARS, 2019, at 2 (2021), https://perma.cc/9UYA-6J73.

worst child poverty rates[140] and public schools—the nation's only universal and compulsory welfare institution[141]—play a significant role in responding to poverty in America.[142] Today, schools provide nutritional, health, dental, vision, and counseling services to students.[143] The important role that schools play in the American welfare landscape can be traced back to historical investment decisions. For America's poorest populations, public education has long been a centerpiece of American welfare.[144] During the late nineteenth and early twentieth centuries, while other nations focused on developing unemployment programs, security for old age, and health insurance, the United States expanded its massive system of compulsory schooling.[145]

Emphasizing the redistributive nature of public schools—specifically, their ability to provide social and economic opportunity, and facilitate individual and collective betterment—is a key aspect of public welfare in the United States.[146] Public schooling departs from the means-tested approach to delivering public welfare, such that a public education is not tied to employment, income requirements, or other means-tested restrictions. The students and families who use state schools are not burdened with the same stigmatizing associations that burden recipients of welfare.[147]

---

140. *See* MARK ROBERT RANK, LAWRENCE M. EPPARD & HEATHER E. BULLOCK, POORLY UNDERSTOOD: WHAT AMERICA GETS WRONG ABOUT POVERTY 73-81 (2021).

141. All fifty states have passed compulsory education laws. *See* Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 804 (2018).

142. In public education, poverty levels—as measured by the number of students qualifying for free and reduced lunches—have increased drastically over the last two decades for all racial groups. Black and Latinx students now "attend schools with substantial majorities—two-thirds—of poor classmates." GARY ORFIELD, JONGYEON EE, ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, UCLA C.R. PROJECT, *BROWN* AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE 6-7 (2016), https://perma.cc/CSS7-RN5Q.

143. *See* Tanious, *supra* note 148, at apps. A-B (detailing the provision of school-based services).

144. *See* MORRIS JANOWITZ, SOCIAL CONTROL OF THE WELFARE STATE 34-35 (1976); *see also* Michael B. Katz. *Public Education as Welfare*, DISSENT (Summer 2010), https://perma.cc/HAD4-RAQE.

145. Katz, *supra* note 143 (observing that "the most significant difference between the institutional bases of the welfare state in Great Britain and the United States was the emphasis placed on public education" (quoting Janowitz, *supra* note 143, at 34)).

146. Janowitz, *supra* note 143, at 34-35.

147. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (asserting that one of the central roles of education is to prepare young people for good citizenship by preventing state dependence and encouraging self-sufficiency). The stigmatization of poor people who rely on public assistance is well-documented. Stigma has been used to regulate reliance on public assistance. *See, e.g.*, Joel F. Handler & Ellen Jane Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 1-3 (1969) (empirically examining feelings of stigma among recipients of public welfare); *see also* Norman L. Wyers, *Shame and Public Dependency: A Literature Review*, 4 J. SOCIO. & SOC.

footnote continued on next page

Within the landscape of American welfare, public schools serve as key sites where both education and other forms of state-funded care are coordinated and dispensed.[148] School welfare services help the students who attend schools, but students' families and wider communities also increasingly rely on schools to fulfill vital needs.[149] To be sure, the outsized role that public education plays in the landscape of American welfare cannot be divorced from policy decisions that privatize dependency and concentrate caregiving within the family. These policies contribute to a welfare landscape where public education is effectively the only public caregiving infrastructure.[150]

The extent to which our society, economy, and labor market depend on our system of compulsory schooling was laid bare during the COVID-19 pandemic.[151] Without access to public schools, many parents, especially mothers and single parents, struggled to participate in the labor market.[152] This reliance extends to other school functions—like medical care and food assistance[153]—that help sustain America's public school population, which is increasingly comprised of low-income and racially diverse students.[154]

WELFARE 955, 963-64 (1977) (calling for policy changes in the implementation of public welfare in order to reduce stigma and its attendant effects).

148. Sherry Maria Tanious, Note, *Schoolhouse Property*, 131 YALE L.J. 1641, 1648-49 (2022) (conducting a fifty-state survey to reveal that, since 1975, federal nutrition assistance programs and health services have expanded in schools such that schools have become "more than the child's source of academic instruction and socialization—[they have] become a supplier of nutritional meals and a provider of health services."); *see also* Abbye Atkinson, *Philando Castile, State Violence, and School Lunch Debt: A Meditation*, 96 N.Y.U. L. REV. ONLINE 68, 76 (2021).

149. For example, in May 2020, the nation's second largest school district reached a milestone of serving 25 million meals. It was the nation's largest food relief effort and one-third of those meals were served to adults, which the school district argued it should be reimbursed for providing. *See* Press Release, L.A. Unified Sch. Dist., Los Angeles Unified Crosses 25 Million Meal Milestone in Country's Largest Food Relief Effort (May 28, 2020), https://perma.cc/52K2-DP9R.

150. Melissa Murray & Caitlin Millat, *Pandemics, Privatization, and the Family*, 96 N.Y.U. L. REV. ONLINE 106, 111 (2021) ("[O]utside of school, there is actually very little state support, and almost no public infrastructure, for caregiving and caregivers. Put simply: The state provides public education, but the family is supposed to provide everything else.").

151. *See generally id.*

152. Misty L. Heggeness & Jason M. Fields, *Parents Juggle Work and Child Care During Pandemic: Working Moms Bear Brunt of Home Schooling While Working During COVID-19*, U.S. CENSUS BUREAU (updated Oct. 30, 2020), https://perma.cc/85CU-GVB3; Lauren Weber, *As Schools Plan to Reopen, Single Parents Have Few Child-Care Options*, WALL ST. J. (Aug. 2, 2020, 11:23 AM ET), https://perma.cc/VW4L-T8CN.

153. Tanious, *supra* note 148, at 1648-49.

154. Compared to when *Brown v. Board of Education* was decided, today's public school students are poorer, more isolated by race and class, and less white. Poverty levels have increased drastically over the last two decades for all racial groups. Black and Latinx students now "attend schools with substantial majorities—two-thirds—of poor

footnote continued on next page

American schools are not simply tasked with the state provision of educational instruction in the traditional sense; rather, within the American welfare landscape, public schools are tasked with providing vital social and economic services.[155] The National School Lunch Program provides low-cost or free lunches to nearly 20 million children in over 100,000 schools daily.[156] The second largest school district in the nation provides mental health counseling and medical care to over 51,000 students facing homelessness, while serving more than 100 million free meals to students living in poverty.[157] The National Center for Homeless Education estimates that over 1 million public school students were unhoused during the 2020-2021 school year.[158] For unhoused students, schools provide basic necessities including free meals, medical care, and shelter during the day.[159]

The structural role that public education plays in responding to the "organized abandonment"[160] of the welfare state increases pressure on schools to collect student data.[161] Like other state welfare institutions, access to needed

---

classmates." ORFIELD ET AL., *supra* note 142, at 1, 6-7 (calling attention to the rise in "double segregation" by race and poverty in schools).

155. *Supporting Homeless Students*, ACCREDITED SCHS. ONLINE (updated Oct. 25, 2022), https://perma.cc/Y7CF-5CMW (explaining that teachers are responsible for ensuring that any homeless student has stable access to food, shelter, medical care, and other basic needs).

156. Analisa Sorrells, *Behind the Lunch Tray: A Look at How School Meals Are Funded*, EDUCATIONNC (Apr. 18, 2022), https://perma.cc/7TBW-4DCN (noting that participation in school meals declined 30% in 2020-2021 due to school closures during the COVID-19 pandemic).

157. Press Release, L.A. Unified Sch. Dist., Los Angeles Unified Provides 100 Million Meals to Students and Families in Need (Feb. 1, 2021), https://perma.cc/TG5P-VXFR; Rebecca Katz, *Nearly 70% of Homeless Students in Los Angeles Unified Chronically Absent Last Year*, L.A. SCH. REP. (July 19, 2022), https://perma.cc/9MYC-LW8K (noting that "[t]here are more than 51,000 homeless students in Los Angeles public schools; and just over 7,000 students currently in foster care" and describing the District's efforts to provide mental health services to those students).

158. NAT'L CTR. FOR HOMELESS EDUC., STUDENT HOMELESSNESS IN AMERICA: SCHOOL YEARS 2018-19 TO 2020-21, at 1 (2022), https://perma.cc/9JZV-44E4.

159. *Supporting Homeless Students*, *supra* note 155; Carolyn Jones, *California Schools Report Fewer Homeless Students, Alarming Advocates*, EDSOURCE (Jan. 27, 2021), https://perma.cc/V7YA-44MJ.

160. Ruth Wilson Gilmore, *You Have Dislodged a Boulder: Mothers and Prisoners in the Post Keynesian California Landscape*, 8 TRANSFORMING ANTHROPOLOGY, nos. 1 & 2, 1999, at 12, 14.

161. *See* Nat'l Ctr. for Educ. Stat., NCES No. 97-859, Protecting the Privacy of Student Education Records 1-3 (1997), https://perma.cc/M7S5-7XLM (explaining that educational records covered by FERPA include a range of academic, personal, and health information); *see also* PATRICIA BURCH & JEIMEE ESTRADA-MILLER, POL'Y ANALYSIS FOR CAL. EDUC., STRENGTHENING COMMUNITY SCHOOLS THROUGH IMPROVED DATA SYSTEMS 1 (2022), https://perma.cc/955S-FG5L (discussing the importance of data collection and

footnote continued on next page

resources in schools is attached to systems of information collection and documentation. To determine eligibility and track participation in social programs, schools collect remarks, explanations, tests, determinations, and certifications in official records.[162]

When viewed from the standpoint of student information privacy, the demands placed on school-based welfare is profound. As schools are structurally tasked with providing food, medical care, mental health services, and other social services they will invariably collect greater amounts of private student information. This shifting landscape means that students who rely on schools to meet their basic needs will experience heightened data collection in schools.

Yet those attentive to the growing welfare function of schools tend to neglect any concern about the impact this function has on state data collection.[163] While a large body of scholarly research suggests that flows of personal information are not always structured by dystopic visions of data extraction[164]—and much of today's information sharing involves a degree of voluntariness, where individuals offer up personal details in exchange for some material benefit[165]—ignoring the privacy invasions catalyzed by school welfare is not without its risks. The primary risk is that one ignores the larger coercive context in which students must submit private information to meet basic social and economic needs.

Many schools sit in neighborhoods already starved of state infrastructure, lacking in access to food and employment, and marked by histories of racial

---

sharing to the community schools model in Los Angeles, whereby "schools partner with community agencies and local government to provide an integrated focus on academics, health and social services, youth and community development, and community engagement" (quoting JEANNIE OAKES, ANNA MAIER & JULIA DANIEL, NAT'L EDUC. POL'Y CTR., COMMUNITY SCHOOLS: AN EVIDENCE-BASED STRATEGY FOR EQUITABLE SCHOOL IMPROVEMENT (2017), https://perma.cc/YW7W-AVEA)).

162. *See, e.g.*, 7 C.F.R. § 245.6 (2022) (requiring documentation of student and family eligibility as a condition of enrollment in the National School Lunch Program and School Breakfast Program).

163. *Id.* at 1647-49 (arguing for legal protections to help secure school welfare services).

164. *See, e.g.*, David Lyon, *Technology vs 'Terrorism': Circuits of City Surveillance Since September 11th*, 27 INT'L J. URB. & REG'L RSCH. 666, 673 (2003) (explaining that most surveillance is practiced with a view to enhance efficiency, productivity, participation, health, and safety); JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 145 (2012) (arguing that "interpreting self-exposure either as a blanket waiver of privacy or as an exercise in personal empowerment would be far too simple."); DOROTHY E. ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 226-27 (2011) (explaining how many Americans voluntarily provide their genetic information to companies in order to fulfill a desire to understand something about their family lineage).

165. *See* DAVID LYON, SURVEILLANCE STUDIES: AN OVERVIEW 15-16 (2007) (arguing that, although surveillance "involves relations of power in which watchers are privileged," those placed under surveillance still play an important role).

and economic isolation.[166] This broader disinvestment in surrounding communities means that refusing school-based services in order to protect information privacy may not be an option for families who, as a matter of government policy, have been offered education reforms in lieu of other more expensive and effective antipoverty programs, like employment programs or increases to the minimum wage.[167]

Consider that, in 2022, as a response to the economic devastation brought by the COVID-19 pandemic, President Joe Biden's budget for the United States Department of Education included a $443 million allocation to expand the Full-Service Community Schools program, up from just $30 million the previous year.[168] The drastic expansion in funding was intended to increase the "broad range of wrap-around services to students and families in underserved schools and communities" and also to recognize the important role that schools play in providing needed resources.[169] The federal government also provided direct government payments for caregiving labor through the CARES Act, but the Act tied eligibility directly to the fact of school closures.[170] These benefits were set to evaporate once schools reopened, even if a parent needed to keep a child home for other health reasons.[171]

The COVID pandemic has underscored how attempts to fund social welfare through schools are often less politically controversial than funding them outside of schools, in part because the caretaking function of schools enables parent labor-market participation. But the result of this approach to addressing inequality is that many schools are tasked with achieving what "no

166. *See* ERICA R. MEINERS, FOR THE CHILDREN? PROTECTING INNOCENCE IN THE CARCERAL STATE 86-88 (2016) (discussing the detrimental impact of school closures in Chicago where communities are "hungry," deprived of access to other state resources).

167. *See* Jean Anyon & Kiersten Greene, *No Child Left Behind as an Anti-Poverty Measure*, 34 TCHR. EDUC. Q., Spring 2007, at 157, 161 (arguing that education reforms like No Child Left Behind stand in the place of more expensive and effective antipoverty programs like raising the minimum wage or job creation); *see also* BURCH & ESTRADA-MILLER, *supra* note 161, at 1 (explaining that, as a response to the economic turmoil catalyzed by the COVID-19 pandemic, "President Joe Biden and leaders of several states have significantly increased investments in community schools, including the $443 million of President Biden's Build Back Better Act budget allocated to their expansion").

168. *See* Press Release, U.S. Dep't of Educ., Statement by Miguel Cardona Secretary of Education on the Policies and Priorities of the U.S. Department of Education (June 24, 2021), https://perma.cc/QT4U-D6AS; *see also* Burch & Estrada-Miller, *supra* note 161, at 1.

169. Press Release, U.S. Dep't of Educ., *supra* note 168.

170. Noah Zatz, *Where is the Care in the CARES Act?*, L. & POL. ECON. PROJECT BLOG (July 27, 2020), https://perma.cc/GG68-KU5P (explaining that "school closure is directly tied to [Pandemic Unemployment Assistance] eligibility: if schools are open, family caregiving evaporates as a basis for eligibility, even if a parent keeps their child home for health reasons").

171. *Id.*

school can do": provide a satisfying solution to poverty with relatively little money and without the assistance of large-scale social initiatives.[172] This mythical thinking about the role of public education in alleviating poverty generates increased pressure on schools to fulfill basic needs, even if this pressure serves as a justification for intensified data collection.

The impossibility of rejecting school welfare in the context of America's diminished social safety net means that young people who suffer the most from the dismantling of state welfare—mostly low-income students of color—will be "informally disenfranchised" of their right to information privacy under FERPA.[173] While FERPA formally grants students information privacy rights, the statute's failure to regulate school data collection in the face of mounting pressure on schools to stand in for the rest of the welfare state functionally removes the right to information privacy at the stage of data gathering.[174] A key consequence of FERPA's construction of information privacy as nondisclosure, therefore, is the asymmetrical distribution of information collection along the lines of race and class.

At the same time, deregulating the manner in which student information is collected has already created real and immediate consequences for students seeking educational benefits. As Kaaryn Gustafson explains, school data-collection practices are not immune from the highly intrusive and stigmatizing techniques that characterize other welfare agencies.[175] In some cases, schools enlist private companies to help police educational boundaries and benefits, surveil students and parents, and operate 24/7 tip hotlines to help root out fraud.[176] Other companies admit that school districts enlist these investigation services to target Black, Latinx, and disabled students.[177] The deregulation of information gathering by schools can subject students and families to intrusive investigations to confirm residency, including early morning home visits and

172. James Traub, *What No School Can Do*, N.Y. TIMES (Jan. 16, 2000), https://perma.cc/P2JT-6PXQ ("It is hard to think of a more satisfying solution to poverty than education. School reform involves relatively little money and no large-scale initiatives, asks practically nothing of the nonpoor and is accompanied by the ennobling sensation that comes from expressing faith in the capacity of the poor to overcome disadvantage by themselves.").

173. *See* BRIDGES, *supra* note 130, at 13 ("Informal disenfranchisement refers to the process by which a group that has been formally bestowed with a right is stripped of that very right by techniques that the Court has held to be consistent with the Constitution.").

174. *See* 20 U.S.C. § 1232g.

175. *See* Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 328-30 (2013); *see also* Augustin, *supra* note 129, at 144-45.

176. Gustafson, *supra* note 175, at 328-29.

177. *Id.* at 329.

stakeouts outside children's homes.[178] These data-collection techniques are enlisted to "selectively distribut[e] public services," but also have the impact of excluding "those who represent the inferior other."[179]

As schools come to occupy a larger role in the American welfare landscape, regulating the manner and scope of their information collection is necessary not only for information privacy, but for the broader project of educational equality. Contrary to the underlying assumption in FERPA, information gathering is never a neutral, monolithic, or objective process.[180] It is a process that necessarily implicates social arrangements and relations.[181] It requires the party collecting information to decide what information to collect, what information to ignore, and the manner in which to gather information.[182] The consequences of these informational decisions not only determine students' access to needed resources, they also communicate much about who has a legitimate claim to public benefits and whose claims should be viewed with suspicion. Importantly, none of these decisions can be reached by a right to privacy narrowly aimed at preventing information disclosure. Under FERPA, the way schools gather information falls outside the purview of legal regulation, with implications for both the allocation of privacy and the project of educational equality.

C. Documentation and Disability

When student information privacy is framed narrowly as the right to prevent the disclosure of personal information, it cannot protect students from the privacy invasions that occur at the stage of information documentation.

178. *See* LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 417 (2019) ("To aid in this surveillance, schools provide investigators with photos of the suspected child, and investigators stake out children's suspected homes, sometimes sitting for hours while they wait for the child to appear.").

179. Gustafson, *supra* note 175, at 330.

180. *See* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1405 (2000) ("Information systems and technologies are designed, not given, and the design process for any technology or system for organizing information necessarily incorporates assumptions about the things or conditions that should be measured, and the relevant quanta of measurement.").

181. *Cf.* LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLE 1 (3d ed. 2021) ("The ways in which scientific research is implicated in the worst excesses of colonialism remains a powerful remembered history for many of the world's colonized peoples.").

182. *See, e.g.*, Solon Barocas & Andrew D. Selbst, Essay, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 684-85 (2016) (explaining, in the context of algorithmic decisions, that data-collection techniques that erroneously exclude information impact the reliability and fairness of statistical models); *see also* Sabina E. Vaught, *Vanishment: Girls, Punishment, and the Education State*, TCHRS. COLL. REC., July 2019, at 1, 2-3 (2019) (discussing the gendered disappearance of information as a key element of carceral control).

For the 7.2 million public school students ages 3-21 who receive special education services under the Individuals with Disabilities Education Act (IDEA),[183] the process of receiving the resources necessary for their education is intricately connected to data documentation.[184]

The IDEA demands the production of numerous records, including documentation of academic progress, physical health, mental capacities, and the social or cultural background of students with disabilities.[185] Under the IDEA, schools receiving federal funding must identify students with disabilities and provide them with the services and resources needed to secure a "free appropriate public education."[186] While the affirmative obligation to provide all students access to education is a positive aspect of the law, this obligation is generally understood to require detailed documentation at almost every stage of the process.[187]

To access needed educational resources under the IDEA, a student must qualify under a specific eligibility category, a process that results in heightened documentation.[188] In order to demonstrate that they are eligible for increased

183. NAT'L CTR. FOR EDUC. STAT., *supra* note 25.

184. For example, to qualify as disabled under Section 504 a child must have "a physical or mental impairment which substantially limits one or more major life activities," and have "a record of such impairment" or be "regarded as having such an impairment." 34 C.F.R. § 104.3(j)(1) (2023).

185. *See* 34 C.F.R. § 300.306(c)(1)(i) (2023).

186. 20 U.S.C. § 1400(d)(1)(A). Prior to IDEA's enactment in 1975, students with disabilities were routinely excluded from public education. *See A History of the Individuals with Disabilities Education Act*, U.S. DEP'T OF EDUC., https://perma.cc/6HHT-QQEV (last updated Jan. 11, 2023). IDEA's requirement to provide students with disabilities an education in the "least restrictive environment" emerged as a valuable tool against the systematic exclusion and institutionalization of disabled students. 20 U.S.C. § 1412(a)(5). Today, a student with an identified disability is eligible for enhanced educational services that permit them to make educational progress. 20 U.S.C. § 1400(d)(1)(A); *see also* 20 U.S.C. § 1412(a)(5) (students with disabilities should be educated in general education classes to the extent possible).

187. The Individualized Education Program (IEP) is at the heart of fulfilling this obligation. The process of developing an IEP requires extensive documentation:

> In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—(i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child.

20 U.S.C. § 1414(d)(3)(A); *id.* § 1414(d)(1)(A) (an IEP "means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with" the law).

188. A school district has an affirmative obligation to "identif[y], locate[] and evaluate[]" a student suspected of having a disability, and the determination of eligibility produces a plethora of recordable information, even if the student is not ultimately found to qualify for specialized services. 20 U.S.C. § 1412(a)(3)(A); *see id.* § 1401(3)(A) (defining a child with a disability as one whose circumstances match certain enumerated conditions: "intellectual disabilities, hearing impairments (including deafness), speech

footnote continued on next page

resources, students provide a great deal of information to schools, including submitting to physical, psychological, and emotional testing by school officials or by third-party evaluators.[189] A formal student evaluation will analyze numerous aspects of a student's functioning, including memory, cognitive functioning, behavior, and personal and family history.[190] These documented evaluations serve as the basis of discussion between schools and families in determining what, if any, disability a student has and what resources should attach to this disability.[191] Although disabled students of all races must provide this heightened documentation, students of color are acutely exposed to increased documentation since they are disproportionately represented in many special education disability categories.[192]

Not only is documentation required in the process of determining disability; it is also produced pursuant to a school's obligations under the IDEA to periodically convene educational meetings—called Individualized Education Programs (IEPs)—that evaluate a disabled student's educational progress.[193] The term "IEP" refers to both a process and a written document containing diverse information about a child's performance, goals, services, and needs.[194] Documentation is therefore a central component of the academic career of a disabled student.

---

or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities").

189. 20 U.S.C. § 1414(a)-(b); 34 C.F.R. § 300.306(c)(1) (2023).

190. 20 U.S.C. § 1414(b)(2); *see also* Susan Yellin, *The School Evaluation Process: How to Get Formal Assessments and Appropriate Services*, ADDITUDE (updated Apr. 8, 2022), https://perma.cc/7DJ5-WPGJ.

191. 20 U.S.C. § 1414(c)(1).

192. Subini Ancy Annamma, David J. Connor & Beth A. Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, *in* DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 9, 10-11 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016) ("African American students continue to be three times as likely to be labeled mentally retarded, two times as likely to be labeled emotionally disturbed, and one and a half times as likely to be labeled learning disabled, compared to their White peers."); *see also* M. SUZANNE DONOVAN & CHRISTOPHER T. CROSS, NAT'L RSCH. COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 35 (2002) ("In this chapter, we compare the number of students of each race/ethnicity identified for special and gifted education with their representation in the stuent population.").

193. *See* OFF. OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 4 (2000), https://perma.cc/B73G-N2NZ (articulating that IEP meetings periodically involve a review of the child's IEP in order to inform the parents of "their child's progress and whether that progress is enough for the child to achieve the goals by the end of the year").

194. 20 U.S.C. § 1414(d)(1)(A)-(B).

This document-driven approach to determining and validating disability means that, as a class, students with disabilities enjoy less information privacy compared to their non-disabled peers. The records of students with disabilities will contain a plethora of private medical and social information, records that they must share to gain the tools necessary to access their education. Yet, if FERPA primarily protects privacy by limiting the disclosure of information, the statute cannot protect students from the privacy invasions that occur at the stage of information documentation.

Still, not all privacy intrusions are bad. Some invasions of privacy may be completely justified depending on the socially desirable ends they help achieve. This is the fundamental argument contained in a large body of scholarly work on privacy, which argues that too much privacy can come at the expense of competing values like free speech,[195] convenience,[196] transparency in market transactions,[197] and innovation.[198]

In the case of disability documentation, students with disabilities are exposed to privacy intrusions in part to ensure that limited educational resources flow to the most deserving students. Such appeals to deservingness and fiscal restraint are built into the philosophy of disability documentation,

195. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1053 (2000) (critiquing and ultimately opposing the justifications for information privacy speech restrictions).

196. Kent Walker, *Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange*, 2000 STAN. TECH. L. REV., no. 2, at 7-11 (arguing that the free flow of information has benefits for consumers including increased convenience, lower transaction costs, and access to a larger number of commercial actors); *see also* Fred H. Cate, *Principles of Internet Privacy*, 32 CONN. L. REV. 877, 884 (2000) (arguing that the free flow of personal information serves a democratizing function in the marketplace, allowing anyone to "make purchases from vendors they will never see, maintain accounts with banks they will never visit, and obtain credit far from home all because of open information flows").

197. Richard A. Posner, Lecture, *The Right of Privacy*, 12 GA. L. REV. 393, 399 (1978) ("Much of the demand for privacy, however, concerns discreditable information, often information concerning past or present criminal activity or moral conduct at variance with a person's professed moral standards. And often the motive for concealment is . . . to mislead those with whom he transacts.").

198. Tal Z. Zarsky, *The Privacy–Innovation Conundrum*, 19 LEWIS & CLARK L. REV. 115, 129-42 (2015) (mapping out and evaluating the various ways that the relationship between privacy and innovation might be conceptualized and drawing attention to law and policy debates around the two ideals); *see also Balancing Privacy and Innovation: Does the President's Proposal Tip the Scale?: Hearing Before the Subcomm. on Com., Mfg., & Trade of the H. Comm. on Energy & Com.*, 112th Cong. 11 (2013) (statement of Rep. Marsha Blackburn) (arguing that European regulations on free-flowing information stall innovation and present a cautionary tale for American lawmakers).

the overwhelming function of which is to guard the resources and legal benefits that attach to disability status.[199]

Consider that the state of California spends an average of $26,000 a year to educate a student in special education, compared to $9,000 a year to educate students in "general education."[200] Against the backdrop of market-driven educational policy—which points to public-sector inefficiency and government waste as among the greatest threats to America's educational system[201]—heightened documentation signals that schools are doing their part to distinguish between worthy and unworthy recipients of educational resources.[202]

Records serve to authenticate disability amidst fears of what legal scholar Doron Dorfman has labeled the "disability con."[203] In his discussion of the public's suspicion of disabled people, Dorfman explains how heightened scrutiny is motivated by panic that some undeserving individuals will receive unwarranted special treatment.[204] The fear of this fraud produces intensified scrutiny over disabled people.[205] By guarding the boundaries of disability, requiring documentation signals that educational institutions are

199. *See, e.g.*, Macfarlane, *supra* note 128, at 61 (writing, in the context of receiving necessary accommodations, that "[t]he medical documentation requirement is likely influenced by the widespread belief that people who claim disability are faking it. . . . As a result, people with disabilities must constantly prove that they are disabled"); *see also* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2340 (2021) (describing the administrative toll that people with disabilities face as a result of securing the necessary documentation to prove and re-prove their disabilities to the entities that pay for benefits).

200. Louis Freedberg, *California Spending Over $13 Billion Annually on Special Education*, EDSOURCE (updated Nov. 18, 2019, 4:00 PM), https://perma.cc/J4ES-GTW9 (noting that costs vary widely depending on disability).

201. *See* PAULINE LIPMAN, THE NEW POLITICAL ECONOMY OF URBAN EDUCATION: NEOLIBERALISM, RACE, AND THE RIGHT TO THE CITY 14-15 (2011).

202. *See* Stephen P. Walker, *Accounting, Paper Shadows and the Stigmatised Poor*, 33 ACCT. ORGS. & SOC'Y 453, 481-82 (2008) (discussing how documentation generally provides society information to identify people with stigmas that cause them to be less liked and more rejected and, consequently, thought of as less deserving of public resources).

203. Dorfman, *supra* note 27, at 1053 & n.1 (noting that the term was originally coined by Ellen Samuels). Disability law breaks with a narrow construction of antidiscrimination law that collapses equality with sameness by disentangling the two and compelling states to provide some measure of positive rights in order to remove barriers to educational participation and progress. *See id.* at 1057-58, 1060-61. Attaching disability to positive rights generates intense scrutiny and suspicion of those seeking legal redress for disability discrimination. *See id.* at 1055-57.

204. *Id.* at 1060-62.

205. *Id.* at 1055-57; *see also* Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV 557, 558 (2020) (discussing intensified private enforcement of disabled people and a broader "moral panic about the abuse of rights by nondisabled fakers").

only dispensing legal and material benefits to those who legitimately qualify for assistance.

But embedded in this econometric reasoning is the spurious assumption that documentation is an appropriate proxy for disability and, accordingly, for deservingness of educational resources. In fact, records are a poor stand-in for disability precisely because access to documentation is mediated by race, class, geography, and other factors that determine proximity to medical and other health professionals.[206] Despite its purported attempts to ration resources in a socially neutral manner, a reliance on documentation embraces a measure of disability that rests on myriad social determinants. Indeed, disability exists whether or not it is documented.[207] Not only does a document-driven process disadvantage disabled people without easy access to documentation providers, it can also exacerbate inequalities within the category of disability itself.[208]

The community of disabled people is diverse, as many disabled people have vastly different medical conditions and many may experience no medical limitations at all.[209] Despite sharing the common experience of living as part of a systematically disadvantaged and subordinated group,[210] disability discrimination and access to accommodations must be understood as mediated by an individual's social experience and identity, including, as Jasmine Harris writes, by their aesthetic markers of disability.[211] Especially when a person's disability is not easily recognized by others, those making decisions about reasonable accommodations may request increased documentation.[212] In many cases, requests for increased documentation based on the perceived aesthetics of legitimate disability is perfectly lawful, even though it disproportionately burdens those with less visible disabilities.[213]

The document-driven approach to recognizing and validating disability is, therefore, a powerful example of how student information privacy is compromised at other stages of the life cycle of information beyond disclosure, and how these privacy intrusions frequently result and reproduce disadvantage

206. Emens, *supra* note 199, at 2345-46 (explaining that the inevitable administrative demands that accompany disability are different depending on education levels, work skills, access to resources, and race and class privilege).

207. *See* Macfarlane, *supra* note 128, at 60.

208. Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 184 (2020) (arguing for the need to consider disability intersectionally and along the lines of relative access to medical diagnosis).

209. *Id.* at 176-77; *see also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 401 (2000).

210. *Id.*

211. Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 942 (2019).

212. Macfarlane, *supra* note 128, at 84.

213. *Id.* at 83-84.

for already marginalized groups. For students with disabilities, the heavy reliance on documentation to validate disability status means that it is nearly impossible for them to maintain privacy from schools. Their educational records will not simply contain information about academic achievement, but also medical records, psychological testing, physical evaluations, and other information a school might create or demand. More importantly, the result of this process is not simply that their privacy will be invaded by demands for documentation, but that the allocation of educational resources can be predicated on hegemonic understandings of what disability can and should look like.

By failing to regulate internal documentation practices, FERPA places protection from the logics of data documentation outside or beyond the concern of information privacy law. As a result of the privacy invasions that take place at the stage of documentation, inequalities within the community of disabled people are intensified as their access to resources becomes dependent, not on their need, but on their ability to secure sufficient documentation.

III. Information Privacy and Institutional Power

I have set forth an argument that challenges a set of basic assumptions about schools that loom large in information privacy law. These basic assumptions are that schools create accurate informational archives, that they collect information to fulfill a purely academic function, and that they document students to fairly distribute resources. Without accepting these assumptions, it would be difficult to accept a statute that adopts as its primary mechanism for securing information privacy the regulation of information disclosure.

When protection from unauthorized disclosure of information becomes the dominant legal method of securing information privacy, the young people who suffer the most are those whose data is created, collected, and documented in ways that reproduce a subordinated status. The laws that purport to protect their information privacy transform into laws that authorize privacy intrusions, while at the same time increasing their vulnerability.

Through the experiences of trans, low-income, and disabled students, the fundamentally indeterminant meaning of information privacy is revealed, as are the stakes for claiming an expanded conception of information privacy. Indeed, privacy can refer to a wide range of practices, interests, and mindsets,[214] and there is no singular way law can protect information

214. ALLEN & ROTENBERG, *supra* note 30, at 4-5 ("Consider the diverse range of things ordinary people and legal professionals refer to when they speak of privacy. In everyday parlance, invasions of "privacy" include: (1) physical intrusions, such as a voyeuristic landlord hiding in a tenant's bedroom; (2) informational intrusions, such as a curious employer reading an employee's personal email just for fun; (3) decisional
footnote continued on next page

privacy.[215] Information privacy laws can prohibit disclosure, surveillance, documentation, or even mandate that individuals have a right to have their data erased.

Depending on what privacy-intruding activities and behaviors the law prohibits, individuals may have information privacy in the sense that they can stop institutions from disclosing their private information. At the same time, they may lack information privacy in the sense that they cannot control how their information is created, collected, and recorded by these same institutions. The elusiveness of a universal construction of information privacy, however, does not diminish the need for the legal pursuit of robust information privacy protections.

Even if information privacy contains no self-evident meaning, a restrictive definition of information privacy leaves students vulnerable to the detrimental consequences of misrepresentation, stigmatization, and the reproduction of hierarchies within the category of disability. Privacy protections are important, not only because they help to secure and maintain important values like intellectual freedom,[216] security,[217] and innovation,[218] but also because they are necessary to secure equality between groups with widely varying access to political power.[219] The important role that privacy

intrusions, such as states banning assisted suicide or polygamy; (4) proprietary intrusions, such as an advertiser using someone's photograph without permission; and (5) associational intrusions, such as an unwelcome person demanding membership in an exclusive club.").

215. *See generally* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006) (providing a taxonomy of behaviors and activities that fall within the broad category of privacy protection).

216. NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 100-01 (2015) (arguing for a right to intellectual privacy to facilitate the production of new ideas, allowing them "room to develop and grow before they are ready for publication").

217. Tiberiu Dragu, *Is There a Trade-Off Between Security and Liberty? Executive Bias, Privacy Protections, and Terrorism Prevention*, 105 AM. POL. SCI. REV. 64, 64 (2011).

218. Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1918-20 (2013) (explaining how diminished privacy impairs the conditions that facilitate innovation).

219. *See* SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 2 (2020) ("[T]he loss of privacy increases the precariousness of marginalized individuals' lives and vulnerable groups are less able to absorb the social costs associated with privacy violations . . . . [A]ny such incursions also inflict exponentially outsized harms on members of marginalized communities."); *see also* DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE 119 (2022) (arguing for a civil right to intimate privacy to protect vulnerable groups and to protect "human flourishing, democratic engagement, and equality"); *see also* Sarah Haley, Shoniqua Roach, Emily Owens & Keeanga-Yamahtta Taylor, *Confinement, Interiority, Black Feminist Study: A Forum on Davis's "Reflections" at 50*, 51 BLACK SCHOLAR, Spring 2021, at 3, 5 (arguing that some degree of privacy in the domestic sphere of enslaved people helped to produce something "*other and in excess of* a captive labor force, namely Black life").

plays in protecting marginalized groups heightens the need for an expansive definition of privacy to inform legal rights. The worrying reality, however, is that there is reason to believe that the Supreme Court is moving in the opposite direction by reinforcing a restrictive understanding of information privacy rights organized narrowly around nondisclosure to third parties.

In the 2021 case *TransUnion v. Ramirez*, the Supreme Court decided whether individuals who were misrepresented in their credit report had standing to sue in federal court.[220] The conflict began when the credit reporting company adopted a name screening system, which compared consumers' names against a federally maintained list of "specially designated nationals" deemed threats to national security.[221] If the customer's first and last name matched anyone on the list, TransUnion generated an alert on the individual's credit report.[222] Individuals who were flagged as a "potential match" with the government database were prevented from obtaining credit even when they were otherwise creditworthy.[223]

One individual, Sergio Ramirez, learned his record was flagged by TransUnion during a routine car purchase in Northern California.[224] Representing a class of 8,185, Ramirez sued TransUnion for violations of the Fair Credit Reporting Act (FCRA), which requires reporting agencies to use "reasonable procedures to ensure maximum possible accuracy" of an individual's credit report.[225] He argued that the careless manner in which TransUnion labeled individuals potential threats to national security violated his rights under the FCRA.[226] The Supreme Court held that only those class members whose credit reports were shared with third parties had standing to sue in federal court.[227]

Writing for the Court, Justice Kavanaugh reasoned that, out of the 8,185 class members who sued TransUnion for misidentifying them as security threats, only the 1,853 individuals whose credit files were provided to third parties had an actionable claim.[228] In other words, it was the disclosure of false information to a third party, not the inaccuracy of the record itself, that

220. 141 S. Ct. 2190, 2212 (2021).

221. *Id.* at 2201.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 2200, 2202 (quoting 15 U.S.C. § 1681e(b)).

226. *Id.* at 2202.

227. *Id.*

228. *Id.* at 2200.

comprised the informational injury for the purpose of standing.[229] The idea that the misrepresentation alone constituted a concrete injury was legally disavowed.

While the precise injury that flows from an inaccurate but (externally) undisclosed informational archive is difficult to quantify, the Court explicitly rejected the argument that, for standing purposes, the inaccurate but internally maintained records created a risk of future harm.[230] *TransUnion* may therefore serve as one example of what privacy theorist Julie Cohen has described as the defining challenges that information-era harms pose to the injury-in-fact construct.[231]

Nevertheless, rather than adopt a more expansive understanding of an informational injury, one positioned to address the problem of misrepresentation in official records, the Supreme Court reinforced a theory of harm predicated on disclosure. By acknowledging an injury for only those plaintiffs whose information was disseminated to third parties, the Court excluded any interest the plaintiffs had in ensuring their records were an accurate representation of their personhood. The interest in a truthful informational archive—even if the archive remained within the borders of the credit agency—was summarily ignored.

Understanding the Court's pattern of recognizing unwarranted disclosure as the dominant informational injury underscores a troublesome structural effect of information privacy law that is reflected in FERPA. This worrisome effect is the expansion of institutional power—both state and private—over data subjects. When courts and lawmakers place their regulatory emphasis on ensuring that student information is not unlawfully disclosed to third parties, the primary role of law becomes to prevent the unauthorized flow of data outside of educational institutions.[232] The manner in which these institutions create, collect, document, and internally share information becomes a matter for schools to determine without meaningful legal interference.

When their internal information practices are shielded from legal scrutiny, educational institutions (and other institutions who benefit from this legal construction of privacy) amass greater amounts of power over individual students because they have the authority to determine how students will be represented in the official archives that shape their lives. Information privacy

229. In evaluating whether the plaintiffs could demonstrate a concrete injury with a close analogue to a traditionally asserted harm, the Court turned to the reputational harm associated with the tort of defamation. *Id.* at 2208. Under the established law of defamation, only those plaintiffs whose defamatory information was published to a third party could claim such an injury. *Id.* at 2209-10.

230. *Id.* at 2210-11.

231. JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 146-53 (2019).

232. *See infra* Part II.

law can therefore construct and exacerbate asymmetrical power relations between individuals and institutions.[233] Privacy scholars are attentive to these asymmetries at the point when data is disclosed.[234] However, there is reason to confront these power differentiations at every stage of the life cycle of data, because doing so challenges a liberal faith embedded in FERPA and other areas of information privacy law.

This liberal faith assumes that the institutions that create, collect, and document our information should also be responsible for protecting our privacy. The unnamed assumption is that FERPA can construct information privacy narrowly as nondisclosure because schools will take on the difficult but necessary work of protecting student privacy at the stages of data creation, collection, and documentation. This impulse for institutional preservation and trust characterizes important privacy theories,[235] and is also reflected in information privacy laws like FERPA.

But when the preservation of entrenched institutional norms and practices becomes the horizon for information privacy law, the law can burden groups who have historically suffered under the dominant institutional order. This is true even in the highly redemptive and melioristic context of public education.

Despite its idealized place in the American mythos, public education has never played a uniformly beneficial role across populations and contexts.[236] State schooling has been both a powerful tool for egalitarian social transformation and for violent cultural assimilation.[237] Its nature and purpose as a site where the state, the family, and the child collide are routinely contested. Approaching information privacy through a faith in institutional preservation—one that effectively expands institutional power over individual records—ignores this persistent contestation over the nature, purpose, and

233. WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES 211 (2018).

234. *See, e.g.*, Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L. REV. 212, 215 (2021) (critiquing privacy statutes that give criminal defendants less access to data than law enforcement officials).

235. HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 148 (2009) (arguing for the theory of contextual integrity as a "decision heuristic, a framework for determining, detecting, or recognizing when a [privacy] violation has occurred").

236. *See* Damien M. Sojoyner, *Black Radicals Make for Bad Citizens: Undoing the Myth of the School to Prison Pipeline*, 4 BERKELEY REV. EDUC. 241, 245 (2013) (arguing that the structure of public education has historically responded to the insurgent actions taken by Black communities); W.E.B DU BOIS, THE SOULS OF BLACK FOLK 36 (1903) (critiquing Booker T. Washington's post-Civil War advancement of "industrial education, conciliation of the South, and submission and silence as to civil and political rights").

237. SABINA VAUGHT, BRYAN MCKINLEY JONES BRAYBOY & JEREMIAH CHIN, THE SCHOOL-PRISON TRUST 2-3 (2022) (understanding schools—and especially the schooling of Indian children—as a function of U.S. conquest and statecraft).

future of public education, and disadvantages the students and families who have historically engaged in this contestation for the purpose of creating more just educational environments.

IV. Principles for a Way Forward

To a large extent, the primary project of this paper is to explain a phenomenon whereby the law gives state schools disproportionate control over official records. It maps some of the consequences of this maldistribution of power for both individual students and for relationships between students and the educational institutions that they exist within and often struggle against. However, within this analysis, there are also normative insights for legal thought and action. Below, I offer three high-level principles that can inform a renewed conception of student information privacy.

A. Collaboration and Solidarity

Advancing a broader conception of information privacy in the education context will require collaboration and solidarity between information privacy and education advocates, especially those advocates committed to ending social stratification along the lines of race, class, gender, and disability. As I have argued, FERPA's understanding of privacy is not simply a conduit for privacy violations, it is also a real threat to educational equality. Addressing both the privacy and equality dimensions of FERPA's failures will require frequently siloed areas of law and advocacy—such as the fights for data justice, disability justice, and trans rights—to explicitly name their overlapping interests and common threats in order to make clear how a legal articulation of privacy as nondisclosure harms an array of communities.

B. Amendments to FERPA

Since expanding the definition of information privacy beyond disclosure will take a broad, multidimensional, and sustained political effort, it will be important to reduce harm to students and families in the meantime. Therefore, FERPA could be amended to allow parents and students stronger tools to add, amend, or even erase records.[238] Under an amended FERPA, parents could

238. This would not be the first time the Act was amended. Various amendments have been made to FERPA since its enactment in the 1974. *See, e.g.*, Buckley/Pell Amendment, Pub. L. No. 93-568, § 2, 88 Stat. 1855, 1858-62 (1974) (codified as amended at 20 U.S.C. § 1232g); Amendments to Education Amendments of 1978, Pub. L. No. 96-46, 93 Stat. 338 (1979) (codified as amended in scattered sections of 20 and 25 U.S.C.); Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified as amended in scattered sections of the U.S. Code); Campus Security Act, Pub. L. No. 101-542, §§ 201-05, 104 Stat. 2381, 2384-87 (1990) (codified as amended in scattered sections of 20 U.S.C.);
footnote continued on next page

appeal documenting decisions to a neutral, third-party actor outside of schools, or be permitted to appeal a documentation decision to a panel of educators and parents with no connection to the student's home school district. Parents could also be given power to select members of the administrative panel so that their interests and perspectives are better represented.

FERPA could also be amended to redraw the boundaries between what constitutes a school record and what does not. Indeed, one core problem given much attention in this Article is that FERPA has not evolved to address the privacy invasions that occur as a result of schools' structural role in the American welfare landscape. Only "education records" are covered by FERPA's privacy protections; in determining what counts as an educational record, courts often imagine an overly narrow purpose and function of education.[239]

In *Bauer v. Kincaid*, for example, a district court considered the release of investigation records held by a campus police department, which contained personally identifiable student information.[240] In permitting the disclosure of the police records, the court explained that FERPA's regulations did not intend to protect the records, since they were not produced in what the court considered the normal course of educational administration.[241] The *Bauer* court advanced an essentialist distinction between the function of school and the function of school services that exceeded the goal of teaching and learning.[242] The police in *Bauer* were located at the school and were employed to serve the school; the court, however, considered policing separate from the imagined core purpose of education.[243]

A large body of scholarly work on the relationships between schools, prisons, and police cuts against the *Bauer* court's understanding of schools.[244]

Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992) (codified as amended in scattered sections of the U.S. Code); Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended in scattered sections of the U.S. Code); Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (1998) (codified as amended in scattered sections of the U.S. Code); Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1464, 1537-38 (2000) (codified as amended at 20 U.S.C. §§ 1001, 1092, 1232g); and USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of the U.S. Code).

239. 20 U.S.C. § 1232g(a)(1)(B).

240. Bauer v. Kincaid, 759 F. Supp. 575, 576-77 (W.D. Mo. 1991). Although the case examines the definition of "educational records" in the higher education context, its implications extend to the K-12 context as well.

241. *Id.* at 590.

242. *See id.*

243. *Id.* at 577, 590.

244. *See, e.g.*, ERICA R. MEINERS, RIGHT TO BE HOSTILE: SCHOOLS, PRISONS, AND THE MAKING OF PUBLIC ENEMIES 31-32 (2007) (writing "[l]inkages between schools and jails are less a pipeline, more a persistent nexus or a web of intertwined, punitive threads"); *see also*

footnote continued on next page

This literature argues that the material and ideological continuities between schools, police, and prisons are collaborative and overlapping. More importantly, it argues that the nature of public schooling—which is deployed equally for the development of democratic ideals and for the purposes of deculturalization and dispossession—is continuously contested, with police assuming a key role in these contestations.[245] What the *Bauer* decision reveals is that courts, in determining what information FERPA ought to protect, necessarily draw boundaries around the natural, intended, and essential function of schools.

Expanding FERPA's definition of educational records would acknowledge that the line between an educational record and any other type of record produced by schools becomes conflicted and diffuse when one considers schools as the primary purveyors of social services. Expanding the definition

---

Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 292 (2019) (arguing that "the formal and informal forms of [school] surveillance function as a sticky *web*, rather than a Pipeline, in which Black and Latinx children and their families are more likely to be watched, have their actions documented, and be categorized as deviant"); SAVANNAH SHANGE, PROGRESSIVE DYSTOPIA: ABOLITION, ANTIBLACKNESS, AND SCHOOLING IN SAN FRANCISCO 55 (2019) (using "pathways" to describe the "infrastructural" nature of the relationship between schools and prisons); MONIQUE W. MORRIS, AFR. AM. POL'Y F., RACE, GENDER AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS 10 (2012) (arguing for an expansion of the pipeline framework because "assuming that the pathways to incarceration for Black females is identical to that of males has failed to curtail the use of exclusionary discipline on Black females"); MEINERS, *supra* note 166, at 9 (critiquing the school to prison pipeline metaphor for positioning schools and young people as somehow outside of the wider carceral state); DAMIEN M. SOJOYNER, FIRST STRIKE: EDUCATIONAL ENCLOSURES IN BLACK LOS ANGELES, at xi-xii (2016) (critiquing the pipeline framework for its tendency to obfuscate the history of school criminalization and the ongoing counterrevolutionary function of public education in Black communities); SABINA E. VAUGHT, COMPULSORY: EDUCATION AND THE DISPOSSESSION OF YOUTH IN A PRISON SCHOOL 37 (2017) ("One of the ironies of the school-to-prison pipeline framework is that it inherently, unintentionally confirms the principal, most damaging misconception of school: that it is good. This is centrally a liberal, melioristic perception.").

245. *See, e.g.*, JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935, at 1-3 (1988) (discussing the contested meaning of education for Blacks in the South in the post-Reconstruction era); *see also* WILLIAM H. WATKINS, THE WHITE ARCHITECTS OF BLACK EDUCATION: IDEOLOGY AND POWER IN AMERICA, 1865-1954, at 21-23 (2001) (describing contests between white elites as they bore out on educational goals of Blacks Americans); SOJOYNER, *supra* note 244, at xi-xiii (examining the contested view of education as enclosure for Black students in Los Angeles); Damien M. Sojoyner, *Black Radicals Make for Bad Citizens: Undoing the Myth of the School to Prison Pipeline*, 4 BERKELEY REV. EDUC. 241, 242-45 (2013) (arguing that criminalization of students rose in response to contestation by Black communities over the nature and purpose of education); DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928, at 8-11 (2d ed. 2020) (explaining connections between American Indian education and land dispossession).

would also account for the shifting role of public education in the American welfare landscape.

One limitation of this proposed amendment to FERPA, however, is that it simply brings information collected from school welfare services onto the same inadequate footing as other information protected by FERPA. In other words, if FERPA's underlying protections are inadequate, then permitting FERPA to protect different kinds of student information is a poor reform for students. A better solution may be to minimize the data collected by schools by universalizing school-based social services like food relief and healthcare, such that documentation demonstrating student need is less necessary.

C. Redistributing Power Over Records

Law and policy solutions should also aim to correct power asymmetries between historically marginalized students and schools though greater oversight of schools' internal information practices. This means subjecting the internal information practices of educational institutions to greater public scrutiny for the explicit purpose of reorganizing these power relations.

The degree to which a public or private institution might be subject to external scrutiny is sometimes discussed with reference to *transparency*. The term transparency refers to "the idea that institutions should be required by law to make information about their activities available to the general public or other outside monitors."[246] Like privacy, the term transparency is subject to fluctuations in meaning over time and context.[247]

When describing what he terms "transparency's ideological drift," David Pozen explains that the political impulses motivating the fight for increased transparency have shifted over time. Where transparency was once a progressive ideal aimed at making "government more participatory and public-spirited," politically conservative organizations have since seized on the ideal and enlisted transparency "to make government leaner and less intrusive."[248] The same mandatory disclosure laws presumed to strengthen public control over state and corporate actors are often used to weaken civic institutions and harass perceived opponents.[249]

Redistributing power over educational records will therefore require more than public disclosure laws that seek to make schools' internal information practices visible to a wider public. It will also require a social and political infrastructure to help the public make meaning of these disclosures so that

246. David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 104 (2018).

247. *Id.* at 102-04.

248. *See id.* at 102.

249. *Id.* at 124-26.

organized groups can use them to push for changes in educational institutions.[250] There are already examples of organized collectives building this meaning-making infrastructure around school disclosures. Organizations like the Police Free LAUSD Coalition and Million Dollar Hoods use data disclosed by school districts and school police departments to raise public awareness around the economic and human costs linked to school policing with the aim of implementing alternative visions of school safety.[251] These organizational efforts provide a blueprint for pairing robust data disclosure laws with investment in community-led infrastructure, allowing ordinary members of the public—who often do not have access to technical and legal experts—to make sense of informational disclosures and, ultimately, use these disclosures to push for more egalitarian educational environments.

Conclusion

This Article critiques the legal construction of information privacy in public schools. It argues that a narrow focus on nondisclosure ignores the privacy violations that take place at other stages of the life cycle of information, and it shows how these privacy violations can result in increased subordination along gender, race, class, and disability lines.

Without an expanded conception of information privacy—one fitted to the task of addressing public education's complex and capricious role—information privacy law threatens to further entrench the institutional information practices that have made American public schools vastly unequal places. Pursuing this expanded definition requires departing from a misguided faith that institutions can be relied upon to protect privacy at all stages of the life cycle of information. Rather, claiming an expanded conception of information privacy requires collaboration and solidarity across previously siloed stakeholders, key amendments to FERPA, and an investment in public infrastructure to oversee and influence schools' internal information practices.

250. In other contexts, legal scholars have proposed creating independent bodies to report on quality-assurance initiatives as an alternative to relying solely on agencies to disclose information about their internal workings. *See, e.g.*, David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 70 (2020).

251. *See* Terry Allen, Isaac Bryan, Andrew Guererro, Alvin Teng & Kelly Lytle-Hernández, Million Dollar Hoods Project, Policing Our Students: An Analysis of L.A. School Police Department Data (2014-2017), at 1-2 (2018), https://perma.cc/93PV-NTX5. *See generally* POLICE FREE LAUSD COAL., FROM CRIMINALIZATION TO EDUCATION: A COMMUNITY VISION FOR SAFE SCHOOLS IN LAUSD (2022), https://perma.cc/BU34-Y3GG.