

## ARTICLES

### CLEANING UP BUCKLEY: HOW THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT SHIELDS ACADEMIC CORRUPTION IN COLLEGE ATHLETICS

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## INTRODUCTION

Anyone who has attended college understands why the following was featured—headlines and picture—in the *Des Moines Register*:

As state university administrators fret about the length of time it takes students to get their degrees, along comes Neel Sheth.

Sheth completed nearly a year's worth of classes in one semester at the University of Iowa this spring while majoring in electrical engineering and physics—about as far from underwater basket weaving as a student can get.

The 19-year-old Cedar Falls native took eight classes and one seminar—27 credit hours—during spring semester. Sheth's achievement is believed to be a university record, but such statistics are not kept. So students and professors alike are left to marvel at the 3.62 grade point he earned while taking 12 semester hours more than the average student.

...

"I've been here since 1980 and I've never seen anyone else do that," says Norlin Boyd, assistant to the dean of engineering. "It's a very, very special accomplishment."

Adds William Klink, associate chairman of the physics department, "It's amazing that he had enough time to take that many classes and do well in them."<sup>1</sup>

The *Des Moines Register* need not make such a big deal out of Sheth's accomplishment. It happens quite frequently if you have exceptional, special talent. Say, for example, if your talent is basketball.

On May 16, 1988, *The Sporting News* reported, "Last year, standout [junior college] guard Eric Berger of Moberly (Mo.) needed a reported 17 hours during the summer to gain his J.C. diploma before becoming eligible to play for Drake [University]."<sup>2</sup> *The Sporting News* underreported Berger's academic accomplishments. He arrived at Drake University in Des Moines, Iowa, enrolled in a three-credit recreation workshop, completed the course and left to enroll at Indian Hills Community College for twenty-one semester hours of academic credit.

Berger completed the courses, received the twenty-one hours of credit, and enrolled at Drake University for the fall semester. During the summer, he had successfully completed twenty-four credit hours at two institutions in a period of seventy-four days. At Drake University, during a fall or spring semester, students usually take ten to eighteen credit hours over a period of 120 days.

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1. Charles Bullard, *Double Major at U of I Marching Double Time*, DES MOINES REGISTER, June 23, 1996, at 1B.

2. *College Basketball Notebook*, THE SPORTING NEWS, May 16, 1988, at 46.

Similarly, Compton Junior College basketball player Curt Smith achieved an extraordinary academic accomplishment: during his final semester at Compton Junior College, Smith outperformed Sheth. Smith completed twenty-eight credit hours with a grade-point average that athletics departments usually disclose as evidence of academic excellence of their athletes. There is more. Smith accomplished this extraordinary record while playing varsity basketball and being named most valuable player of the Southern California Athletic Conference after averaging 29.5 points per game.<sup>3</sup>

Unlike the University of Iowa, neither Indian Hills Community College, nor Compton Junior College, nor Drake University bragged about Berger's or Smith's extraordinary academic achievements. Also unlike Sheth, neither Berger nor Smith graduated.

Then there is Ricky Clemons. Clemons, a former University of Missouri basketball player, surpassed Berger's twenty-four credit hour summer school achievement. Clemons completed the twenty-four credit hours in three different states (nine credits from Brigham Young University in Utah, three credits from Adams State College in Colorado, and twelve credits from Barton Community College in Kansas—all but the twelve from Barton were correspondence courses).<sup>4</sup> Moreover, Clemons did so without having a high school diploma or GED.<sup>5</sup> In what

3. DRAKE BULLDOGS BASKETBALL MEDIA GUIDE 18 (1992–1993) (on file with the authors). While at Compton Junior College:

[Smith] earned second-team all-Junior College honors at Compton (Calif.) Junior College . . . [was] named MVP of Southern California Athletic Conference after averaging 29.5 points per game, while leading the state with 9.5 assists per game . . . ranked third in California Athletic Association in free throw percentage (.875) . . . also hit 87 three-point baskets in 1991–92, while leading Compton to quarterfinal round of California Community College Tournament. . . . guided Compton to 28–5 record last year . . . [and] collected 49 points and 10 assists vs. Los Angeles Harbor.

*Id.*

4. Deposition of Sarah K. Reesman, *Missouri v. Enrique Eugene Clemons* (Cir. Ct. of Boone County, Mo. Mar. 6, 2003) (No. 03CR164210).

5. *Id.* The fact that Clemons obtained a year's worth of credits in weeks was not a matter of concern to the University of Missouri:

“When you're looking at a transcript and you're evaluating it, you might see some things that look a little funny to you that you probably might not do at your institution,” said [Gary] Smith, who said he has been involved with admissions work at [the University of Missouri] for 30 years. “But if that other institution is an accredited institution . . . you don't just pick up the phone and say, ‘What the hell are you doing there?’ That doesn't happen.”

Vahe Gregorian, *MU, NCAA Say Clemons Met Standards*, ST. LOUIS POST-DISPATCH, Feb. 12, 2003, at B1; see also Deposition of Sarah K. Reesman at 67, *Clemons* (No. 03CR164210). In Reesman's deposition, the following exchange occurred between her and Kevin Crane, the prosecutor for Boone County, Missouri:

[Mr. Crane]: Okay, now 24 hours in one summer—is that something that gives you some concern with respect to this individual and his academic standing? . . .

must be a telling moment either for personal academic achievement or for higher education, Clemons accomplished his academic feat plus his junior year at the University of Missouri without ever having read a book.<sup>6</sup>

Even with their extraordinary academic achievements, neither Berger, nor Smith, nor Clemons holds the record for academic credit hours completed by a basketball player:

I'm responding to Marc Hansen's column about Dontae Jones, the Mississippi State basketball player who became eligible by earning 36 hours of credit in one summer at a junior college.

As a student at a junior college . . . I'm taking 17 hours of college credit and am swamped with homework, tests, research papers and speeches. Last semester, I took 14 hours, for a total of 31 hours in one school year—not 36 in one summer.

Jones' summer had to be a definite feat. Whatever helped Jones through his 36 hours, please pass it on to me. Or better yet, make me a star basketball player.<sup>7</sup>

Maybe it takes a student to know incredulity when she sees it.

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[Ms. Reesman]: I wouldn't say concern. I just recall from last spring knowing that [Clemons] had to take quite a few credits in order to get his [Associate's Degree].

Deposition of Sarah K. Reesman at 67, *Clemons* (No. 03CR164210).

6. Joe Walljasper, *Clemons: Jail Adds Perspective*, COLUMBIA DAILY TRIB., Dec. 20, 2003, available at <http://www.showmenews.com/2003/Dec/20031220News003.asp>. "Besides his favorite hobby—talking on the phone—Clemons is heard saying on the [tape] recordings that he spent his free time [in jail] sleeping and reading. 'I'd never read a book in my life,' he told his friend Rod Green. 'Seriously, I'd never read a book.'" *Id.*

7. Kendra Larson, Editorial, DES MOINES REGISTER, May 5, 1996, at 9D.

## I. FACING ACADEMIC CORRUPTION IN COLLEGE ATHLETICS

“[T]elling the truth about a given condition is absolutely requisite to any possibility of reforming it.”<sup>8</sup>

The corruption in college athletics is a story repeatedly told but a problem never solved. From the Carnegie Foundation study in 1929 to the *second* Knight Commission on Intercollegiate Athletics in 2001,<sup>9</sup> endless commentary, study, and criticism of college athletics comprise a history of failed reform. Less than a decade after spending \$3 million and producing three reports with recommendations, the Knight Foundation acknowledged “that the problems of big-time college sports have grown rather than diminished.”<sup>10</sup> Thus, they decided to revisit the problem.<sup>11</sup> At the opening session of its second effort in October 2000, Knight Commission member and former Knight Foundation president Creed Black told the commission members that “[t]he time has come to face reality.”<sup>12</sup> They didn’t.<sup>13</sup>

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8. WILFRED S. BAILEY & TAYLOR D. LITTLETON, *ATHLETICS AND ACADEME: AN ANATOMY OF ABUSES AND A PRESCRIPTION FOR REFORM* 137 (1991) (quoting Barbara Tuchman, historian and Pulitzer Prize-winner).

9. In response to “athletics abuses threatening the very integrity of higher education,” trustees of the John S. and James L. Knight Foundation established a Commission on Intercollegiate Athletics “to propose a reform agenda for college sports.” *REPORT OF THE KNIGHT FOUNDATION: COMMISSION ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION* 8 (2001) [hereinafter *A CALL TO ACTION*] (on file with the authors).

10. *Id.* at 4.

11. *Id.*; see also *REPORT OF THE KNIGHT FOUNDATION: COMMISSION ON INTERCOLLEGIATE ATHLETICS, A NEW BEGINNING FOR A NEW CENTURY: INTERCOLLEGIATE ATHLETICS IN THE UNITED STATES* (1993); *REPORT OF THE KNIGHT FOUNDATION: COMMISSION ON INTERCOLLEGIATE ATHLETICS, A SOLID START: A REPORT ON REFORM OF INTERCOLLEGIATE ATHLETICS* (1992); *REPORT OF THE KNIGHT FOUNDATION: COMMISSION ON INTERCOLLEGIATE ATHLETICS, KEEPING FAITH WITH THE STUDENT-ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS* 3–4, 11 (1991).

12. Tom Witosky, *Powerful NCAA Advisers Target Costs*, *DES MOINES REGISTER*, Aug. 29, 2000, at 1.

13. Critics of the Knight Commission’s report were not satisfied. See, e.g., Rick Telander, *They’re Out of Control: Commission States Obvious About College Sports*, *CHI. SUN-TIMES*, June 27, 2001, at 90. Telander aptly described the extent of the corruption in college athletics and the inefficacy of the Knight Commission’s report that we quote his observations at length:

These [Knight Commission members]—all of them of the highest order of intellect and academic bearing, esteemed university presidents and the like—have been studying the corruption in college sports for, as best I can tell, 17 years.

And in their—third? fourth? 100th?—report since being formed in 1984, the committee has determined that—guess what?—big-time, money-making college sports are out of control.

. . . .

The twenty-seven Knight Commission members—seventeen of whom were either university presidents, presidents emeritus, or higher education officers—knew that facing reality meant telling the truth about

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In this newest Knight Foundation report, issued Tuesday, the brain trust has determined that “the problems of college sports have worsened since 1991, when (the commission) issued a landmark report on student athletics.”

....

These folks called their own 10-year-old report “landmark.”

My God, this, among other banalities, is what that report said: “Big-time athletics programs have taken on all the trappings of a major entertainment enterprise.”

I believe the word “duh” was invented to follow such pronouncements.

“The problems are so deep-rooted and longstanding,” the 1991 report continued, “that they must be understood to be systemic.”

That means it took the commission another decade of research to determine that, yep, the inflated coaching salaries, TV deals, under-the-table bribes, corporate sponsorships and academic cheating that were part of the system in 1991 are all still there.

....

But after a while, you just give up. The sanctimony of the Knight Foundation folks drove me nuts. They were the same people who were allowing the corruption to occur in the first place.

They were the foxes studying the henhouse.

....

“(Big-time college football) is not a student’s game, as it once was. It is a highly organized commercial enterprise. The athletes who take part in it have come up through years of training; they are commanded by professional coaches; little if any initiative of ordinary play is left to the player. The great matches are highly profitable enterprises. Sometimes the profits go to finance college sports, sometimes to pay the cost of the sports amphitheater, in some cases the college authorities take a slice for college buildings.”

Knight Foundation?

Hardly.

That’s from the 1929 Carnegie Foundation Report on the negative influence of big-time college sports on our educational system.

And even that 311-page report, which followed others of its kind, noted that “the system is demoralizing and corrupt.”

As I read this new report from the Knight gang, I just wonder if the folks might disband sometime and begin studying the wheel or the dangers of the sharpened knife.

....

“At this stage of the development of some intercollegiate athletics programs and (given) the resources that are devoted to those programs and future commitments, if anyone thinks there’s any degree of simplicity to slowing it down . . . I think that’s overly optimistic.”

That blather, quoted in *USA Today* on Tuesday, came from the mouth of Tulsa president Robert Lawless, who heads the NCAA’s highest executive committee.

Forty-one words, with 10 of three or more syllables, to say what he meant: “It’s going to be real hard to fix this mess.”

*Id.*

what goes on behind the closed doors of their universities. It was a risk they could not—or would not—take.<sup>14</sup>

Recent questions, charges, or findings of academic impropriety at the universities of Minnesota,<sup>15</sup> California Berkeley,<sup>16</sup> Rhode Island,<sup>17</sup> Georgia,<sup>18</sup> Ohio State,<sup>19</sup> Fresno State,<sup>20</sup> Fairfield,<sup>21</sup> Missouri,<sup>22</sup> St. Bonaventure,<sup>23</sup> and Gardner-Webb<sup>24</sup> give voice to the Knight Commission's charge that the problems of big-time college sports "have grown rather than diminished,"<sup>25</sup> and, along with improper conduct by

14. As the Knight Commission convenes for the *third* time, co-chairman William Friday said: "What has happened with grades and courses seriously threatens the integrity of the institution.' . . . 'The university cannot tolerate these practices.'" Welch Suggs, *Knight Commission to Reconvene this Fall*, CHRON. HIGHER EDUC., May 23, 2003, at A33. Of course, colleges and universities not only tolerate these practices, they cover them up. Friday has stated precisely the need for disclosure.

15. See, e.g., Jay Weiner, *Haskins' Sweet Deal Leaves Sour Taste*, STAR TRIB. (Minneapolis, Minn.), Nov. 20, 1999, at 1A.

16. See, e.g., Tanya Schevitz, *UC Bars Professor for Faking Credits to Help Athletes*, S.F. CHRON., Mar. 10, 2001, at A1.

17. See, e.g., *After Resigning, Harrick Announces Retirement*, ESPN.com, at <http://espn.go.com/ncb/news/2003/0327/1530432.html> (Mar. 29, 2003).

18. See, e.g., *id.*; see also Mike Finger, *Academic Fraud Runs Rampant at Major Universities*, SAN ANTONIO EXPRESS-NEWS, Sept. 21, 2003, at 1C ("Georgia coach Jim Harrick was dismissed after it was learned that his son and assistant taught a bogus class for players.").

19. See, e.g., Mike Freeman, *Pursuit of Victories Presses on Colleges*, N.Y. TIMES, July 13, 2003, at 4.

20. See, e.g., Finger, *supra* note 18, at 1C ("Fresno State was placed on four years' probation last week in part because a team statistician had prepared 17 pieces of course work for senior basketball team members."); *Fresno State on Probation*, N.Y. TIMES, Sept. 10, 2003, at D2; Associated Press, *Fresno State Put on Probation for Multiple Infractions* (Sept. 10, 2003), available at <http://cbs.sportline.com/collegebasketball/story/6630602>.

21. See, e.g., Associated Press, *Former Fairfield Basketball Players Allege Violations* (Aug. 5, 2003), available at [http://www.signonsandiego.com/sports/college\\_basketball/20030805-1435-bkc-fairfield-investigation.html](http://www.signonsandiego.com/sports/college_basketball/20030805-1435-bkc-fairfield-investigation.html).

22. See, e.g., Nate Carlisle, *Clemons Pact Remains Sealed: UM Attorney Rejects Records Request*, COLUMBIA DAILY TRIB., July 27, 2003, at 14A, available at <http://archive.columbiatribune.com/2003/jul/20030727news002.asp>.

23. See, e.g., Finger, *supra* note 18, at 1C ("St. Bonaventure also scored points for originality, as the school president was pushed out of office after accepting a basketball transfer on the basis of a welding certificate."); Lena Williams, *After Forfeiting 6 Victories, Bonnies Vote to End Season*, N.Y. TIMES, Mar. 5, 2003, at D5; Andy Katz, *Players, Not Coaches or School, Make the Decision*, ESPN.com, at <http://espn.go.com/ncb/news/2003/0304/1517900.html> (Mar. 7, 2003).

24. See, e.g., Viv Bernstein, *Christian Values Meet Athletic Scandal*, N.Y. TIMES, Oct. 23, 2002, at D1; Associated Press, *Grade Tampering Scandal Hits Christian College* (Oct. 8, 2002), available at <http://www.cnn.com/2002/EDUCATION/10/08/grade.tampering.ap/>.

25. A CALL TO ACTION, *supra* note 9, at 4.

coaches at Iowa State,<sup>26</sup> Baylor,<sup>27</sup> Alabama,<sup>28</sup> and Washington,<sup>29</sup> make vivid Vanderbilt University chancellor Gordon Gee's comment that "[t]his has been the most ignominious year in recent memory for college sports"<sup>30</sup>—ignominious because contemporary college athletics is fueled by a myth, or more accurately, a lie.

When coaches recruit, they recruit only the best athletes. Hundreds of times they deny opportunity to athletes who do not meet athletic standards. Everyone applauds and supports the coach's demand for excellence. Then the coach finds a young man who can run and jump like no other but whose academic record is weaker than those hundreds of young men to whom the coach has denied an opportunity to receive a college education. Do we now hear of excellence, of standards? Of course not. Instead we hear that we should provide *opportunity* for this fine young man. In other words, when we switch from athletics to academics, we switch from standards to sensitivity. What is sad is how supposedly intelligent people fall for this insulting, self-serving appeal.

Colleges and universities then enroll these athletes who are woefully underprepared for higher education, allow them to miss numerous classes, come dead-tired to many others, work them twenty to thirty hours a week in a demanding and distracting business, and then claim that these athletes receive the opportunity for a *college* education. It cannot be done. The reality makes a mockery of the NCAA manual:

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26. See, e.g., *Eustachy Attended Missouri Party Following Loss*, ESPN.com, at <http://espn.go.com/nbc/news/2003/0428/1545990.html> (Apr. 28, 2003).

27. See, e.g., Mike Wise, *Death and Deception: In an Era of Scandals, Baylor's Tale Stands Alone*, N.Y. TIMES, Aug. 28, 2003, at C16.

28. See, e.g., Kelly Whiteside, *Through Scandal After Scandal, Alabama's Faith Remains Firm*, USA TODAY, May 5, 2003, at 1C, available at [http://www.usatoday.com/sports/college/football/sec/2003-05-04-cover-alabama\\_x.htm](http://www.usatoday.com/sports/college/football/sec/2003-05-04-cover-alabama_x.htm) ("[Alabama head football coach Mike] Price . . . was undone by a stripper named Destiny and an expensive order of room service.").

29. See, e.g., Tim Korte, Associated Press, *Fired Coach Sues Washington and NCAA* (Aug. 22, 2003), at <http://www.signonsandiego.com/sports/20030822-1002-fbc-neuheisel-gambling.html>.

30. Gordon Gee, *My Plan to Put the College Back in College Sports*, WASH. POST, Sept. 21, 2003, at B2. Gee contends that the first step is "to end sham courses, manufactured majors, degree programs that would embarrass a mail-order diploma mill, and the relentless pressure on faculty members to ease student-athletes through their classes." *Id.* Until such proposals are accompanied by disclosure, they will continue to be failed reforms.

The time required of student-athletes for participation in intercollegiate athletics shall be regulated to minimize interference with their opportunities for acquiring a quality education in a manner consistent with that afforded the general student body.<sup>31</sup>

All of this is played out behind the closed doors of universities.

“Higher education is a remarkably unwatched industry,” writes Anne Matthews in *Bright College Years: Inside the American Campus Today*.<sup>32</sup> “Trust us,” the university has always said, “we command secrets, we know best.”<sup>33</sup> Matthews asks: “What’s going on in there?”<sup>34</sup> Well, what *is* going on in there?<sup>35</sup> Are the academic records of Berger, Smith, Clemons, and Jones extraordinary personal achievements or examples of institutional fraud? University presidents do their best to ensure the question is never answered. “You are violating the student’s right to privacy,” they are quick to say. In other words, welcome to the Family Educational Rights and Privacy Act of 1974 (FERPA)—otherwise known as the Buckley Amendment—the shield behind which higher education hides the academic corruption in college athletics.

There is a way—only one feasible way—to face reality, to expose the corruption and hold presidents, academic administrators, faculty, and governing boards accountable: tell the truth. How does an institution such as a college or university tell the truth? It discloses its records to the public. In order to tell the truth about corruption in college athletics, colleges and universities need to disclose—that is, make available to the public—athletes’<sup>36</sup> academic majors, academic advisers, courses listed by

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31. NCAA CONST., art. 2, § 2.14, *available at* [http://www.ncaa.org/library/membership/division\\_i\\_manual/2003-04/2003-04\\_d1\\_manual.pdf](http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf) (last visited Jan. 30, 2004) (on file with the authors).

32. ANNE MATTHEWS, *BRIGHT COLLEGE YEARS: INSIDE THE AMERICAN CAMPUS TODAY* 17 (1997).

33. *Id.* at 35.

34. *Id.*

35. Baylor law professor Bill Underwood is more direct: “You have to be skeptical of everything you hear and be willing to look behind what people tell you and take a hard look at everything . . . I mean, everything.” Scott Charton, *Clemons, Path Fraught With Dubious Grades*, COLUMBIA MISSOURIAN, Aug. 31, 2003, at 7A.

36. We do not use the term “student-athlete.” Andrew Zimbalist explains: The term student-athlete itself tells you they are not normal students. This anomalous term was coined by Walter Byers in 1953 to assist NCAA member schools in their fight against workmen’s compensation insurance claims for injured football players. If student-athletes were normal university students, then either the term would not be necessary or it would be joined by other terms like student-musician, student-artist, or student-engineer.

ANDREW ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS* 37 (1999).

Numerous commentators refuse to use or are critical of the term when referring to students who play sports. For example, Marc Hansen states:

academic major, general education requirements, and electives (with the names of instructors and course grade-point averages).

Are these disclosures an invasion of privacy? Would they violate the Buckley Amendment? To answer these questions, Part II provides an overview of the Buckley Amendment and its specific application to college and university life. Part III briefly reviews two recent Supreme Court decisions interpreting the law. Part IV proposes a modest modification to the Buckley Amendment that balances institutional accountability with a student's right to privacy, calls attention to an alternative method of disclosure now permitted under the law, exposes how institutions use the Buckley Amendment to shield conduct not protected by the law, and exposes the selective application of the law by the NCAA and colleges and universities through the use of waiver forms.

## II. THE BUCKLEY AMENDMENT

In 1974, Congress enacted FERPA, and President Ford signed it into law.<sup>37</sup> FERPA—commonly referred to as the “Buckley Amendment”

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I have been trying hard lately to avoid using the term “student-athlete.”

At the NCAA basketball tournament, it's student-athlete this, student-athlete that. Please direct your questions to the student-athletes. The student-athletes will now be tested for performance-enhancing drugs.

All right, already. The phrase needs a serious haircut. The student part should be eliminated.

We don't refer to members of the pep band as student-musicians. We don't call the budding artists on campus student-sculptors.

Marc Hansen, *A Vote for Holding Schools and Athletes Accountable*, DES MOINES REGISTER, Apr. 21, 2000, at 1C; see also JIM DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY 191 (2003) (“Even the name used throughout this book to describe the participants in college sports, *student-athlete*, is contrived.”); JOHN FEINSTEIN, THE LAST AMATEURS 403 (2000) (“No term is misused more often in athletics today.”); JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES XXXI (2001) (“We have chosen to resist some of the standard terminology associated with college sports . . . whereas the NCAA is adamant about referring to students who play college sports as ‘student-athletes,’ we do not use this term.”); Andrew Bagnato, *2 Sides of the Story on Stipends: Cut Coaches' Salaries to Make It Work*, CHI. TRIB., Feb. 18, 2001, § 3, at 12 (“Let's not call them ‘student-athletes,’ a phony and deceptive term invented by the NCAA.”).

37. Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571–74 (Aug. 21, 1974) (codified as amended in scattered sections of 20 U.S.C. § 1232g (2000)). Congress substantially amended the statute four months later to address significant concerns about the scope of the law. See Act of Dec. 31, 1974, Pub. L. No. 93-568, § 2, 88 Stat. 1855, 1858–62 (codified as amended in scattered sections of 20 U.S.C. § 1232g). For useful background information on the law, see Family Compliance Office, U.S. Dep't of Educ., Legislative History of Major FERPA Provisions, at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html> (last visited Jan. 30, 2004) [hereinafter DOE Legislative History]. See generally Family Compliance Office, U.S. Dep't of Educ., Family Policy Compliance Office, at <http://www.ed.gov/policy/gen/guid/fpco/index.html> (last visited Jan. 30, 2004). Also, several comprehensive annotations provide a general overview of the law. See, e.g.,

after its principal author, former New York Senator James Buckley<sup>38</sup>—amended section 438 of the General Education Provisions Act.<sup>39</sup> Senator Buckley commented that the law aimed to curb “the growing evidence of the abuse of student records across the nation.”<sup>40</sup>

The Buckley Amendment generally prohibits “educational agencies or institutions”<sup>41</sup> from maintaining a “policy or practice” that denies parents the right to inspect and review the education records of their children.<sup>42</sup> The law also prohibits policies or practices that permit the release of education records or other personally identifiable information of students without the consent of students or their parents.<sup>43</sup> It is the latter prohibition that has prompted comments that “the Buckley Amendment was intended primarily to regulate the careless release of

JAMES A. RAPP, EDUCATION LAW § 13.04 (2003); John Theumann, Annotation, *Validity, Construction and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)* (20 U.S.C.S. § 1232g), 112 A.L.R. FED. 1 (1993).

38. Congress enacted FERPA as an attachment to a bill and without a congressional committee hearing or recommendations to the full Senate or House of Representatives. See Education Amendments of 1974, § 513, 88 Stat. at 571. Because the original amendment was not subject to committee consideration, there is no contemporaneous legislative history. Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools’ Legitimate Educational Interests: Rethinking FERPA’s Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 5 (2001). Further, “[e]ach amendment of FERPA has been included as a small segment of more comprehensive legislation, which also has limited the legislative history for FERPA.” *Id.* The Department of Health, Education, and Welfare (now the Department of Education) first issued interpretive regulations in 1976. See generally 41 Fed. Reg. 24,662 (1976).

39. “FERPA is part of the Federal General Provisions Concerning Education (GEPA), 20 U.S.C. § 1221, a set of unfunded conditions on the receipt of federal education funds.” Daggett & Huefner, *supra* note 38, 5 n.13. For convenience, “FERPA,” “Buckley Amendment,” “statute,” and “law” will be used interchangeably.

40. 121 CONG. REC. S13,990 (daily ed. May 13, 1975) (statement of Sen. Buckley); see also Benjamin F. Sidbury, Note, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress Can Eliminate the Loophole*, 26 J.C. & U.L. 755, 758 (2000).

41. 20 U.S.C. § 1232g(a)(3) (defining educational agencies or institutions); 34 C.F.R. § 99.1 (2003) (defining educational agencies or institutions).

42. 20 U.S.C. § 1232g(a)(1)(A)–(B); 34 C.F.R. § 99.10.

43. See 20 U.S.C. § 1232g(b)(1)–(2); 34 C.F.R. § 99.3; see also J.P. *ex rel.* Popson v. W. Clark Comm. Sch., 230 F. Supp. 2d 910, 949 (S.D. Ind. 2002) (stating that “the fact that one teacher has a *habit* of throwing out such notes at the end of each school year does not establish the existence of a *school-wide policy* or *practice* of throwing them out”); Daniel S. v. Bd. of Educ. of York Comm. High Sch., 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) (stating that a single incident of release of personal information is not a “policy or practice” sufficient to state a claim under the Buckley Amendment); Jensen *ex rel.* C.J. v. Reeves, 45 F. Supp. 2d 1265, 1276 (D. Utah 1999) (“FERPA was adopted to address systematic, not individual, violations of students’ privacy. . . .”); Bauer v. Kincaid, 759 F. Supp. 575, 589 (W.D. Mo. 1991) (“FERPA provides for the withholding of federal funds otherwise available to an educational institution which has a policy or practice of permitting the release of educational records.”).

student records by educational institutions receiving federal fund[s].”<sup>44</sup> Notwithstanding that purpose, however, it is equally clear that the law that was referred to in the original act as protecting the “Rights and Privacy of Parents and Students”<sup>45</sup> also is a law prohibiting institutional secrecy by providing access for students (and their parents) to their education records.<sup>46</sup> As former Senator Thomas J. McIntyre opined, “[t]he intent of the amendment was to allow openness of school records.”<sup>47</sup>

Congress enacted the Buckley Amendment under its Spending Clause authority.<sup>48</sup> The federal government, therefore, does not wield direct enforcement power over the institutions affected by the law. Rather, if an institution violates the law, only the Department of Education may withhold federal education funds from the institution as a penalty.<sup>49</sup> The law gives enforcement power to the Department of Education, which created its Family Compliance Office to monitor and enforce institutional compliance with the law.<sup>50</sup>

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44. Robert T. Monroe, *Chalk Talk—Balancing Student Privacy With the Public’s Right to Know: Georgia Supreme Court’s Red & Black Ruling Creates Gray Area*, 23 J.L. & EDUC. 281, 284 (1994).

45. Education Amendments of 1974, § 513, 88 Stat. at 571.

46. See Dennis Chase, *No More “Brats” or “Bastards,”* 2 NATION’S SCHS. & COLLEGES 27–32 (1975); Barbara L. Woodward, *The Buckley Amendment—Through a Glass, Darkly*, 34 INDEP. SCH. BULL. 21–25 (1975). Thus, the Buckley Amendment was designed to serve a dual purpose: to provide parents and students access to students’ education records and “to protect such individuals’ right to privacy by limiting the transferability of their records without their consent.” 120 CONG. REC. S39,862 (daily ed. Dec. 13, 1974) (joint statement in explanation of the Buckley/Pell Amendment).

47. 120 CONG. REC. S39,858 (statement of Sen. McIntyre).

48. See U.S. CONST. art. 1, § 8, cl. 1; see also 20 U.S.C. § 1232g(a)(1)(A)–(B), (2); § 1232g(b)(1)–(2); 34 C.F.R. § 99.67(a)(1), (3) (stating that the Department of Education may “[w]ithhold further payments under any applicable program” or “[t]erminate eligibility to receive funding under any applicable program”); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002); *Rim of the World Unified Sch. Dist. v. Superior Court*, 129 Cal. Rptr. 2d 11, 14 (Ct. App. 2002) (“One way in which federal law differs from California law, though, is that FERPA does not actually prohibit the release of education records. Rather, FERPA conditions the availability of federal funds on conformance with its provisions.”); Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 620 (1997) [hereinafter Daggett, *Buckley I*] (stating that not only are colleges and universities required to comply with the law to receive federal education funds, “[n]o specific federal funds are provided to schools to subsidize their compliance with Buckley.”); Daggett & Huefner, *supra* note 38, at 5 (“Rather than a mandate, FERPA requirements are conditions attached to the receipt of federal education funds.”).

49. See *Bauer*, 759 F. Supp. at 589 (“FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records.”). “Funds may be terminated only if the [Department of Education] determines that a recipient institution ‘is failing to comply substantially with any requirement of [the Act]’ and that such compliance ‘cannot be secured by voluntary means.’” *Gonzaga Univ.*, 536 U.S. at 279 (citations omitted).

50. 20 U.S.C. § 1232g(g). The statute itself only provides for enforcement by filing a complaint with the Department of Education. *Id.*; 34 C.F.R. §§ 99.63–99.66;

The law applied initially to “any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution.”<sup>51</sup> The law now applies broadly to “educational agenc[ies] or institution[s],” which are defined as “any public or private agency or institution which is the recipient of funds under any applicable program.”<sup>52</sup> Any educational agency or institution, public or private, K–12, or postsecondary that (1) “provides educational services or instruction,” or “is authorized to direct and control public elementary or secondary, or postsecondary educational institutions”; and (2) receives federal education funds (including federally guaranteed student loans) is subject to the law.<sup>53</sup> Obviously, there was never any doubt that colleges and universities were subject to the law.

But even the most cursory review reveals that the law was enacted hastily, poorly written, and, from its adoption, has begged review. Not surprisingly, the initial reaction in higher education to the law was a combination of confusion, hostility, and panic.<sup>54</sup> A lawyer and special adviser at Yale University mused, “the act was a masterpiece of wretched draftsmanship . . . [and] [w]hen all the gaps in the amendment were combined with its totally impractical affirmative requirements, it became

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Daggett, *Buckley I*, *supra* note 48, at 618. The Department of Education’s Family Policy Compliance Office is empowered to investigate, process, and review complaints concerning alleged violations of the law and also provides technical assistance to ensure that covered institutions are complying with the law. 34 C.F.R. § 99.60. If a covered institution determines that it cannot comply with the law because of an apparent conflict with state or local law, it must notify the office within forty-five days and cite the state or local law. 34 C.F.R. § 99.61.

51. Education Amendments of 1974, § 513(a), 88 Stat. at 571–72.

52. Act of Dec. 31, 1974, § 2(a)(1)(A), 88 Stat. at 1858–59 (codified at 20 U.S.C. § 1232g(a)(3)); *see also* 34 C.F.R. § 99.1 (further expanding the definition). At least two courts have concluded that an athletic conference “is not an educational agency or institution subject to” the law. *Ark. Gazette Co. v. S. State Coll.*, 620 S.W.2d 258, 260 (Ark. 1981); *see also* *Kneeland v. NCAA*, 650 F. Supp. 1076, 1089 (W.D. Tex. 1986) (stating that “[t]here is no evidence that either [the NCAA or the Southwest Athletic Conference] is an educational agency or institution under the Buckley Amendment”).

53. 34 C.F.R. § 99.1(a)(1)–(2). “If one part of an educational agency receives funds, FERPA applies to the entire agency.” Daggett & Huefner, *supra* note 38, at 6 (citing 34 C.F.R. § 99.1(d)).

54. The administrative burdens placed on colleges and universities by the law must not be understated: “Schools invest considerable staff time to comply with Buckley. Buckley also impacts the way schools perform routine tasks, and sometimes conflicts with other laws that schools must follow.” Daggett, *Buckley I*, *supra* note 48, at 618. Daggett identifies four areas where the law burdens effective college and university administration: “compliance with Buckley itself, Buckley’s impact on routine school activities, Buckley’s dated premises concerning student records and school practices, and Buckley’s many conflicts, internally and with other laws.” *Id.* at 620.

obvious that the amendment was so preposterous that it could not possibly finally be enacted into law by the United States Congress.”<sup>55</sup>

To address the concerns raised by the educational community and to target numerous ambiguities in the law,<sup>56</sup> Congress enacted major amendments on December 31, 1974, and made them retroactive to November 19, 1974.<sup>57</sup> Former Senators Buckley and Pell, the sponsors of the December 1974 amendments, also introduced a major source of legislative history for the law entitled the *Joint Statement in Explanation of Buckley/Pell Amendment*.<sup>58</sup> Over the years, the law has been amended repeatedly in an ad hoc manner to address various congressional concerns.<sup>59</sup>

One thing, however, is manifestly evident: the law was written in haste, enacted without consideration by any congressional committee, and subject to confusion and numerous amendments. One commentator summarized the history of and the problem with the law: “Although Buckley’s level of regulation is comprehensive, it has largely been a congressional afterthought.”<sup>60</sup>

#### A. Education Records

The Buckley Amendment originally provided a laundry list of student education records subject to its right-to-inspect-and-review and nondisclosure requirements.<sup>61</sup> In the December 1974 amendments, Congress amended the laundry list of records making the law apply to

55. Alfred B. Fitt, *The Buckley Amendment: Understanding It, Living With It*, 96 C. BD. REV. 2, 3 (1975). Concerns about the effect of the law on letters of recommendation were reflected in titles of articles written at the time. See generally David R. Shaffer et al., *Who Shall Be Hired: A Biasing Effect of the Buckley Amendment on Employment Practices?*, 61 J. APPLIED PSYCHOL. 571 (1976); Bart Barnes, *Open Files Law Spurs Bland College Recommendations*, DES MOINES REGISTER, Dec. 1, 1975, at 2B.

56. 120 CONG. REC. S39,861–62 (statement of Sen. Buckley); DOE Legislative History, *supra* note 37.

57. Act of Dec. 31, 1974, § 2(b), 88 Stat. at 1862; DOE Legislative History, *supra* note 37.

58. 120 CONG. REC. S39,862. Sen. McIntyre acknowledged when the December 1974 amendments were being considered that the law “was written in haste and has raised serious questions in the minds of school officials.” *Id.* at S39,858 (statement of Sen. McIntyre). Senator Buckley also noted that the law was fundamentally flawed as originally enacted: “the educational community has pointed to certain ambiguities that have been contained in the language and provisions—[also] because there was none of the normal legislative history, it means that [the agency] does not have an adequate record on the basis which to develop the necessary regulations.” *Id.* at S39,862 (statement of Sen. Buckley).

59. The amendments relevant to our argument will be discussed *infra* Part II.A–D. In 2000, the Department of Education significantly amended its regulations, which further define and clarify the reach of the law. Family Educational Rights and Privacy, 65 Fed. Reg. 41,852 (July 6, 2000) (codified at 34 C.F.R. § 99).

60. Daggett, *Buckley I*, *supra* note 48, at 617.

61. Education Amendments of 1974, § 513(a), 88 Stat. at 571–72.

“education records” or “those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”<sup>62</sup> The definition of “education record” is obviously broad, and arguably vague.<sup>63</sup>

The Buckley Amendment does provide several exceptions to the definition of education records.<sup>64</sup> The statute exempts four categories of information, and the regulations exempt an additional category.<sup>65</sup> Sole possession notes,<sup>66</sup> physical health treatment records of students over the age of eighteen (or postsecondary students) that are accessible only by treatment staff,<sup>67</sup> certain alumni records,<sup>68</sup> school employee records,<sup>69</sup> and “records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the

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62. Act of Dec. 31, 1974, § 2(a), 88 Stat. at 1859 (codified at 20 U.S.C. § 1232g(a)(4)(A)(1)–(2)). 34 C.F.R. § 99.3 provides a similar definition for “education records.” The December 1974 amendments limited, among other things, the right of postsecondary students to review the financial records of their parents. Act of Dec. 31, 1974, § 2(a), 88 Stat. at 1860 (codified at 20 U.S.C. § 1232g(a)(1)(C)(i)); 34 C.F.R. § 99.12(b)(1); DOE Legislative History, *supra* note 37. More importantly, the right to inspect and review records was limited by the definition of “student”: “any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.” Act of Dec. 31, 1974, § 2(a), 88 Stat. at 1861 (codified at 20 U.S.C. § 1232g(a)(6)); DOE Legislative History, *supra* note 37.

63. See Daggett & Huefner, *supra* note 38, at 12–13; see also Monroe, *supra* note 44, at 284 (stating that “the statutory definition of ‘educational records’ is vague”). According to Lynn Daggett and Dixie Snow Huefner:

The definition makes clear that FERPA records are not limited to documents in the official “student file”—the material may be in a teacher’s desk, nurse’s office, or principal’s file, among other places. Regulations note that student information may be recorded in a variety of ways, “including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” The regulations define “personally identifiable information” as not only that which includes a student’s name, but also as records which include the student’s parent’s name, the family’s address, an ID number such as social security, or information that makes the student’s identity “easily traceable.”

Daggett & Huefner, *supra* note 38, at 13–14 (footnotes omitted).

64. See 20 U.S.C. § 1232g(a)(4)(B).

65. Daggett & Huefner, *supra* note 38, at 14.

66. 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3. “[S]ole possession” notes . . . are notes prepared by certain school employees that are neither accessible by nor released to anyone else except a temporary substitute for the maker of the note.” Daggett & Huefner, *supra* note 38, at 14. “Once the notes are accessed by a third party (even a school administrator or the student herself), they lose their status as sole possession notes and become FERPA records.” *Id.*; see also Daggett, *Buckley I*, *supra* note 48, at 627.

67. 20 U.S.C. § 1232g(a)(4)(B)(iv); 34 C.F.R. § 99.3.

68. 34 C.F.R. § 99.3.

69. 20 U.S.C. § 1232g(a)(4)(B)(iii); 34 C.F.R. § 99.3.

purpose of law enforcement,”<sup>70</sup> are all expressly exempted from the definition of “education record.”

As Daggett and Huefner note, there are two consequences of these records being exempted from the definition of “education record”: “First, parents (and adult students) have no FERPA right to access them. Second, security documents presumably could be shown to outside authorities such as police without parent (or adult student) consent, and perhaps in the case of public schools, may even be accessible under public records laws.”<sup>71</sup>

One particular exemption, however, is particularly relevant to our argument presented later in this Article. In a step toward greater *disclosure*, Congress amended the law in 1992 to exclude from the definition of “education record” those “records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.”<sup>72</sup> Evidently, when Congress wants to act and remove the shield of the Buckley Amendment in certain circumstances, it does so, and it does so without hesitating—even though students’ privacy rights are arguably affected.

### B. Right to Inspect and Review

When Congress enacted the Buckley Amendment, it created a parental or student right to inspect and review students’ education records, files, and data maintained by educational institutions and agencies relating to students attending the institution or agency.<sup>73</sup> A

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70. The law-enforcement records exception was added in 1992. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1555(a), 106 Stat. 448, 840 (July 23, 1992) (codified at 20 U.S.C. § 1232g(a)(4)(B)(ii)).

71. Daggett & Huefner, *supra* note 38, at 15–16 (footnotes omitted). The statute and regulations contemplate disclosure under state disclosure laws. See 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. § 99.31(a)(5)(i).

72. Higher Education Amendments of 1992, § 1555(a)(ii), 106 Stat. at 840. Congress thus expressly exempted campus police records from the definition of “education record.” Daggett, *Buckley I*, *supra* note 48, at 627; see also Daggett & Huefner, *supra* note 38, at 14. The regulations provide, however, that the law-enforcement unit must create the records for a law-enforcement purpose and the records must be maintained by that unit. 34 C.F.R. § 99.8(b). If the records are maintained by the educational agency or institution, or are created “exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution,” then they lose their status as exempted records. 34 C.F.R. § 99.8(b)(2). See generally *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1228 (D.D.C. 1991).

73. DOE Legislative History, *supra* note 37; see also 20 U.S.C. § 1232g(a)–(b). Daggett and Huefner note that

FERPA . . . provides generally that student records: (1) are to be kept confidential, with access to third parties only with parent consent, (2) may be accessed on request by the student’s parents, and (3) may be challenged by parents if claimed to be misleading, inaccurate, or in violation of students’ privacy rights.

parent who requests to review a student's education records must be afforded access to the records within a "reasonable" time.<sup>74</sup> The right to inspect and review a student's education records transfers from the parent to the student when the student reaches the age of eighteen or enrolls in a postsecondary institution.<sup>75</sup>

After inspection and review, the parent or adult student may request that the institution amend the record if the record is inaccurate, misleading, or infringes on the student's privacy rights.<sup>76</sup> The law also requires institutions to provide a hearing for the parent or student who contests the accuracy of the student's education records<sup>77</sup> and requires institutions to notify annually those affected by the law about their inspection rights under the law.<sup>78</sup>

### C. Third-Party Disclosure

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Daggett & Huefner, *supra* note 38, at 4 (footnotes omitted).

74. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(b); Daggett, *Buckley I*, *supra* note 48, at 629. "Parents and adult students have the right, upon request, to access their own (child's) records within a 'reasonable' time, and no later than forty-five days after the request." Daggett & Huefner, *supra* note 38, at 6 (footnote omitted). "'Access' generally refers to in-person inspection of the original records, but in most cases does not entitle parents to obtain photocopies of the records." *Id.* (footnote omitted); *see also* 34 C.F.R. § 99.10(d).

75. 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.5(a); Daggett & Huefner, *supra* note 38, at 6.

76. 34 C.F.R. § 99.20(a); Daggett & Huefner, *supra* note 38, at 8–9. "This right to contest student records does not, however, extend to challenging the fairness of grades or the grading process." Daggett & Huefner, *supra* note 38, at 10 (footnote omitted). This issue, unlike most other legal questions relating to the law, is relatively well settled. *See generally* Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990) (determining that the law does not apply to grading errors alleged by student); Lewin v. Med. Coll. of Hampton Rds., 931 F. Supp. 443 (E.D. Va. 1996) (determining that the law may not be used to challenge the accuracy of a teacher's academic evaluations). Thomas R. Baker also notes that the legislative history of the law indicates that it would not be available to challenge a student's grades. *See* Thomas R. Baker, *Inaccurate and Misleading: Student Hearing Rights Under FERPA*, 114 EDUC. L. REP. 721, 726 (1997).

77. 20 U.S.C. § 1232g(a)(2); Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 435 (2002). The hearing must be conducted pursuant to DOE regulations. 20 U.S.C. § 1232g(a)(2). The regulations provide that a school official may preside (as long as the official does not have a direct interest in the outcome) and that the objector has the right to be represented by an attorney. 34 C.F.R. § 99.22(c)–(d). *See generally* Baker, *supra* note 76.

78. *See* 34 C.F.R. § 99.7(a)(1); Daggett & Huefner, *supra* note 38, at 10. Covered institutions must notify parents and adult students about their right to inspect and review education records, request correction of those records, and file a complaint with the Department of Education's Family Policy Compliance Office. 34 C.F.R. § 99.7(a)(2). The annual notification also must describe the procedure to consent to disclosure of certain information before education records are released to third parties. *Id.* § 99.7(a)(3); *see also* Daggett & Huefner, *supra* note 38, at 10. "To provide such notice, the school may utilize 'any means that are reasonably likely to inform'" the parent or adult student. Daggett & Huefner, *supra* note 38, at 10 (footnote omitted).

Under the Buckley Amendment, educational agencies and institutions generally may not have a policy or practice of releasing students' education records without written consent.<sup>79</sup> Consequently, colleges and universities may not release education records unless the parent or student provides written consent specifying which records may be released, the reasons for the release, and the parties to whom the records may be released.<sup>80</sup> Furthermore, "[t]he release of information without reference to a particular student's name may violate FERPA if the information is 'easily traceable' to a student."<sup>81</sup>

There are, however, several exceptions to the prior-consent rule.<sup>82</sup> Education records may be released without prior consent (1) to other school officials who have a legitimate educational interest in the information;<sup>83</sup> (2) to other schools in which the student wishes to enroll if the parents are first notified and afforded the opportunity to challenge the content of the records;<sup>84</sup> (3) to others in connection with financial aid;<sup>85</sup>

79. 20 U.S.C. § 1232g(b)(2)(A); 34 C.F.R. § 99.30(a)–(b).

80. See 34 C.F.R. § 99.30(b); DOE Legislative History, *supra* note 37. "The parent and the minor student are then entitled to a copy of the released records upon parental request and payment of copy fees." Daggett & Huefner, *supra* note 38, at 7 n.24; see also 34 C.F.R. § 99.30(c).

81. Daggett & Huefner, *supra* note 38, at 7. 34 C.F.R. § 99.3 provides that "personally identifiable information" consists of any "personal characteristics that would make a student's identity easy to trace." See Daggett & Huefner, *supra* note 38, at 7 n.26.

82. See 20 U.S.C. § 1232g(b)(1)(A)–(J); 34 C.F.R. § 99.31; DOE Legislative History, *supra* note 37.

83. 20 U.S.C. § 1232g(b)(1)(A). Consistent with its 1992 exemption of law-enforcement records from the definition of "education record," Congress also has exempted certain student disciplinary records from the law's blanket nondisclosure provisions, and those records may be shared with others at the institution who have a legitimate educational interest in the student's behavior. *Id.*; 34 C.F.R. § 99.31(a)(1); see also Daggett & Huefner, *supra* note 38, at 7 ("Nonconsensual disclosure of the record may be made to 'other school officials, including teachers,' within the educational agency *with a legitimate educational interest* in a student's educational record. It is the school's responsibility to set out a written standard for determining when there is a legitimate educational reason for inspecting student records." (footnotes omitted)). As one commentator argues, written consent is probably not required for a faculty member of a postsecondary institution to access a student's records. Charles Drebes, *The Buckley Amendment: An Administrator's Refuge from Accountability*, 23 J L. & EDUC. 290, 291 (1994).

In 1994, Congress enacted the Improving America's Schools Act, which permitted the inclusion of "appropriate information . . . concerning disciplinary action taken against [a] student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community" and permitted disclosure of this information to teachers and officials who have a legitimate educational interest in the student. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 249, 108 Stat. 3912, 3925–26 (Oct. 20, 1994) (codified as amended at 20 U.S.C. § 1232g(h)); DOE Legislative History, *supra* note 37.

84. 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. § 99.31(a)(2); see also Daggett & Huefner, *supra* note 38, at 7 ("Schools may also release records to a school in which the student seeks to enroll, or in which the student is currently enrolled or receiving services,

(4) to certain state and local officials under limited circumstances;<sup>86</sup> (5) in connection with an emergency if the information is necessary to protect the health or safety of others;<sup>87</sup> (6) in response to a judicial order or lawfully issued subpoena;<sup>88</sup> and (7) in response to certain legal actions.<sup>89</sup>

In addition to these well-established exceptions to the prior-disclosure rule, since 1974, Congress has occasionally relaxed the law's nondisclosure requirements, particularly in the area of campus crime and student disciplinary proceedings. In 1990, Congress enacted the Student Right-to-Know and Campus Security Act,<sup>90</sup> which amended the law to allow postsecondary schools to "disclos[e] to an alleged victim of any crime of violence . . . the results of any disciplinary proceeding conducted by [the] institution against the alleged perpetrator of such crime with respect to such crime."<sup>91</sup>

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if the releasing schools make a 'reasonable attempt' to provide advance notice to the parent (e.g., in a school's FERPA policy)." (footnotes omitted).

85. 20 U.S.C. § 1232g(b)(1)(D); 34 C.F.R. § 99.31(a)(4)(i).

86. 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. § 99.31(a)(5)(i).

87. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10), 99.36; *see also* Jain v. State, 617 N.W.2d 293, 298 (Iowa 2000) (stating that the emergency exception is "discretionary in nature"); Daggett & Huefner, *supra* note 38, at 8.

88. 20 U.S.C. § 1232g(b)(1)(J); 34 C.F.R. § 99.31(a)(9); Rios v. Read, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (determining that a covered institution may disclose personally identifiable information if done in response to a judicial order). *See generally* Daggett & Huefner, *supra* note 38, at 8, 15–16. A court may, however, conduct an in camera review (or similar review) of certain subpoenaed information to determine whether disclosure would impinge on the student's privacy interests. *See* Venson v. Georgia, 74 F.3d 1140, 1143 & n.1 (11th Cir. 1996); Gillard v. Boulder Valley Sch. Dist., 196 F.R.D. 382, 386 (D. Colo. 2000); Daggett & Huefner, *supra* note 38, at 16 (stating that "courts will consider the student's privacy interests in deciding whether to permit subpoena of student records").

89. 34 C.F.R. § 99.31(a)(9)(ii)(B), (iii)(A)–(B). "Schools may release a student's relevant records to the court if the school and the parent (or adult student) are in litigation against each other." Daggett & Huefner, *supra* note 38, at 8.

90. *See generally* Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, 104 Stat. 2381 (Nov. 8, 1990). The Act was part of comprehensive legislation targeting postsecondary institutions. *See* H.R. Rep. No. 101-518, at 1 (1990), *reprinted in* 1990 U.S.S.C.A.N. 3363, 3372. Title II of this Act was entitled the Crime Awareness and Campus Security Act of 1990. § 203, 104 Stat. at 2385 (codified as amended at 20 U.S.C. § 1232g(b)(6)(A)).

91. Crime Awareness and Campus Security Act of 1990, § 203, 104 Stat. at 2385; *see also* 34 C.F.R. § 99.31(a)(13); Daggett & Huefner, *supra* note 38, at 21 n.116. The House Committee Report noted that the amendment did not require institutions to provide this information to victims; rather it only "remove[d] the prohibition against providing such information." H.R. Rep. No. 101-518, at 1, *reprinted in* 1990 U.S.S.C.A.N. at 3372.

In 1998, Congress enacted the Higher Education Amendments of 1998, which added "nonforcible sex offense" to accompany "crime of violence." Higher Education Amendments of 1998, Pub. L. No. 105-244, § 951, 112 Stat. 1581, 1835 (1998) (codified as amended at 20 U.S.C. § 1232g(b)(6)). Congress also added a provision that permitted *general* disclosure (as opposed to only the victim) of the final results of any disciplinary proceeding against an alleged perpetrator of a crime of violence or nonforcible sex offense

Congress also has acted to curb underage alcohol and drug consumption at colleges and universities by permitting disclosure of violations relating to the use or possession of alcohol or controlled substances, regardless of whether those violations are documented in the student's education records.<sup>92</sup> In 2000, Congress targeted campus sex crimes by enacting the Campus Sex Crimes Prevention Act, which amended FERPA.<sup>93</sup> The Campus Sex Crimes Prevention Act permits limited disclosure of a student's sex-offender status, ostensibly to curb the threat that convicted sex offenders would go unnoticed on university campuses.<sup>94</sup> Finally, in response to the September 11 attacks, Congress again amended FERPA to permit the federal government to request and

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“if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.” § 951(B), 112 Stat. at 1835–36; *see also* Letter from LeRoy S. Rooker, Director of the Family Compliance Office, Dep't of Educ., to S. Daniel Carter (Mar. 10, 2003) (on file with the authors). Any disclosure of the final results, however, must only contain the name of the student, the violation, and any sanction. Names of other students only may be disclosed with their written consent. § 951(C)(ii), 112 Stat. at 1836. Again, however, the amendments only *permit*, but do not require, postsecondary institutions to disclose the final results of disciplinary proceedings where the student's conduct constituted an enumerated crime of violence or nonforcible sex offense. Daggett & Huefner, *supra* note 38, at 5 n.15, 8, 17.

Before these amendments, the courts were split regarding whether student disciplinary records could be disclosed without consent. For pre-amendment court decisions concluding that disclosure without consent was proper, see, for example, *Bauer*, 759 F. Supp. at 589–90; *Kirwan v. Diamondback*, 721 A.2d 196, 204 (Md. 1998); *State ex rel. Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959 (Ohio 1997); *Red & Black Publ'g Co., Inc. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993). *See also* Daggett & Huefner, *supra* note 38, at 18–24. *But see, e.g.,* *Norwood v. Slammons*, 788 F. Supp. 1020, 1027–28 (W.D. Ark. 1991); *DTH Publ'g Corp. v. Univ. of N.C. Chapel Hill*, 496 S.E.2d 8, 12–13 (N.C. Ct. App. 1998); *Connoisseur Communication v. Univ. of Mich.*, 584 N.W.2d 647, 649 (Mich. Ct. App. 1998).

The recent trend, however, is to treat student disciplinary records, absent an exception, as “education records” protected by the law. *United States v. Miami Univ.*, 294 F.3d 797, 815 (6th Cir. 2002). For a critique of *Red & Black Publ'g Co.*, see Monroe, *supra* note 44, at 285 (“Simply because items in a student's records do not involve academics or financial aid does not mean that the student forfeits his right to keep such information private.”), and Maureen P. Rada, Note, *The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How it Can be Undone*, 59 OHIO ST. L.J. 1799, 1812 (1998) (arguing that any requirement that a student record be “related to academic performance, financial aid, or scholastic performance” is “conspicuously absent from the language of Buckley”).

92. Higher Education Amendments of 1998, § 952, 112 Stat. at 1836 (codified as amended at 20 U.S.C. § 1232g(i)); *see also* Sidbury, *supra* note 40, at 765.

93. Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(d), 114 Stat. 1464, 1538 (2000) (codified at 20 U.S.C. § 1232g(b)(7)(A)). Under the 2000 amendment to FERPA, “certain sex offenders will be required to inform the state about any higher education institutions in which they are enrolled.” Daggett & Huefner, *supra* note 38, at 9; *see also* Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. 469, 470 n.13 (2001) [hereinafter Huefner & Daggett, *FERPA Update*].

94. Campus Sex Crimes Prevention Act, § 1601(d), 114 Stat. at 1538.

collect certain records in the possession of colleges or universities that are relevant to a terrorist-related investigation.<sup>95</sup> Therefore, through several amendments to the law, colleges and universities may disclose myriad categories of information to third parties without the consent of parents or adult students. Most importantly for the purposes of this Article, however, the law always has exempted “directory information” from its nondisclosure requirements.

#### D. Directory Information

What constitutes “directory information” is the issue central to the thesis of this Article. The definition of “directory information” determines, in part, whether institutions can cover up or be held publicly accountable for their academic integrity because colleges and universities may release “directory information” to the public without violating the Buckley Amendment.<sup>96</sup> Both 20 U.S.C. § 1232g(a)(5)(A) and 34 C.F.R. §§ 99.3, 99.37 define the term “directory information.”<sup>97</sup> 20 U.S.C. § 1232g(a)(5)(A) provides:

For the purposes of this section the term “directory information” relating to a student includes the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

Department of Education regulations elaborate on the definition of “directory information”:

*Directory information* means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It

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95. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 507, 115 Stat. 272, 367 (2001) (codified at 20 U.S.C. § 1232g(j)). The USA PATRIOT Act provides:

[T]he Attorney General . . . may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General . . . to—(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an . . . act of domestic or international terrorism.

*Id.*

96. Daggett & Huefner, *supra* note 38, at 14–16 (indicating that FERPA allows nonconsensual disclosure of directory information, upon notice and absent parental objection).

97. See Daggett & Huefner, *supra* note 38, at 7–8.

includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (*e.g.*, undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.<sup>98</sup>

The statute and regulations provide, however, that although colleges and universities may disclose directory information to the public, the institution must first afford parents or adult students the right to object to the release of directory information by annually informing them about their rights under the law.<sup>99</sup> Although colleges and universities are not specifically required to do so by statute, the regulations provide that "if a school intends to disclose certain information in a directory, the annual notification should note the disclosure, list the types of directory information, and explain the deadline and process for parental objection."<sup>100</sup>

In 2000, the Department of Education significantly revised its regulations implementing and interpreting the Buckley Amendment.<sup>101</sup> Interestingly, the Department decided *not* to include class rosters and schedules as "directory information." On June 1, 1999, the Department of Education published a notice of proposed rulemaking inviting interested persons to submit comments and recommendations concerning whether, among other things, the definition of "directory information" should be expanded to include a student's e-mail address, enrollment status, photograph, class roster, and class schedule.<sup>102</sup> The Department also requested comments concerning the definition of "dates of attendance."<sup>103</sup>

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98. 34 C.F.R. § 99.3.

99. 20 U.S.C. §§ 1232g(a)(5)(B), 1232g(e); 34 C.F.R. § 99.37(a)(2)–(3); *see also* Brent v. Paquette, 567 A.2d 976, 985 (N.H. 1989) (stating that a school violates the law by releasing otherwise "directory information" if it fails to notify "the public of the types of information it was designating as directory, and without giving parents an opportunity to request that certain information not be released"); Oregon County R-IV Sch. Dist. v. LeMon, 739 S.W.2d 553, 558–59 (Mo. Ct. App. 1987) (discussing designation of information as "directory information"); Rathie v. Northeastern Wis. Technical Inst., 142 Wis. 2d 685, 692–94, 419 N.W.2d 296, 300 (Ct. App. 1987) (noting that the school had neither designated categories of directory information nor adopted directory information procedures; therefore, the requested education records could not include any directory information); Daggett, *Buckley I*, *supra* note 48, at 633, 640.

100. Daggett, *Buckley I*, *supra* note 48, at 640; *see also* 34 C.F.R. § 99.37.

101. Huefner & Daggett, *FERPA Update*, *supra* note 93, at 479.

102. 65 Fed. Reg. at 41,853–55.

103. *Id.* The Department of Education ultimately amended the regulations to define "dates of attendance" as "the period of time during which a student attends or attended an education agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter. . . . [but] does not include specific

The Department ultimately amended the definition of “directory information” to include a student’s e-mail address and photograph, but it declined to include class rosters and class schedules.<sup>104</sup> In rejecting the inclusion of class schedules and rosters, the Department noted that:

Another commentator also suggested adding class schedules and class rosters to the list [of directory information]. Two commentators, however, expressed concern about the safety of students if these types of information were made public.

...

In response to the comments we received about class rosters and class schedules, we have decided not to include them in the regulations. We will reevaluate our previous advice that defined these items as “directory information” and further consider the concerns raised by commentators about student safety.

In particular, we are concerned that the inclusion of class rosters and class schedules may lead schools to disclose sensitive information. For instance, we believe a school’s disclosure of the class schedule of a student enrolled in a special education or remedial class would be harmful or an invasion of privacy. Additionally, many class rosters include students’ [social security numbers] or other identification numbers; a disclosure of this information, even if a class roster were designated as directory information, would be a violation of FERPA.<sup>105</sup>

When pressed by the authors to reveal what the Department’s previous advice was and which commentators advocated for and against the designation of class rosters and schedules as directory information, the Family Compliance Office responded by faxing an opinion letter in which LeRoy Rooker, the Director of the Family Compliance Office, opined that a student’s “enrollment status” (for example, part-time or full-time) could be designated as directory information because “such a disclosure would not generally be considered harmful to or an invasion of . . . privacy” if disclosed.<sup>106</sup>

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daily records of a student’s attendance at an educational agency or institution.” *Id.* Huefner and Daggett note that because of the new definition schools may not without consent “release information to local police, for example, about specific days a student was absent.” Huefner & Daggett, *FERPA Update*, *supra* note 93, at 479–80.

104. 34 C.F.R. § 99.3; 65 Fed. Reg. at 41,855.

105. 65 Fed. Reg. at 41,855.

106. Letter from LeRoy S. Rooker, Director of the Family Compliance Office, Dep’t of Educ., to Elliott Baker, Director, Academic Records and Summer School, Slippery Rock University (Apr. 10, 1998) (on file with the authors). The authors’ e-mail request to the Department was relatively simple, but apparently not clear:

Notwithstanding the cryptic response to our inquiry, the Department has at least decided to consider including class rosters and class schedules as directory information. This decision by the Department acknowledges the need to clean up the distinction between public behavior and privacy rights when it comes to defining directory information.

*E. Waiver of Buckley's Privacy Protections*

As noted above, colleges and universities may not generally release the education records or otherwise personally identifiable information of students, other than directory information, without the written consent of the parent or the student.<sup>107</sup> A college or university may, however, obtain the "written consent from the student's parents [or the student] specifying [the] records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents."<sup>108</sup> The regulations go further than the statute and provide an elaborate mechanism by which parents and students can waive their privacy protections under the Buckley Amendment.<sup>109</sup>

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[Our] question is quite simple: What was the previous advice the Department gave that defined [class rosters and class schedules] as directory information? Did this advice take the form of a formal opinion letter? In addition, is there any way for [us] to review the comments by the commentators who advocated for and against including "class rosters" and "class schedules" as directory information?

E-mail from coauthor Matthew R. Salzwedel to Ellen Campbell, Family Compliance Office, Dep't of Educ. (Aug. 28, 2002) (on file with the authors). The authors are admittedly puzzled by the Family Compliance Office's response to our inquiry. The April 10, 1998, Rooker opinion letter neither mentions class rosters or schedules nor indicates which commentators advocated for or against their inclusion as directory information in the 2000 regulations. The Department's "previous advice" could have been an offhand comment in a letter from Rooker to Diane Layton at Shelton State Community College in Alabama. In that letter, Rooker stated, with respect to the service of subpoenas on students, that "[i]f a student's class schedule is listed as directory information, it would be permissible to disclose a student's class schedule to the individual serving the subpoena." Letter from LeRoy S. Rooker, Director of the Family Compliance Office, Dep't of Educ., to Diane Layton, Director of Admissions and Registrar, Shelton State Community College, Tuscaloosa, Alabama (n.d.) (on file with the authors).

107. 20 U.S.C. § 1232g(b)(2); 34 C.F.R. § 99.30. Of course, there are specific exceptions to the prior-consent rule, which we have discussed above. *See supra* Part II.C.

108. 20 U.S.C. § 1232g(b)(2)(A).

109. 34 C.F.R. § 99.30. The regulations state:

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

- (1) Specify the records that may be disclosed;
- (2) State the purpose of the disclosure; and

The obvious breadth of the law's waiver provisions was not lost on certain members of Congress. When Congress enacted the Buckley Amendment, several senators questioned whether its waiver provisions would essentially gut the law of its intended purposes. For instance, former Senator Walter Mondale asked, "would a postsecondary institution be permitted to require, as a condition of application, acceptance, or any other service normally provided to students at the institution, that a student sign such a waiver?"<sup>110</sup> Senator Mondale followed that query with a more pointed question for Senator Pell: "Would there be any conditions under which an institution could *compel* any of its students to sign such a waiver?"<sup>111</sup> Senator Pell responded,

Under the proposed language an institution would be permitted to request such a waiver of applicants or students but would *not be permitted to require* that the student waive his rights to either the confidentiality of his records, or his access to those records as a precondition to enrollment or matriculation or any other service normally provided to students at the institution under any circumstances.<sup>112</sup>

As we will later see, when the Buckley Amendment became law, the NCAA and university officials wasted no time in confirming Senator Mondale's fears by ensuring, through mandatory waiver forms, that the law would not hinder their control of information relating to athletes.<sup>113</sup> But first, given the haste, inattention to, and confusion over passage of the law, its original scope, and the adoption of various ad hoc amendments, it is hardly surprising that two cases interpreting the law finally reached the Supreme Court in 2002.

### III. THE SUPREME COURT'S INTERPRETATION OF BUCKLEY

Although Congress enacted the Buckley Amendment in 1974, no cases interpreting the law reached the Supreme Court until 2002. Indeed, it is remarkable—considering the significant reach of the law and its

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(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

*Id.*

110. 120 CONG. REC. S39,864 (statement of Sen. Mondale).

111. *Id.* (emphasis added).

112. *Id.* (statement of Sen. Pell) (emphasis added).

113. *See infra* Part IV.B.

tendency to run roughshod over state right-to-know disclosure laws—that there is such dearth of Supreme Court precedent interpreting the law. The lack of Supreme Court precedent has kept the law’s true scope and application a mystery to students, institutions, and the public alike. The two Supreme Court decisions, however, limited the scope of the law by (1) denying a private right of action to aggrieved parents and students; and (2) taking a small step in reducing the class of records subject to its nondisclosure requirements.

A. *Standing: Gonzaga University v. Doe*

A recurring issue in litigation over violations of the Buckley Amendment was whether a private party had standing to allege a violation of the law. Courts had consistently held that the law itself did not expressly or implicitly create a private right of action to challenge alleged violations.<sup>114</sup> As noted above, individuals who believe their rights under the law have been violated may file a complaint with the Department of Education's Family Compliance Office, which will investigate the complaint and inform the school in writing about its findings and conclusions.<sup>115</sup> "In extreme cases, where a pattern of violations exists, the Office of the Secretary of the Department of Education may initiate proceedings to withdraw federal funds from the school [and] [t]he federal government, in some cases, may also enforce [the Buckley Amendment] by bringing a civil action."<sup>116</sup>

What was less certain—and the subject of much recent debate—was whether private individuals could bring a civil action against an offending institution using a 42 U.S.C. § 1983 action to vindicate their rights under the law.<sup>117</sup> "The Second, Fifth, Sixth, and Tenth Circuits, as well as many federal district and state courts, ha[d] held that a Section 1983 action may be brought to vindicate FERPA violations."<sup>118</sup> In *Gonzaga University v.*

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114. See Daggett & Huefner, *supra* note 38, at 11 (noting that "FERPA itself does not provide the right to file a private lawsuit to challenge alleged violations"); see, e.g., *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 69 (1st Cir. 2002); *Tarka v. Franklin*, 891 F.2d 102, 104 (5th Cir. 1989); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Girardier v. Webster Coll.*, 563 F.2d 1267, 1276–77 (8th Cir. 1977); *Slovinec v. DePaul Univ.*, 222 F. Supp. 2d 1058, 1061 (N.D. Ill. 2002); *Francois v. Univ. of D.C.*, 788 F. Supp. 31, 32 (D.D.C. 1992).

115. 20 U.S.C. § 1232g(g). 34 C.F.R. § 99.63 lists the address for the Family Policy Compliance Office, and 34 C.F.R. § 99.66 articulates the office's enforcement prerogatives. See also Daggett & Huefner, *supra* note 38, at 11.

116. Daggett & Huefner, *supra* note 38, at 11 (footnotes omitted); see also *Miami Univ.*, 294 F.3d at 809 (stating that the government has standing and may bring action for injunctive relief). 20 U.S.C. §§ 1232g(b)(2), (f) and 34 C.F.R. § 99.67 provide that the law may be enforced by the Department of Education by terminating or withholding federal funds from offending institutions. But because the law's enforcement mechanisms generally "leave aggrieved persons and schools between a fake rock and a place so hard no one goes there," effective enforcement of the law has often been illusory. See Lynn M. Daggett, *Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. 29, 57 (1997) [hereinafter Daggett, *Buckley II*].

117. See Daggett, *Buckley II*, *supra* note 116, at 66–67 ("Section 1983 claims may provide an incentive for public schools to avoid official patterns, practices and policies of Buckley violations, but are unlikely to provide relief for other claims, particularly of individual instances of Buckley violations."); Sandra L. Macklin, Note, *Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies*, 74 IND. L.J. 1321, 1345 (1999) (arguing that Indiana courts should permit § 1983 actions to enforce the law's privacy protections).

118. Daggett & Huefner, *supra* note 38, at 11. See, e.g., *Falvo v. Owasso Indep. Sch. Dist. No. I-001*, 233 F.3d 1203, 1210 (10th Cir. 2000), *rev'd*, 534 U.S. 426; *Cullens*

*Doe*, however, the Supreme Court foreclosed the erroneous view of several lower courts and held that aggrieved individuals may not bring a § 1983 action to enforce the law's privacy protections.<sup>119</sup> The Court, in an opinion written by Chief Justice Rehnquist, concluded that individuals were foreclosed from bringing § 1983 actions to enforce the law "because the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C § 1983."<sup>120</sup>

*Gonzaga University* began when an undergraduate teaching major was denied "an affidavit of good moral character" from the dean of the university. The dean denied the affidavit because a teacher at the university had overheard one student tell another that the plaintiff had engaged in sexual misconduct against the student.<sup>121</sup> The teacher launched an investigation, which culminated in the university denying the plaintiff an affidavit that the state required for teacher certification.<sup>122</sup> The plaintiff sued the university in state court using § 1983 to allege a violation of the Buckley Amendment because the university had released personal information to an unauthorized person.<sup>123</sup> The plaintiff prevailed in the trial court, and the Washington Supreme Court ultimately affirmed the district court's damage award.<sup>124</sup> Because the Washington Supreme Court's decision rested on an interpretation of federal law, namely § 1983, the university petitioned for a writ of certiorari to the Supreme Court.<sup>125</sup>

The Supreme Court began its analysis by noting that it had "never before held, and decline[d] to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights" that may be vindicated by a § 1983 action.<sup>126</sup> The Court continued, stating that it:

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v. Bemis, 979 F.2d 850, No. 92-1582, 1992 WL 337688, at \*1 (6th Cir. Nov. 18, 1992); *Tarka*, 891 F.2d at 106-07 (5th Cir. 1989); *Fay*, 802 F.2d 21, 33 (2d Cir. 1986); *Achman v. Chisago Lakes Indep. Sch. Dist.*, 45 F. Supp. 2d 664, 672-74 (D. Minn. 1999); *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Maynard v. Greater Hoyt Sch. Dist.*, 876 F. Supp. 1104, 1107 (D.S.D. 1995); *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 48 (D.N.H. 1994); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991). *But see, e.g., Gundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997); *Norris v. Bd. of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992).

119. 536 U.S. at 276. For a concise description of *Gonzaga University*, and the reaction of interested parties, see Peter Schmidt, *U.S. Supreme Court Rules That Individuals Cannot Sue Colleges Under Privacy Law*, CHRON. HIGHER EDUC., June 28, 2002, at A24.

120. *Gonzaga Univ.*, 536 U.S. at 276.

121. *Id.* at 277.

122. *Id.*

123. *Id.*

124. *Id.* at 277-78.

125. *Id.* at 278.

126. *Id.* at 279.

now reject[ed any] notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of “rights, privileges, or immunities secured by the Constitution and laws” of the United States. Accordingly, it is *rights*, not the broader or vaguer “benefits” or “interests,” that may be enforced under the authority of that section.<sup>127</sup>

Because the law contained no rights-creating language, which according to the Court is critical to show that Congress intended to create new federal rights, the Court concluded that the law could not be enforced through private § 1983 actions.<sup>128</sup> The Court noted its conclusion was “buttressed by the mechanism that Congress” used to enforce the law; namely, its express authorization for the Department of Education to “*deal with violations*” of the law.<sup>129</sup> Thus, after *Gonzaga University*, it appears that the exclusive remedy under the Buckley Amendment is voluntary compliance or a direct civil action by the Department of Education against the offending institution,<sup>130</sup> although Congress is considering an amendment to the law that would essentially overrule *Gonzaga University* and permit students to sue their schools for violations of the law.<sup>131</sup>

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127. *Id.* at 283.

128. *Id.* at 286.

129. *Id.* at 289.

130. *See Miami Univ.*, 294 F.3d at 807–08 (holding that the Department of Education may bring a civil action against offending institutions because the statute authorizes the Department to “*take any other action authorized by law with respect to the recipient*” of federal funds (quoting 20 U.S.C. § 1234c(a)(4)); *id.* at 808 (stating that “the United States has the inherent power to sue to enforce conditions imposed on the recipients of federal grants.”); *see also* Taylor v. Vt. Dep’t of Educ., 313 F.3d 768, 786 (2d Cir. 2002) (concluding that *Gonzaga University* also precludes records-access claims under 20 U.S.C. § 1232g(a)(1)). For a short overview of *Miami University*, see Ben Gose, *Court Says Colleges Can’t Release Files from Student Judicial Proceedings*, CHRON. HIGHER EDUC., July 12, 2002, at A24 (noting that “campus-crime experts and student-press advocates expressed strong disappointment [with the decision]. They believe that some colleges will be more likely to urge students to report incidents that could embarrass the institutions to campus judicial panels, which operate behind closed doors, rather than the police.”).

131. On April 29, 2003, Rep. Robert E. Andrews of New Jersey introduced H.R. 1848 which would legislatively overrule the Supreme Court’s decision in *Gonzaga University*. *See* H.R. 1848, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:HR.1848>: (last visited Jan. 30, 2004). On June 25, 2003, the bill was referred to the Subcommittee on Courts, the Internet, and Intellectual Property and the Subcommittee on Education Reform where it has not been acted on since June 2003. The proposed amendment provides:

Any . . . parent, student, or person aggrieved by an action or inaction in violation of this section or the regulations thereunder by such educational

*B. Scope of Education Records: Owasso Independent School District v. Falvo*

In addition to the Supreme Court's recent decision in *Gonzaga University* concerning standing under the Buckley Amendment, the Court also decided its first case interpreting the definition of education records.<sup>132</sup> In *Owasso Independent School District v. Falvo*, the Court held that presecondary peer grading did not violate the Buckley Amendment because peer-graded class work and assignments were not "maintained" by the school.

In *Owasso*, the school district permitted its presecondary students to grade one another's tests and call out the grades during class.<sup>133</sup> One student's mother complained about the practice and when attempts to change the policy failed, she brought suit in federal district court under § 1983,<sup>134</sup> alleging that the practice violated, among other things, her child's privacy rights.<sup>135</sup> The district court granted summary judgment in favor of the school district holding "that the grades subject to the grading practice d[id] not constitute 'education records' under FERPA."<sup>136</sup> Falvo appealed, and the Tenth Circuit reversed the district court's grant of

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agency or institution may bring, in an appropriate United States district court—

(A) an action based on a violation of this section or the regulation prescribed thereunder to enjoin such violation;

(B) an action to recover damages for such a violation, as determined by the court; or

(C) both such actions.

*Id.* § 2(a)(1). The proposed amendment also provides for treble damages if "the defendant willfully or knowingly violated this section or the regulations thereunder" and the court may increase that award "to not more than 3 times the amount available [for actual damages]." *Id.* § 2(a)(2).

132. *Owasso*, 534 U.S. at 428–29. For discussions of *Owasso* and its procedural history, see Ralph D. Mawdsley & Charles J. Russo, *FERPA, Student Privacy and the Classroom: What Can Be Learned From Owasso School District v. Falvo?*, 171 EDUC. L. REV. 397, 399–404 (2003) (suggesting that *Owasso* teaches that "schools can determine the academic ineligibility of athletes without concern that a finding of ineligibility might somehow reveal information about an athlete's grades"), and Kelly A. Nash, Case Note, *Peer Grading Outlawed: How the Tenth Circuit Misinterpreted the Family Education Rights and Privacy Act in Falvo v. Owasso Independent School District*, 229 F.3d 956 (10th Cir. 2000), 25 HAMLINE L. REV. 479, 480–95 (2002).

133. *Falvo v. Owasso Indp. Sch. Dist.*, 233 F.3d 1203, 1207 (10th Cir. 2000), *rev'd*, *Owasso*, 534 U.S. at 426.

134. *Falvo*, 233 F.3d at 1207. As noted above, the Supreme Court in *Gonzaga University* ultimately foreclosed the use of § 1983 actions to enforce the law. *See supra* Part III.A.

135. *Falvo*, 233 F.3d at 1207.

136. *Id.* The district court determined that "the grades . . . revealed to other students were not 'maintained' by the School District"; therefore, they did not constitute "educational records." *Id.* at 1213.

summary judgment in favor of the school district on the Buckley Amendment claim.<sup>137</sup>

The Tenth Circuit held, based solely on the statutory language, that “the grades which students record on one another’s homework and test papers and then report to the teacher constitute ‘education records’ under FERPA.”<sup>138</sup> The court acknowledged, “There is no dispute that the grades which students place on each other’s papers and then report to the teacher ‘contain information directly related to a student’ and thus satisfy the first element of the statutory definition for ‘education record.’”<sup>139</sup> The court also determined the grades satisfied the second element in the statutory definition, noting that “when the grades are placed in the teacher’s grade book, they are ‘maintained’” by a person acting for an educational institution.<sup>140</sup> The court concluded:

If Congress intended FERPA to preclude a teacher from revealing to one student the grades of another when written in a grade book, it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book or noting them in some similar way which serves the same purpose as a grade book record.<sup>141</sup>

In an opinion by Justice Kennedy, the Supreme Court reversed. The Court defined the question before it as “whether peer-graded classroom work and assignments are education records.”<sup>142</sup> The Court first stated that the Tenth Circuit’s interpretation of the law:

would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation’s schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. This principle guides our decision.<sup>143</sup>

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137. *See id.* at 1213–18. The Tenth Circuit also held, however, that peer grading did not violate the child’s limited substantive right under the Fourteenth Amendment to prevent disclosure of certain personal information because the child did not have a reasonable expectation of privacy in the information. *Id.* at 1208–10. The court noted that it could “not conclude that . . . grades are so highly personal or intimate that they fall within the zone of constitutional protection.” *Id.* at 1209. It suggested that “to hold otherwise would trivialize the Fourteenth Amendment.” *Id.*

138. *Id.* at 1215 (footnote omitted).

139. *Id.* (citation omitted).

140. *Id.*

141. *Id.* at 1216.

142. *Owasso*, 534 U.S. at 429.

143. *Id.* at 432.

The Court determined as an initial matter that a peer-graded assignment did not constitute an education record because at that stage the assignment is not “‘maintained’” by the school.<sup>144</sup> The Court recognized that a “teacher does not maintain the grade while students correct their peers’ assignment or call out their own marks.”<sup>145</sup> Students who grade each other’s assignments also could not “maintain” the grades within the meaning of the statute because:

[t]he word “maintain” suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled. The student graders only handle assignments for a few moments as the teacher calls out the answers. It is fanciful to say they maintain the papers in the same way the registrar maintains a student’s folder in a permanent file.<sup>146</sup>

The Court acknowledged the law requires a school to maintain “‘a record’ of access” for each student; consequently, this “suggest[ed] Congress contemplated that education records would be kept in one place with a single record of access.”<sup>147</sup> The Court recognized that Congress would not have designed the elaborate procedure for disputing the accuracy of a student’s education record<sup>148</sup> while also intending that this “procedural machinery” would permit a parent “to challenge the accuracy of the grade on every spelling test and art project the child completes.”<sup>149</sup>

The Supreme Court’s decision in *Owasso* emphasized that the Buckley Amendment is an overly broad and heavy-handed federal law that should be interpreted reasonably to balance a student’s privacy rights against the efficient functioning of our country’s schools. Whether the *Owasso* decision will serve to narrow the reach of the law in less obvious cases, however, is still unclear. But what is crystal clear is that additional

144. *Id.* at 432–33.

145. *Id.* at 433.

146. *Id.*

147. *Id.* at 434. The Court also concluded that student graders were not persons acting for the school. Such actors must be limited, according to the Court, to agents of the school such as teachers, administrators, and other employees. *Id.* at 433.

148. *See supra* notes 76–77 and accompanying text.

149. *Owasso*, 534 U.S. at 435. Justice Scalia concurred in the Court’s judgment agreeing that peer-graded student papers were not education records. *Id.* at 436 (Scalia, J., concurring). Scalia disagreed, however, with the Court’s repeated reliance on the concept of a “central repository” to define the meaning of “education records.” *Id.* at 436–37 (Scalia, J., concurring). Scalia described the Court’s reliance on a “central repository” concept “incurably confusing” and noted that reliance on such a concept would seemingly render superfluous the exception from education records for “‘records . . . which are in the sole possession of the maker . . . and which are not accessible or revealed to any other person except a substitute.’” *Id.* (Scalia, J., concurring) (quoting 20 U.S.C. § 1232g(a)(4)(B)(i)).

interpretation of the law is needed. *Owasso* was a case where a parent actually persuaded a federal appellate court to conclude that presecondary peer grading violated a federal privacy law. The mere fact the law was interpreted in such a broad and intrusive manner indicates how significant the law's impact can be to the educational community.

#### IV. CLEANING UP BUCKLEY: A MODEST MODIFICATION TO PROVIDE INSTITUTIONAL ACCOUNTABILITY AT COLLEGES AND UNIVERSITIES

*"As my pastor . . . says, 'You can't fix what you won't face.'"*<sup>150</sup>

Intellectual life requires making distinctions. Going to class is a public act. The result of this public act—what grade the student receives—is a private matter. The same is true with voting: whether you vote is a public act and is a matter of public record. How you vote—the result of the public act—is private. No one believes that a professor who tells one student what course another student is taking is violating the latter's right to privacy. Like anyone, any professor and any student can watch the student walk to class and enter a classroom. And when has a student, when asked what courses he is taking, declined to answer on the grounds of privacy? Yet those members of Congress who first determined what constituted directory information and the Department of Education regulations that followed have failed to make such a commonsense and reasonable distinction.

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150. Betty Winston Baye, Editorial, *Inequalities are to Blame, Not White Folks*, DES MOINES REGISTER, Apr. 6, 2002, at 11A.

*A. Directory Information: Making Distinctions—Public Acts; Private Rights*

Given the long history of examples, allegations, and scandals involving academic corruption in college athletics,<sup>151</sup> accompanied by charges of exploitation of the black athlete, it is remarkable that little if any interest or effort has been made to face or to expose the problem.<sup>152</sup> Facing the problem is simple, sensible, and reasonable. Accordingly, the Department of Education must reconsider its recent rulemaking decision<sup>153</sup> and amend its regulations by inserting the word “courses” after the words “major field of study”:

*Directory information* means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student’s name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, [*courses*] . . . .<sup>154</sup>

Alternatively, to put to rest once and for all the controversy surrounding whether a student’s courses are public or private information, Congress should amend the statute<sup>155</sup> itself.

For those who insist a priori on complete student anonymity, there is an alternative to our proposal. Congress should require what the law already permits by amending the legislation that now requires the publication of graduation rates.<sup>156</sup> In place of—or in addition to—publishing graduation rates, the amendment should require publication of academic records of members of student groups, such as athletics teams, sufficient in number to protect the privacy of individual students.

151. See *supra* Part I.

152. See *infra* Part IV for treatment of Congress’s amendment requiring disclosure of graduation rates.

153. See *supra* notes 102–05 and accompanying text.

154. 34 C.F.R. § 99.3. As custodians of academic records, college and university registrars turn to *The American Association of Collegiate Registrars and Admissions Officers’ FERPA Guide* to apply the law. Of particular relevance to our thesis, notice “Note 1” that is added to “directory information” in the *Guide*, stating:

It was determined in 1996 that class rosters and student’s schedules could be directory information items. They are not included in the above list. Although class rosters and student schedules can still be identified as directory information by an institution, the Family Policy Office is currently reviewing their status as directory information based upon concerns that have been expressed since 1996.

RICHARD A. RAINSBERGER ET AL., *THE AACRAO 2001 FERPA GUIDE* 6 (2001).

155. 20 U.S.C. § 1232g(a)(5)(A).

156. See *infra* notes 203–04 and accompanying text.

To insist on student anonymity is, of course, to equate—or confuse—a right to privacy with a desire for anonymity. As Alan Dershowitz points out, “privacy and anonymity are not the same.”<sup>157</sup> John Balzar explains the problem when we mistake anonymity with privacy:

Privacy is the right to be left alone. Anonymity is the peculiar desire to be unknown and unaccountable . . . . Privacy is a matter of private behavior. Anonymity . . . is a public concern.

Why do you want an anonymous identity. . . ? So you can avoid answering for what you say or do.

. . . .  
Privacy and anonymity are different things. They often conflict.<sup>158</sup>

As with anyone, it is understandable that a student might *prefer* that no one know what courses he or she is taking. In the absence of making careful distinctions, however, the *preference for* privacy becomes a *claim to* privacy. Daily, we may walk from our home to the grocery store, and we may notice that someone is recording our entrance to and exit from the store. We may claim that the grocery store we frequent and when we frequent it is nobody’s business. We might even prefer that our trips be anonymous. But we have no right to claim that anyone noting our trips is violating our right to privacy. Nor does a student who finds that someone is reporting what courses he is taking. To suggest that disclosing what courses a student takes violates their privacy rights is not protecting privacy; it is trivializing it.

Consider (1) major field of study; (2) courses required to complete that major field of study; and (3) grades earned in those courses. If a student’s major field of study is considered directory information (a decision that certainly can be made in private), it is difficult to understand why the public act of attending the classes needed to complete the major would be protected by a right to privacy. If one takes the right to privacy seriously *and* makes careful distinctions, would not the commonsense and reasonable distinction be between courses and individual grades, not between major field of study and courses? Take, for example, the following academic record:<sup>159</sup>

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157. Alan M. Dershowitz, Editorial, *Why Fear National ID Cards?*, N.Y. TIMES, Oct. 13, 2001, at A23 (“[P]rivacy and anonymity are not the same. American taxpayers, voters and drivers long ago gave up any right of anonymity without loss of our right to engage in lawful conduct with zones of privacy. Rights are a function of experience . . .”).

158. John Balzar, Editorial, *Anonymity Brings Out Our Worst Impulses*, DES MOINES REGISTER, May 3, 2002, at 13A.

159. Academic Record of coauthor Jon Ericson, Doane College, Fall 1956, and University of Nebraska, 1957–1960.

<b>Student 1: Academic Major, Speech Communication</b>		
<i>Course</i>	<i>Title</i>	<i>Hours</i>
Speech 101	Speech	2
Speech 10	Speech Fundamentals	3
Speech 105	Interpretative Reading	2
Speech 109	Public Speaking	2
Speech 75	Introduction to Broadcasting	3
Speech 109	Parliamentary Procedure	1
Speech 136	American Theatre	3
Speech 13	Introduction to Technical Theatre	3
Speech 111	Business & Professional Speaking	3
Speech 223	Persuasion	3
Speech 105	Interpretative Reading	1
Speech 212	British & American Public Address	3
<i>University Requirements &amp; Minors, English &amp; History:</i>		
Spanish 51	Beginning Spanish	5
Spanish 52	Beginning Spanish	5
Spanish 53	Second Year Spanish	3
Spanish 54	Second Year Spanish	3
Spanish 55	Composition & Conversation	2
English 105	Freshman English	3
English 1	English Composition	2
English 2	English Composition	2
English 21	British & American Literature	3
English 22	British & American Literature	3
English 222	American Literature	3
English 292	Medieval Continental Literature	2
History 109	History of Civilization	3
History 4	Modern Europe	3
History 9	Survey, American to 1865	3
History 10	Survey, American after 1865	3
Math 101	Mathematics	4
Zoology 1	Introduction to Zoology	3
Zoology 2	Introduction to Zoology	3
Zoology 103	Animal Ecology	4
Economics 11	Principles of Economics	3
Economics 107	Principles of Insurance	3
Political Science 10	Modern Government	3
Psychology 188	Social Behavior	3
<i>Elective Courses:</i>		
Business Admin. 111	Business Organization	3
Business Orgs. 190	Personnel Administration	3
Business Orgs. 3	Introduction to Accounting	3
Education 61	Human Development	3
Physical Education 98	Playgrounds Org. and Admin.	2
Education 31	History of Modern Education	3
Home Economics 191	Marriage, Home, Religion	3
Journalism 156	Public Mind	2
Orientation 101	Freshman Orientation	1
Music 81	Applied Voice	1

Every entry reflects the public act of *going to, attending, and returning from a class*. Not a single individual grade is disclosed. Public behavior is public; private information remains private. It takes but a glance to see that disclosing the courses a student takes will be, in most

cases, of little interest and an exercise in boredom. Take a second example:<sup>160</sup>

<b>Student 2: Academic Major, Political Science &amp; Economics</b>				
<i>Course</i>	<i>Title</i>	<i>Hours</i>	<i>Instructor</i>	<i>Class G.P.A.</i>
Political Science 75	Introduction to World Politics	3	Clark	2.35
Political Science 114	Public Opinion	3	Sanders	3.21
Political Science 115	Pres. Nom./Electoral Politics	3	Haskell	2.89
Political Science 160	Modern Europe Political Systems	3	Zeff	3.23
Political Science 172	International Political Economy	3	Larson	2.58
Political Science 170	International Law	3	DeLaet	3.08
Political Science 185	American Political Thought	3	Goldford	2.53
Economics 1	Principles of Macroeconomics	3	Weaver	2.43
Economics 2	Principles of Microeconomics	3	Hewitt	2.87
Economics 105	Money & Banking	3	Berry	2.70
Economics 109	Public Economics	3	Hewitt	3.00
Economics 121	Comparative Economic Systems	3	Hosseinzadeh	3.61
Economics 137	Economic Analysis of Law	3	Newkirk	3.62
Economics 162	Marxian Political Economics	3	Hosseinzadeh	3.80
Economics 173	Inter. Microeconomic Analysis	3	Boal	2.82
Economics 174	Inter. Macroeconomic Analysis	3	Hosseinzadeh	3.00
<i>University Requirements &amp; Minor, Business Studies:</i>				
Art 75	Survey Art History	3	Worthin	2.75
Math 50	Analytic Geometry & Calculus I	4	Randic	3.14
History 1	Passages to 1750	3	Lovett	2.66
History 2	Passages Since 1750	3	Crider	3.14
Philosophy 51	Logic & Language	3	Torgerson	2.89
Biology 1	Biological Sciences	4	Rogers	3.08
Sociology 1	Introduction to Sociology	3	Magruder	3.18
Geography 2	Human Geography	3	Dhussa	3.12
Psychology 1	Introduction to Psychology	3	Evans	2.84
Music 80	Music in Western Culture	3	Canerina	3.36
PADM 140	Mun. Gov't & Admin.	3	Brooks	3.32
Marketing 101	Marketing & Principles	3	Bradford	3.13
Finance 95	Investments	3	Lawrence	2.68
Management 110	Mgmt. Process & Behavior	3	Blumenfield	3.31
Info. Sys. 40	Computer Tools for Business	3	Sellers	3.00
Accounting 41	Introduction to Accounting I	3	Dodd	2.86
Finance 101	Corporate Finance	3	Ryan	2.60
Statistics 71	Statistics I	3	Klugman, M.	3.11

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160. Academic Record of coauthor Matthew R. Salzwedel, Drake University, 1994–1998.

*Elective Courses:*

Honors I	Freshman Orientation	1	Myszewski	4.00
FYS 44	Politics in Multicultural Societies	3	Longman	3.32
Religion 10	The Bible	3	Patrick	3.13
Philosophy 107	Contemporary Philosophy	3	Torgerson	3.44
Philosophy 151	Social Justice: Cuba	4	Torgerson	3.90
Rhetoric 77	Parliamentary Procedure	3	Ericson	2.88
Rhetoric 134	Argument About Sport	3	Ericson	2.34

In both records, only the student's public behavior is disclosed: the courses the student has taken. The student's individual grades remain protected as private information. In the second record, however, note how the attention moves from the student's public behavior—courses taken—to the institution's behavior—faculty teaching each course and class grade-point average. It is here—the pattern of institutional behavior—that disclosure of courses moves from an exercise in boredom to an exercise in accountability.

On February 5, 1993, the editors of the *New Mexico Daily Lobo* published the academic progress of the University of New Mexico men's basketball team:<sup>161</sup>

No.	Player	CUM. G.P.A.	SEM. G.P.A.	Year	Major
10	Steve Logan	1.5471	0.0000	Sr.	Univ. Studies
12	Greg Brown	1.6669	1.6669	Jr.	Univ. Studies
21	Corey Jenkins	1.3950	1.3950	Jr.	Univ. Studies
22	Scott Pritchett	2.0000	2.0000	Sr.	Univ. Studies
24	Eric Thomas	3.4598	3.3336	Soph.	Biology
25	Lewis Lamar	2.1255	2.0825	Jr.	Univ. Studies
30	Canonchet Neves	2.0458	1.5275	Jr.	Undecided
33	Khari Jackson	1.8959	0.9320	Sr.	Univ. Studies
34	J.J. Griego	2.6559	2.4660	Jr.	Accounting
35	Brian Hayden	2.8451	3.2680	Soph.	Univ. Studies
45	Lance Milford	2.4474	2.7000	Sr.	Political Science
50	Trent Heffner	2.6230	2.6429	Sr.	Univ. Studies

Without a doubt, someone violated the players' right to privacy; their semester and cumulative grade-point averages were disclosed.

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161. Wende Schwingendorf, *Some Lobo Hoopsters Fail to Make the Grade*, NEW MEXICO DAILY LOBO, Feb. 5, 1993, at 1.

So let us remove the private information and leave only “directory information” as currently defined by the statute and regulations:

<i>Name</i>	<i>Major</i>
Steve Logan	University Studies
Greg Brown	University Studies
Corey Jenkins	University Studies
Scott Pritchett	University Studies
Lewis Lamar	University Studies
Khari Jackson	University Studies
Brian Hayden	University Studies
Trent Heffner	University Studies
Canonchet Neves	Undecided
Lance Milford	Political Science
J.J. Griego	Accounting
Eric Thomas	Biology

Notice how the pattern of academic major catches the eye.<sup>162</sup> If we were to add courses, along with the name of the instructor and overall course grade-point average, the focus would remain riveted on the institution; and a significant step away from institutional secrecy toward institutional accountability would be accomplished—all while protecting students’ right to keep their individual grades private.

The purpose of disclosure, then, is not to check up on how the *students* are doing but to scrutinize what the *institution* is doing. With all the tax dollars, government grants, tax-deductible gifts, tax exemptions (to private as well as to public universities), and tuition, how is the institution meeting its public trust? Disclosure provides the opportunity for the public to grade the institution’s faculty, dean, provost, president, and trustees. Make no mistake about it, the concern over disclosing courses is *not* a concern for the student’s privacy; it is, rather, a concern that faculty, administrators, and presidents will be exposed for their complicity in the academic corruption.<sup>163</sup>

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162. For another example of a pattern of academic majors for athletes, see Jon Ericson, Remarks Before The Knight Commission on Intercollegiate Athletics, Washington, D.C. (Oct. 18, 2000) (unpublished manuscript, on file with the authors).

163. The pattern of the same fields of study is nationwide:

[T]he academic choices of football players who competed in this year’s bowl games demonstrates that there are . . . clusters of athletes in particular fields of study on virtually every campus. When 10 percent or more of players are enrolled in a field like communications, but less than 1 percent of undergraduates are, it doesn’t seem like a coincidence.

. . . .

Whether or not they admit it, academic advisers sometimes steer athletes into specific courses and degree programs to make it easier for them to meet the NCAA’s academic standards.

Welch Suggs, *Jock Majors: Many Colleges Allow Football Players to Take the Easy Way Out*, 49 CHRON. HIGHER EDUC., Jan. 17, 2003, at A33. Athletics directors and coaches, however, are prompt to point out that the faculty creates academic majors. That is precisely our point: “[a]thletics directors defend the practice [of steering athletes into specific courses and degree programs to make it easier for them to meet the NCAA’s

A glance at school catalogs makes one wonder why students' courses are omitted from the definition of "directory information." At Drake University, the courses required of entering pharmacy students are made public for all to see. To know what courses students are taking as they enter Drake University's pharmacy school, see the Drake University 2002–2004 General Catalog.<sup>164</sup> The following is the curriculum for the pre-pharmacy and professional programs at Drake University:

**Pre-Pharmacy Program**

FIRST PREPROFESSIONAL YEAR

<i>Fall Semester</i>	<i>Credit Hours</i>
Chemistry 1/3: General Chemistry 1 and Lab 4	4
Biology 1: The Biological Sciences	4
First-Year Seminar	3
Information Systems 44: Information Systems	3
Pharmacy 11: Dean's Hour 1	0.5

The following is the curriculum for the spring semester of the professional program:<sup>165</sup>

Pharmacy 132: Pathophysiology	4
Pharmacy 133: Principles of Drug Addiction I	5
Pharmacy 171: Social-Behavioral Aspects of the Healthcare System	4
Pharmacy 102: Drug Information Practicum	1
Pharmacy 138: Integrated Pharmacy Practice Experience	0.5
Pharmacy 103: Pharmacy Calculations	2

And if your son or daughter is a first-year law student at Drake, anyone can find out what courses he or she is taking—via catalog or the Internet.<sup>166</sup> Similarly, at the University of Minnesota Law School, grade distributions for each class are posted near the registrar's office for anyone to view.<sup>167</sup> The public can examine the courses any first-year University of Minnesota law student takes and the grades each class in the aggregate receives at the law school.<sup>168</sup> Surely, no one thinks making public the courses taken by law students, or the aggregate grade-point

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academic standards], pointing out that professors and administrators, not coaches, are the ones who approve courses and majors." *Id.*

164. DRAKE UNIV., DRAKE UNIVERSITY 2002–2004 GENERAL CATALOG 151–52 (2002).

165. *Id.* at 152.

166. See Required Courses, Drake Univ. Law School, available at <http://www.law.drake.edu/academics/curriculum/required.html> (last visited Jan. 22, 2004).

167. See Grade Distributions for Fall 1998 & Spring 1999, University of Minnesota Law School (unpublished printout, on file with the authors); see also Univ. of Minn. Law School Final Quartile Rankings 1995–2003, <http://www.law.umn.edu/uploads/images/172/quartilechart2003.pdf> (last visited Jan. 22, 2004).

168. Univ. of Minn. Law School Final Quartile Rankings 1995–2003, *supra* note 167.

averages of those courses at the University of Minnesota, violates the Buckley Amendment.

The Department of Education regulations establish the general guidelines for directory information: “information . . . that would not generally be considered harmful or an invasion of privacy if disclosed.”<sup>169</sup> Looking at the two examples of student courses listed above (or at any catalog listing a required curriculum for students) makes it difficult to argue that the affected students have suffered harm to their privacy. The harm lies behind the closed doors of higher education.

Though telling the truth is the best (in fact the only) hope of facing and solving the academic corruption in college athletics, some individuals, such as the two commentators advising the Department of Education,<sup>170</sup> believe that disclosing courses would create a safety risk to students. Being in favor of safety is of course akin to being on the side of the angels, but like setting speed limits or undertaking other various public-safety measures, a community must weigh individual risk with the public good. For one to argue that disclosing courses might aid a stalker—while *approving* disclosure of the student’s name, address, telephone listing, e-mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status, and participation on athletics teams—is to deny reasonableness as a means for determining what should be included as directory information. And if the argument for safety is serious, what is to be done with college catalogs that list the specific courses a student is required to take? Further, if we were to omit courses *being taken*, what harm results from disclosing courses *already taken*?

Finally, whether including courses as directory information or not, a student concerned about safety may simply refuse disclosure of *any* information.<sup>171</sup> For example, Drake University’s form includes the option: “DO NOT EVEN PRINT MY NAME IN THE STUDENT DIRECTORY.”<sup>172</sup> What, then, is to prevent an entire athletic team from refusing to disclose their directory information?<sup>173</sup> One would expect the answer to be “nothing,” because athletes *should* have the same right to refuse disclosure as any student. But in actuality, we will see<sup>174</sup> that when it comes to a student’s right to privacy, athletes *are* treated differently.

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169. 34 C.F.R. § 99.3.

170. *See supra* note 105 and accompanying text.

171. *See supra* note 99 and accompanying text.

172. The form, however, reminds the student of the consequences of signing: “I understand this may make it difficult for my friends, family, and others to contact me . . .” Drake Univ. Office of the Registrar, Family Education Right To Privacy Act (FERPA) (rev. 1991) (on file with the authors).

173. If athletes only refuse to have their courses disclosed, then that in itself would be a form of disclosure.

174. *See infra* Part IV.B.

An athlete ordering a university not to disclose any information will be an irony impossible to miss.

Given that colleges and universities consider it harmless to publish required courses, that common practice finds no harm in telling friends the names of students in a class, and as a student concerned about safety can prevent the release of any information, it is difficult to understand how the public act of attending classes should be protected as a right to privacy. In addition (and most importantly) when weighing the degree of academic corruption in college athletics compared to the act of attending classes, it is clear the Department of Education's decision not to include courses as directory information was not based on making careful distinctions. Or, to borrow Justice Kennedy's language in *Owasso*: the Department of Education's "logic does not withstand scrutiny."<sup>175</sup> Disclosing students' courses would be a significant step away from institutional secrecy and towards public accountability.

*B. The Waiver: Universities—The Masters of Anecdotal Disclosure*

Some fear (or use the appeal) that disclosing students' courses will embarrass the athlete. The comment is extraordinary in what it reveals. It is an admission that, for many athletes, the education they receive in college is embarrassing. But when we see course patterns such as those of the New Mexico basketball team,<sup>176</sup> disclosure will turn our attention to the professors who teach those courses and the administrators who approve them. In other words, the focus and any embarrassment will be where it should be: on the institution, not on the athlete.

Nevertheless, even where disclosure of courses would not by any reasonable measure be harmful, some find the idea of including students' names troublesome and question why and whether they need to be disclosed. The short answer is that they do not. That is why we provide an alternative method for disclosure in addition to including students' courses as directory information. Colleges and universities today could demonstrate their academic integrity by releasing the academic records, *including grades*, of members of athletics teams as long as the number of records is large enough that no individual student records could be identified. The formatting for such a large number of records need not be complicated: simply arrange the courses by grade received. For example:

**Junior-College Basketball Player's Academic Record<sup>177</sup>**

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175. *Owasso*, 534 U.S. at 432.

176. See Schwingendorf, *supra* note 161, at 1.

177. Record compiled using information in exhibits E and F attached to the Deposition of Sarah K. Reesman, *Clemons* (No. 03CR164210). The authors requested the deposition transcript and exhibits from the Boone County Prosecuting Attorney pursuant to the Missouri Open Records Law, MO. REV. STAT. § 610-010-200 (2003). Letter from Bonnie J. Adkins, Custodian of Record, Office of the Boone County Prosecuting Attorney,

<i>Course</i>	<i>Title</i>	<i>Hours</i>	<i>Instructor</i>	<i>CLASS G.P.A.</i>
<i>Courses in which the athlete received an A: 16 credit hours</i>				
Phys. Educ.	Activity by Contact	1		
Phys. Educ.	Basketball Fundamentals	1		
Phys. Educ.	Basketball for Men	1		
Phys. Educ.	Basketball Weight Training	1		
Phys. Educ.	Technique of Camp Orgs.	3		
Phys. Educ.	Basketball Skills & Analysis	1		
Phys. Educ.	Advanced Basketball for Men	1		
Phys. Educ.	Advanced Basketball Weight Training	1		
Phys. Educ.	Basketball for Men	1		
Phys. Educ.	Basketball Weight Training [after taking Advanced]	1		
Phys. Educ.	Weight Training [after taking above courses]	1	Ryan Wolf	4.00
Sociology	Family Interaction	3		
<i>Courses in which the athlete received a B: 23 credit hours</i>				
STUS	College Study Methods	2		
English	Basic English [second time]	3		
English	Basic Writing [ second time]	1		
English	Developmental English	3		
Phys. Educ.	Elementary Physical Education	3	L. Brauman	3.5/3.6
Phys. Educ.	Psychology of Sport	2	L. Brauman	3.3
Biology	Principles of Biology	3		
Zoology	Human Anatomy	3		
English	Communication Arts II	3	K. Daley	3.4
<i>Courses in which the athlete received a C: 23 credit hours</i>				
Math	Math Concepts	2		
Math	Beginning Algebra	2		
Theatre	Theatre History II	3		
Anthropology	Cultural Anthropology	3		
Music	Music Appreciation	3		
Physical Education	Introduction to Health, PE, Recreation	3	Kayser	3.2

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Columbia Missouri, to coauthor Matthew R. Salzwedel (Oct. 6, 2003) (on file with the authors). The authors also requested the names of professors with course grade-point averages from Barton Community College, Adams State College, College of Southern Idaho, and Brigham Young University. The College of Southern Idaho and Brigham Young University refused to provide the information.

*Courses in which the athlete received a D: 12 credit hours*

Theatre	Theatre History I	3		
Communication	Fundamentals of Oral Communications	3		
Business	Intro. to Business	3		
Phys. Educ.	Intro. to Exercise Science	3	K. Henderson/ B. Schroeder	2.9/3.3.3/ 3.5/2.9

*Courses in which the athlete received a F or No Credit or Withdrew*

English	Basic English	NC
English	Basic Writing	NC
Economics	Principles of Econ.	W
Physics	General Astronomy	W
Biology	Concepts of Biology	F
Math	Math in Modern Society	F
English	English Comp. I	NC
Biology	Envtl. Science	WIP
Biology	Envtl. Science Lab	WIP
Criminal Justice	Law of Arrest, Search & Seizure	WIP
English	English Comp. I	WIP
Geography	World Reg. Geog.	WIP
Phys. Educ.	Volleyball Skills & Analysis	WIP
Phys. Educ.	Health & Wellness	WIP

As noted above, a college or university only violates the Buckley Amendment if it discloses education records or otherwise personally identifiable information of students without their consent.<sup>178</sup> Information is not considered an education record if it does not “contain information directly related to a student.”<sup>179</sup> And the Department of Education’s broadest definition of personally identifiable information is “information that would make the student’s identity easily traceable.”<sup>180</sup> Beyond the statute and regulations, the Department of Education in its opinion letters has made it clear that “student-level information from education records may be disclosed, without consent, if ‘personally identifiable information’ . . . has been removed.”<sup>181</sup> Indeed, the Department has gone further and stated that the Buckley Amendment does not prohibit the aggregation of data and disclosure of statistical student information as long as the students’ identities are not easily traceable.<sup>182</sup>

178. See 20 U.S.C. § 1232g(b)(1).

179. 20 U.S.C. § 1232g(a)(4)(A)(i); 34 C.F.R. § 99.3; Daggett & Huefner, *supra* note 38, at 13.

180. 34 C.F.R. § 99.3.

181. Letter from LeRoy S. Rooker, Director of the Family Compliance Office, Dep’t of Educ., to Corlis P. Cummings, Senior Vice Chancellor for Support Services, Bd. of Regents of the Univ. Sys. of Ga. (Sept. 25, 2003) [hereinafter Letter from Rooker to Cummings]. The Department of Education has termed this type of data “anonymous” or “de-identified.” *Id.*

182. *Id.*; see also *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 961–62 (Ohio 1997) (Stratton, J., dissenting). The Department of Education,

Surely, it is a stretch for colleges and universities to argue that disclosure of enough records to show suspect *patterns*, without disclosing the names of the students or their individual grades, violates the Buckley Amendment.<sup>183</sup> Yet to our knowledge, no college or university has volunteered or will volunteer to release this information in a manner that would not be personally identifiable.

One of the most egregious defects of the Buckley Amendment is its propensity to allow colleges and universities the wherewithal to manipulate the law, thereby protecting the institution while giving the appearance of protecting student privacy. As one administrator has observed, “[w]hat seems apparent . . . is that some college and university officials have grown accustomed to using the act—indeed, abusing it—as a defensive shield against disclosure of information that the public has a right to know and to which the Buckley Amendment has never had any relevance.”<sup>184</sup> The following example involving a request for the identity of an exam proctor—who proctored exams for Clemons—from representatives of BYU, graphically illustrates this flaw and shows that the university’s actions do not protect student privacy and only protect the institution. When BYU representatives were approached with certain requests for information regarding Clemons, “[BYU spokesperson Carri] Jenkins said federal student privacy laws barred identification of the proctor or proctors who oversaw Clemons’ exams in his three Brigham Young correspondence courses.”<sup>185</sup>

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however, has refused to take a “categorical approach regarding the minimum size of cohorts or other restrictions applicable to the release of aggregated or student-level information necessary to avoid personal identification of an individual.” Letter from Rooker to Cummings, *supra* note 181. Thus, while FERPA precludes a school from posting grades by social security number, student ID number, or by name because these types of information are personally identifiable or easily traceable to the student, nothing in FERPA precludes a school from assigning individual numbers to students for the purpose of posting grades as long as those numbers are known only to the student and the school officials who assign them. See Letter from LeRoy S. Rooker, Director of the Family Compliance Office, Dep’t of Educ., to Dr. Evangelos J. Gizis, Interim President, Hunter College of the City Univ. of New York (n.d.) (on file with the authors).

183. *But cf.* *Rim of the World Unified Sch. Dist. v. Superior Court*, 104 Cal. App. 4th 1393, 1400 (Ct. App. 2002) (“Even if the student’s name and other identifying information were redacted from an expulsion record, it would still contain ‘information directly related to a student,’ such as the specific reasons for the expulsion and other details. That information would be more than just the ‘directory information’ allowed by [20 U.S.C. § 1232g(b)(2)].”).

184. Drebes, *supra* note 83, at 292 (citation omitted).

185. Scott Charton, *BYU Seeing if Clemons Cheated: Former MU Guard Took Nine Hours of Correspondence Courses from the Utah School*, COLUMBIA MISSOURIAN, Sept. 19, 2003, at 1A. A series of e-mail exchanges between BYU spokesperson Carri Jenkins and coauthor Jon Ericson between September 19, 2003 and September 30, 2003 reveal the elastic interpretation of “education record” afforded by the poorly written Buckley Amendment. Excerpts from the exchange include:

The difference between reporting academic troubles and disclosing the mental health of the student who reported the troubles also calls for an elastic application of the Buckley Amendment:

Although the publicity arms of athletic departments annually release the names of athletes who achieve good grades—“Academic All-Big Ten” means a player holds [a] GPA of at least 3.0—Ohio State spokeswoman Elizabeth Conlisk contends [Norma] McGill violated federal student privacy law when she revealed the academic troubles of [Maurice] Claret.

As for [chair of McGill’s department, Kenneth] Goings’ public comment about the mental health of McGill, who was a graduate student at the time, Conlisk argues Ohio State did not violate privacy law in that instance. Double standard? No, she insists, because Goings’ attack was based on “rumors,” not student records.<sup>186</sup>

The broad and vague definition of “education record” also provides colleges and universities the opportunity to deny requests for aggregate *course* grade-point averages.<sup>187</sup>

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[Ericson]: Could you please direct me to the specific section of which federal law that bars release of the name of a person serving in an instructional capacity?

[Jenkins]: The Family Educational Rights and Privacy Act.

[Ericson]: I understand that a proctor serves in a teaching or administrative role, not in a student role, and therefore I can’t find anything in Buckley that protects the name of a person functioning in that capacity. Could you point out where in the Buckley amendment the name of a proctor is protected by the right to privacy?

[Jenkins]: Your question was reviewed by a member of our legal counsel. We maintain that because the proctor is nominated by the student and because the proctor is not employed by the university, the name of the proctor is part of the student’s file and therefore *may be* protected by the Buckley amendment.

E-mail correspondence between coauthor Jon Ericson, and BYU spokesperson Carri Jenkins (Sept. 19–30, 2003) (emphasis added) (on file with the authors).

Three weeks later another BYU spokesperson Michael Smart said: “Brigham Young rules require that the proctor be screened by the university’s Department of Continuing Education to ensure he or she is an educator without any relation to the student. Federal privacy rules prevent [him] from identifying the proctor . . .” Angela Stricker, *Clemons Didn’t Cheat, BYU Says*, COLUMBIA MISSOURIAN, Oct. 17, 2003, at 1B. Smart’s reference to a proctor as an educator makes BYU’s earlier effort to place the name of the proctor in Clemons’s education record, if not inconsistent, even more elastic.

186. Tom Farrey, *Just Pay Them to Be Athletes and Forget About the Rest*, ESPN.com, at <http://espn.go.com/ncaa/s/2003/1006/1632215.html> (Oct. 7, 2003).

187. For example, consider the following exchange between M. Belen Maetas, Adams State College Registrar, and coauthor Jon Ericson:

[Ericson]: Please send me the course G.P.A. for the following course for the summer of 2002: English 102Z Communication Arts II, 3 credits, Instructor K. Daly.

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[Maestas]: Due to federal guidelines, I am unable to provide you with the requested information. . . .

[Ericson]: Could you please inform me which specific section of which federal guideline prevents you from providing the course grade point average for a course?

[Maestas]: FERPA is a Federal law that applies to educational agencies and institutions that receive funding under a program administered by the U.S. Department of Education. The statute is found at 20 U.S.C. § 1232g and the Department's regulations are found at 34 CFR Part 99. . . .

[Ericson]: I am embarrassed that I have not made clear my request. I seek no information about any student. I seek no individual student's grade. All I request is the COURSE G.P.A. for English 102Z Communication Arts II, 3 credits, Instructor K. Daly during the summer session, 2002. . . .

[Maestas]: I have forwarded your request to our institution's Provost, Dr. David Svaldi. He requests that you direct a written and signed response to his attention.

E-mails between coauthor Jon Ericson, and M. Belen Maestas, Registrar, Adams State College (Oct. 6–7, 2003) (on file with the authors). Provost Svaldi eventually provided the course grade-point averages.

Ericson also attempted to obtain course grade-point averages for the courses taken by Clemons at the College of Southern Idaho. Representatives from Southern Idaho at first declined to provide the course grade-point averages, stating that this information “would be [given] on a need to know basis and the willingness of the Registrar to devote man hours to that specific request.” E-mail from Connie Hardy, College of Southern Idaho, to coauthor Jon Ericson (Sept. 22, 2003) (on file with the authors). Ericson then requested the information directly from Dr. John S. Martin, Director of Admissions, Records, Registrar at the College of Southern Idaho. E-mails between John S. Martin, Director of Admissions, Records, Registrar, College of Southern Idaho, and coauthor Jon Ericson (Oct. 20–30, 2003) (on file with the authors) [hereinafter e-mails between Ericson and Martin]. Ericson was informed that his request would cost \$200. Email from Carol Charlie, Assistant to John S. Martin, Director of Admissions, Records, Registrar, to coauthor Jon Ericson (Oct. 15, 2003). During this time, Clemons's educational record became public record and Ericson tailored his request to cover course grade-point averages of courses taken by Clemons. E-mails between Ericson and Martin, *supra*. When Ericson provided the \$200 to cover the “man hours” needed for researching the course grade-point averages, Martin balked at his request stating that he would present Ericson's request to the administration for approval. *Id.* Martin then informed Ericson that the administration had denied his request, and Ericson revised his request asking only for the names of Clemons's professors. *Id.* Martin again denied Ericson's request and then wrote that, apparently because Clemons's academic record was now in the public record, he had “been instructed [by the administration] to inform [Ericson] that Mr. Clemons was a student [at the College of Southern Idaho] for [five semesters and] [d]uring that time, [Clemons] earned 57 credits with a [grade-point average] of 2.1.” *Id.* Ericson responded asking for the names, telephone numbers, and e-mail addresses—all public information—of the administrators responsible for denying his request. *Id.* Martin replied stating that after consultation with the college's legal counsel, he would “not provide any information to any requestor without a subpoena.” *Id.*

Ericson also sought information requesting travel schedules for athletes from prior years to compare athletes' travel obligations to their class-attendance obligations. Drake University, the University of Iowa, and Iowa State University were contacted to provide travel schedules of college basketball players, but only Drake University and the University of Iowa provided their travel schedules. Iowa State University refused to provide the information, even after numerous requests to the Iowa State University Provost, Athletics Department representatives, and a faculty representative. *See* e-mail

Universities not only use the law to shield institutional conduct; they further, as we are about to discover, engage in a massive system of control and anecdotal disclosure of athletes' academic records. When the law is used to avoid accountability, the result is to trivialize the right to privacy, not protect it.<sup>188</sup>

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from Connie Middleton, Iowa State Univ., to coauthor Jon Ericson (Oct. 3, 2001) (on file with the authors) (denying Ericson's request for the basketball team's travel schedule based on fears after the September 11 attacks, even though Ericson requested the travel schedules from the basketball seasons occurring before September 11); e-mails from coauthor Jon Ericson, to Rollin Richmond, Provost, Iowa State Univ. (Oct. 4–9, 2001) (on file with the authors) (noting the Provost's failure—and the Athletic Department's failure—to respond to Ericson's inquiry on several occasions). Iowa State University representatives disregarded Ericson's inquiry, even after faculty representative Barbara Lickliger demanded to know Ericson's motivations for requesting the information. Ericson replied to Lickliger and discussed the “real and never-ending charges and instances of academic corruption in college sports” and his affiliation with the Drake Group, and its position supporting a proposal to schedule athletic contests “so as not to conflict with class attendance.” See e-mail from coauthor Jon Ericson, to Barbara Lickliger, Iowa State University (Nov. 5, 2001) (on file with the authors); e-mail from Barbara Lickliger, Iowa State Univ., to coauthor Jon Ericson (Nov. 5, 2001) (on file with the authors) (replying “thanks” in response to Ericson's detailed explanation for his request, and providing no further information with regard to Ericson's request).

188. Another illustration of the uniform knee-jerk denial of requests for nonpersonally identifiable student information is *An Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.*, in which the Indiana Court of Appeals addressed a request by the Indianapolis Star newspaper (under the Indiana Access to Public Records Act) for internally produced information regarding the firing of Bobby Knight as basketball coach at Indiana University. 787 N.E.2d 893, 898–900 (Ind. Ct. App. 2003).

Indiana University had refused to make available the “Knight Disciplinary Records,” which included internally produced documents relating to, among other things, the claim by basketball player Neil Reed that Knight had choked him during practice. *Id.* at 898. Indiana University argued that the Knight Disciplinary Records could not be disclosed because they contained numerous references to students' education records, and, as such, were protected by FERPA's nondisclosure provisions. *Id.* at 908 (stating that “to the extent that the [Knight Disciplinary Records] contain information directly relating to students, their nonconsensual disclosure would be a violation of FERPA”). And, according to Indiana University, it was not its responsibility to redact the documents in the Knight Disciplinary Records to make them FERPA-compliant. *Id.* Specifically, the university argued that because FERPA contained no provision mandating that education records be redacted to eliminate personally identifiable information, it had no obligation to do so in response to the newspaper's request. *Id.*

The court disagreed with the university's argument and held that, under the Indiana Access to Public Records Act, public agencies were required to “redact or otherwise separate those portions of the record which would otherwise render it non-discloseable” instead of denying access to the records as a whole. *Id.* According to the court, it did not matter whether the redaction limited the intelligibility of the documents. *Id.*; see also *Mackenzie v. Ochsner Clinic Found.*, No. CIV.A.02-3217, 2003 WL 2199339, at \*5 (E.D. La. Aug. 20, 2003) (ordering defendant to work with plaintiff's counsel to provide plaintiff with necessary statistical summaries regarding medical residents' academic probation, test scores, and academic performance “without utilizing personally identifiable information and without disclosing the records themselves”).

Which *method* of disclosure, then, is not the crucial issue. *Disclosure is crucial* because telling the truth about the academic corruption in college athletics will not occur until Congress or the Department of Education amends the definition of “directory information” or Congress enacts legislation mandating that colleges and universities do what they presently can do, but won’t: release the academic records of members of student groups—e.g., an athletic team—without releasing the names of the students.<sup>189</sup>

Finally, what many overlook is that disclosing courses will actually benefit and empower the athlete. As it is now, the decision to limit athletic scholarships to one year and placing academic support in athletics departments means one thing above all else: *control* the athletes to keep them eligible. Congress did not intend the Buckley Amendment to serve as an instrument for greater control over athletes. But after the amendment became law, the NCAA and university officials wasted no time—notwithstanding the concerns voiced in the congressional record above<sup>190</sup>—ensuring that the law would not hinder their control of the athlete. They used the law’s *waiver provision* to accomplish that goal. Giving voice to Anne Matthews’s observation that colleges and universities claim the public should trust them because they “know best,” colleges and universities require athletes to sign a waiver of their privacy rights or they are not allowed to participate in athletics.<sup>191</sup>

For example, the Missouri Valley Conference (MVC) was quick to ensure the new law would not get in the way of athletics departments when it came to disclosure of students’ otherwise protected education records. In a 1975 memorandum, then-MVC Commissioner Mickey Holmes stated:

Enclosed is a sample of the “Release of Academic and Participation Records” form which satisfies the requirements of the recently enacted Buckley Amendment guarding information of a personal nature for all students.

. . . .

Please note, too, that execution of this form is a basic requirement for initial certification of eligibility and if the form

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189. Many options are available for institutions to demonstrate their academic integrity through disclosure while not releasing students’ names. For example, junior colleges could disclose the academic records of the members of their basketball team over the past five years. Defining a player as “the eight members who played the most minutes,” the forty records would be sufficient to protect the privacy of each athlete while providing public accountability for the education the athletes receive. Or, given the accusations of the exploitation of the black athlete, universities could disclose the academic records of its black athletes over a period of three years (or any period that provides numbers sufficient to protect the students’ privacy).

190. See *supra* notes 110–12 and accompanying text.

191. MATTHEWS, *supra* note 32, at 35.

is not signed, the student-athlete *shall not be eligible* for practice, competition, or financial aid based on athletic ability at your institution.<sup>192</sup>

Today, unlike students' freedom to participate in any other extracurricular activity, colleges, universities, and the NCAA require athletes to sign *two* waivers of their right to privacy before they are allowed to participate in college athletics. The forms state, in part:

You must sign this form to participate (i.e. practice or compete) in intercollegiate athletics. . . .

NCAA Constitution 3.2.4.6 and NCAA Bylaws 14.1.4 and 30.5 require that you sign this form.

. . . .

You agree to allow the NCAA to test you in relation to any participation by you in any NCAA championship [event] . . . .

. . . .

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192. Memorandum from Mickey Holmes, Comm'r of the Mo. Valley Athletic Conference (Aug. 1, 1975) (on file with the authors) (emphasis added).

You understand that consent and the results of your drug tests, if any, will be disclosed in accordance with the provisions of the Buckley Amendment consent.<sup>193</sup>

\* \* \* \*

#### Part II: Buckley Amendment Consent

This form has four parts: . . . a Buckley Amendment Consent . . . You must sign all four parts to participate in intercollegiate competition.

By signing this part of the form, you certify that you agree to disclose your educational records.

You understand that this entire form and the results of any drug test you may take are part of your educational records. These records are protected by the Family Educational Rights and Privacy Act of 1974, and they may not be disclosed without your consent.

You give your consent to disclose only to authorized representatives of this institution, its athletics conference (if any) and the NCAA, the following documents:

You agree to disclose these records only to determine your eligibility for intercollegiate athletics, your eligibility for athletically related financial aid, for purposes of inclusion in summary institutional information reported to the NCAA (and which may be publicly released by it), for NCAA longitudinal research studies and for activities related to NCAA compliance reviews.

Further, you authorize the NCAA to disclose personally identifiable information from your educational records . . . to a third party (including but not limited to the media) as necessary to correct inaccurate statements reported by the media or related to a student-athlete reinstatement case, infractions case or waiver request. You also agree that necessary case information . . . may be published or distributed to third parties as required by NCAA bylaws, policies or procedures. You will not be identified by name by the NCAA in any such published or distributed information.<sup>194</sup>

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193. NCAA, DRUG TESTING CONSENT—DIVISION I, FORM 02-3D (July 3, 2002) (on file with the authors), available at [http://www1.ncaa.org/membership/membership\\_svcs/admin\\_publications.html](http://www1.ncaa.org/membership/membership_svcs/admin_publications.html).

194. NCAA, STUDENT-ATHLETE STATEMENT—DIVISION I, FORM 02-3A (July 3, 2002) (on file with the authors), available at [http://www1.ncaa.org/membership/membership\\_svcs/admin\\_publications.html](http://www1.ncaa.org/membership/membership_svcs/admin_publications.html).

But if the purpose of requiring the waiver is limited to the reasons listed in the form, how does one explain the following?

Eight members of the 2000–01 Drake women’s basketball team own a 3.47 cumulative [grade-point average] or higher, led by redshirt freshman Mandy Kappel (Sioux Falls, S.D.), 3.85. Other players with a [grade-point average] of 3.47 or better include Jayme Anderson (Janesville, Wis.), 3.76; Allison Burchill (Omaha, Neb.), 3.68; Martha Chaput (Council Bluffs), 3.60; Maureen Head (Iowa City), 3.47; Molly Nelson (Fort Dodge), 3.50; Erin Richards (Mason City), 3.48; and former player Kristin Santa (Lake Bluff, Ill.), 3.72.<sup>195</sup>

The answer is that Drake University, like most colleges and universities, requests an additional waiver of an athlete’s privacy rights under the Buckley Amendment. The 2002–2003 *Drake University Sports Information Student-Athlete Update and Release of Information Form* authorizes:

personnel of the Department of Intercollegiate Athletics to review and to disseminate to third parties information in [the athlete’s] personal “education records” including information contained on this form and any other information pertinent to my participation in University recognized sports, for public relations purposes.<sup>196</sup>

*For public relations purposes.* For the college or university, an athlete’s privacy is property to be controlled, not a right to be protected. Armed with the athlete’s waiver, the result is anecdotal disclosure and self-congratulation.

Selective disclosure, however, draws negative implications for other athletes. For example, followers of the Drake women’s basketball team will recognize what is not stated in the university’s selective disclosure:

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195. *Drake Women’s Basketball Program Honored*, ON CAMPUS, Oct. 12, 2001, at 2.

196. DRAKE UNIV., 2002–2003 DRAKE UNIVERSITY SPORTS INFORMATION STUDENT-ATHLETE UPDATE AND RELEASE OF INFORMATION FORM (on file with the authors). The *Drake University Sports Information Athlete Biography Form* also asks a variety of questions of the student, but again ends with the familiar waiver coda: “I authorize use of the above information and any personally-related academic or athletic material by the Drake Athletic Department.” DRAKE UNIV., DRAKE SPORTS INFORMATION ATHLETE BIOGRAPHY FORM (on file with authors). For another example, see the University of Iowa form, “STUDENT-ATHLETE CONSENT TO USE PHOTOGRAPHS AND TO RELEASE INFORMATION,” which concludes: “This consent permits release of information which may be protected by Public Law 93-380, Section 513, commonly called the Buckley Amendment.” (on file with authors).

the names of team members who did not earn a 3.47 grade-point average. Because of Drake University's controlled-disclosure policy, requesting a report on the academic performance of the basketball team would produce:

<i>Player</i>	<i>G.P.A.</i>
Mandy Kappel	3.85 (played fall semester)
Jayne Anderson	3.76 (did not play)
Kristin Santa	3.72
Allison Burchill	3.68
Martha Chaput	3.60 (played fall semester)
Maureen Head	3.47
Molly Nelson	3.50
Erin Richards	3.48
Carla Bennett	RIGHT TO PRIVACY
JaNae Mosley	RIGHT TO PRIVACY
Stephanie Schmitz	RIGHT TO PRIVACY
Kris Horner	RIGHT TO PRIVACY

The conclusion becomes obvious: because disclosing only the best academic records is in the self-interest of both the athletics program and the athlete, the policy *appears* to be a decision based on principle. But it is not. As the pattern makes clear, there is no comprehensive commitment to privacy. Drake University's selective disclosure reveals that Bennett, Mosley, Schmitz, and Horner must have earned less than a 3.47 grade-point average.

What is particularly striking is that not only is the waiver applied selectively *to* athletes but that the waiver applies *only* in athletics. Of the more than ninety other extracurricular activities listed in the Drake University *DBOOK*, *none* requires a waiver of the Buckley Amendment to participate. This "double selectivity"—only in athletics and only to some athletes—reveals that the basis for the waiver is self-promotion instead of principle, institutional congratulation instead of institutional analysis, avoidance instead of assessment, and advertising instead of accountability. Universities engage in—and in fact are the masters of—the very sort of anecdotal disclosure that is condemned when examples of academic corruption in college athletics are made public by whistleblowers and the media.

It is clear the NCAA and institutions use the Buckley Amendment and other waivers to maintain control over their athletes. Through this control, these institutions provide disclosure that is selective in application. Thus, the hypocrisy of how the waivers are applied when it comes to college athletics is evident. The standard appears to be if the record is good, disclose it to sell the university; and if the record is bad, do not disclose it and claim the student's right to privacy. As Professor Herb Strentz writes:

to understand the Buckley Amendment all you have to know is two things:

(1) If the desired information will make a school look good, you probably can have access to it.

(2) If the desired information will make a school look bad, you probably cannot have access to it.

It's that simple.

....

It's all for releasing what a school official considers to be good news.<sup>197</sup>

Reviewing the various waiver of right-to-privacy policies applied to athletes makes it clear that institutions of higher education favor disclosure. The question is what kind of disclosure is consistent with the values of the institution: anecdotal disclosure that may mislead or serve as a cover-up or disclosure that fosters accountability and protects the public trust?

Although professors and administrators are generous in their insistence on accountability for other institutions and people, they become defenders of institutional secrecy when others suggest that they apply the same standards to themselves.<sup>198</sup> With the Buckley Amendment they

197. Herb Strentz, Editorial, *Law Compounds Drake Basketball/GPA Woes*, IOWA NEWSPAPER ASS'N BULL., Feb. 7, 2001, at 2. For an excellent essay that exposes the hypocrisy of how universities use waivers for selective disclosure of athletes' academic records, see Editorial, *A Bureaucratic Tale: How ISU Manages To Tell Just Good News*, AMES TRIB., Apr. 28, 1998, at A6. The essay concludes:

It's wrong to keep secret the grade points of all but the smartest athletes. That's like giving baseball box scores that don't say who committed the errors, or basketball statistics that don't list the missed free throws, or football results that give the passing statistics only of those quarterbacks with high completion rates.

You can make a case—at least we can—that it's every bit as important for the public to know how those junior-college recruits are doing in the classroom as it is to know how the very smartest are doing. You can make a case that if an athlete must sign any release form—such as the NCAA form—then the university could make any student involved in any extracurricular activity sign a form saying his grades could be released or, especially, any disciplinary proceeding against him could be released.

None of that will happen, of course, for Iowa State University is an institution built on secrecy—secrecy that lets it hide everything from the discipline (if any) of faculty plagiarizers to the names of student troublemakers. But it's happy to tell us the grade points of athletes who do well—even if [it] violates the law in doing so.

Now, of course, it no longer violates the law in doing that.

So smart athletes can bask in glory.

And not-so-smart ones can scrape by in secrecy.

*Id.*

198. As former Harvard University President Derek Bok has observed, “[c]uriously, universit[y] faculties] are very eager to do research on every institution in

found an ally. Indeed, in addition to the academic corruption in athletics, the law also has provided a way to bury other potentially embarrassing information. As pointed out earlier, it took an amendment by Congress for institutions to release records that would shed light on the prevalence of campus crime.<sup>199</sup> Before the 1998 amendments, Maureen Rada noted:

Universities will not likely understand Buckley as allowing the disclosure of disciplinary records for one simple reason: *schools benefit more from concealing information than they do from releasing it*. . . . [S]hrouding information on campus crime in disciplinary boards effectively makes those crimes disappear for purposes of the Campus Security Act . . . [and] by burying information within university disciplinary boards, schools are *able to deny awareness* of crime on campus.<sup>200</sup>

. . . .  
The incentive structure that Congress . . . set up *clearly favors continued concealment*. Thus, educational institutions, wise to these incentives, opportunistically invoke Buckley to their benefit.

. . . .  
Unless a clear statement is made that disciplinary reports are definitely *not* educational records covered by Buckley, *schools will always err on the side of concealment*: the transaction costs of disclosing under the current system are otherwise too great.<sup>201</sup>

Benjamin Sidbury also recognized, when advocating for complete disclosure of *all* student disciplinary records, that such disclosure:

will make it explicitly clear to all university administrators that FERPA may no longer be abused as a tool to *hide campus crime* and as a means to protect the students that commit criminal offenses. Additionally, institutions will no longer be able to hide behind FERPA's ambiguous language in order to *portray* the image of a safe campus.<sup>202</sup>

The lesson is instructive.

From campus crime, to racism and sexism, to misuse of research funds, precedents abound where the federal government has demanded public accountability and has withheld funds from institutions of higher

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society except themselves." Derek Bok, *Reclaiming the Public Trust*, CHANGE, July–Aug. 1992, at 13, 16.

199. See Rada, *supra* note 91, at 1801, 1803, 1830.

200. *Id.* at 1814–15 (emphasis added). For a more recent example of concern, see Gose, *supra* note 130, at A24.

201. Rada, *supra* note 91, at 1820, 1827 (emphasis added).

202. Sidbury, *supra* note 40, at 780 (emphasis added).

education—public and private—until such public accountability has been effected. Simply receiving public funds has been sufficient to warrant public disclosure. For example, at public colleges and universities, a faculty member’s salary is not protected from disclosure by the right to privacy. Given the frequency and degree of scandal in college athletics and the huge sums of money involved, the public’s right to know the conduct of public officials concerning academic integrity in higher education is certainly equal to the rationale for the public’s right to know the salary of an English, music, or chemistry professor.

The irony is that by enacting the Buckley Amendment, Congress impeded what it originally sought to accomplish in these related areas. Without making careful distinctions between public and private information, Congress encumbered the opportunity for accountability in college athletics that it sought when it later enacted the legislation requiring the disclosure of graduation rates.<sup>203</sup>

Congress enacted the Student Right-to-Know and Campus Security Act because Congress recognized, in part, that “the academic performance of student athletes, especially student athletes receiving football and basketball scholarships, has been a source of great concern in recent years.”<sup>204</sup> The answer to the “source of great concern” was to require the disclosure of graduation rates. Disclosing graduation rates, however, has done nothing to solve the problem of academic corruption in college athletics. Even those who advocated for disclosure of graduation rates recognized that “any defense based upon graduation rates underestimates the ingenuity of athletic departments in fashioning ‘gimme’ courses and degrees for their coddled athletes, the sole purpose of which is to ensure their eligibility for four or five years.”<sup>205</sup> Indeed, the skepticism that disclosing graduation rates will address the problem remains widespread: “like grade point averages, graduation rates have some real shortcomings as a measuring stick for a program’s academic integrity.”<sup>206</sup> “Real shortcomings” is an understatement, and it is obvious that improving graduation rates cannot be the answer. Authors Wilfred Bailey and Taylor Littleton observe:

I’ve looked at transcripts of some athletes, kids who are potentially bright young men, and when I finish I want to cry. It hurts me to see them—even of people who have graduated—and I just realize that there’s nothing in that transcript that you could give to a potential employer and say, “Look what I have

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203. See Student Right-to-Know and Campus Security Act, § 1, 104 Stat. at 2381.

204. *Id.* § 102(4).

205. TOM McMILLEN & PAUL COGGINS, *OUT OF BOUNDS: HOW THE AMERICAN SPORTS ESTABLISHMENT IS BEING DRIVEN BY GREED AND HYPOCRISY—AND WHAT NEEDS TO BE DONE ABOUT IT* 75 (1992).

206. GARY FUNK, *MAJOR VIOLATION: THE UNBALANCED PRIORITIES IN ATHLETICS AND ACADEMICS* 19 (1991).

acquired in my four years of college.” That’s the reason I have some hangups about this—I think we need more of our athletes to graduate, of course; but if graduation means these kinds of transcripts, I’m not for emphasis on that criterion.<sup>207</sup>

Graduation rates, therefore, are good for chatroom or cocktail party put-downs, but they have done nothing to change what goes on behind the closed doors of higher education. By requiring public disclosure of graduation rates, Congress recognized that the problem of academic corruption in college athletics is national in scope and that disclosure is necessary to address it. Modifying the Buckley Amendment by including courses as directory information and requiring disclosure of academic records without releasing students’ names will be consistent with the purpose of the Buckley Amendment and will address the problem Congress initially set out to solve by requiring the publication of graduation rates.

The problem just became greater and more immediate. New NCAA admission requirements for athletes are on the way:

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207. BAILEY & LITTLETON, *supra* note 8, at 52; *see also* ROBERT JAMES WALLER, *The Trials of Hunter Rawlings*, in ONE GOOD ROAD IS ENOUGH: ESSAYS 37, 43 (1990) Waller writes:

Oh, athletic departments are fond of trotting out figures to show that athletes have higher graduation rates than non-athletes. That’s not very convincing, to me at least. I want to know in what fields of study the athletes have graduated, what courses they took, who taught the courses, what grades they received, and something about the overall rigor of the classes.

Waller, *supra*, at 43.

There's a new reality show in college sports, one that promises to reveal the integrity of college presidents who want to be known as high-minded academics, even reformers, but must operate more like Fortune 500 CEOs. The game is called, *How low can you go?*

The rules are simple. As expected Thursday, the NCAA Division I board of directors approved a new set of academic proposals that will allow college coaches in every sport to recruit high school athletes who achieved no better than a 400 on their SAT.

That's right: 400, which is, not so coincidentally, the lowest score possible.

Not a single answer correct on the test.<sup>208</sup>

In other words, the NCAA has created *even lower* than current admission standards for athletes. "The new rules will permit athletes with stellar high-school grades to qualify for college sports even if they have abysmal test scores."<sup>209</sup> Only the most naïve among us will fail to recognize the implications of even *lower* admission standards for athletes:

The new NCAA format merely extends the current sliding scale that weighs SAT score against high-school [grade-point average] in determining eligibility, to further reward players with good grades. If an athlete Christmas-trees his SAT and gets only a 500, for instance, he better have wowed his teachers in the classroom—as he'll need a 3.3 [grade-point average] in his core academic classes to play for any college.

Of course, teachers can be wowed for reasons other than academic performance. Like compassion. What teacher wants to be known as the educator who kept a top athlete from a college scholarship because he gave him a C instead of a B, or refused to let him re-take an exam?

"What we've seen in recent years is grade inflation, guys getting all A's their senior year, kids going all over the country to prep schools and getting better grades than they ever got," [Former University of Virginia basketball coach and athletics director Terry] Holland said. "I mean, come on!"

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"The unintended consequence is that we are only passing our problems down to the high schools," Holland said. "This rationale for fraud is then carried into college—highly visible

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208. Tom Farrey, *It's All Academic Now*, ESPN.com, at <http://sports.espn.go.com/espn/print?id=1453693&type=columnist> (Nov. 3, 2002).

209. Douglas Lederman & Welch Suggs, *NCAA Passes New Rules on Academic Standards*, CHRON. HIGHER EDUC., Nov. 8, 2002, at A38.

athletes who are already ‘stars’ are valuable commodities and must be kept eligible or someone will be embarrassed. It is a short step from academic ‘support’ to academic ‘fraud’ under such circumstances.”<sup>210</sup>

The short step from academic support to academic fraud is the short distance between academic integrity and academic corruption.<sup>211</sup> As pointed out, the question is not how many athletes graduate, but how many are kept eligible by an institutionalized, systemic program that uses the athlete and betrays the purpose of the academic institution. Only the academic record of the athlete contains that answer.<sup>212</sup>

And so it comes down to academic records: records of courses with students’ names but without grades—or—records of courses and grades but without students’ names. Either way, we would finally have an answer to Anne Matthews’s question: “What goes *on* in there?”<sup>213</sup>

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210. Farrey, *supra* note 208.

211. And the new academic standards will produce even greater pressure on academic integrity:

Academic advisers [say] steer[ing] athletes into specific courses and degree programs to make it easier for them to meet the NCAA’s academic standards . . . is bound to become more of a trend as the NCAA phases in new academic standards that will require athletes to complete more of their course work in order to stay eligible for sports. The new rules are supposed to improve athletes’ graduation rates, which for years have lagged behind those of their classmates, but the policy may push more athletes into easier academic programs, devaluing the degrees they eventually do earn.

Suggs, *supra* note 163, at A33.

212. Disclosure of graduation rates does not begin to address the indictments, now commonplace, of the academic corruption in college athletics: “The only reason . . . academically unqualified athletes are in our universities is that administrators and professors cheat. . . . And every time they cheat they compromise their own integrity, and the integrity of the university.” MARTIN ANDERSON, *IMPOSTORS IN THE TEMPLE* 181 (1992). As the recent explosion of academic scandals demonstrates, years pass, but the indictment remains.

213. MATTHEWS, *supra* note 32, at 35.

## V. CONCLUSION

*“In the United States, people know all about the corruption, the phony admissions standards, the payoffs, the boosters that permeate college sports. University administrators know. Fans know. We all go along.”*<sup>214</sup>

*We all go along.* What a chilling indictment of our colleges and universities. It is sadly ironic that institutions whose reason for being is *to search for truth* are home to at best a myth—at worst, a lie—shielded by the Buckley Amendment.

Without disclosure, allegations of academic impropriety usually consist of rumor, innuendo, and gossip directed toward the athlete. With disclosure, the focus will *not* be on Berger, Smith, Clemons, Jones, and all the other athletes who are subjected to questions about their academic records. The focus will be on the faculty who taught those courses, and on the faculty and administrators at every institution who are complicit in the corruption.<sup>215</sup>

We now have a federal disclosure law because there is concern about crime on campus. We have a federal disclosure law because we are concerned about graduation rates of athletes (which, as noted above, avoids the problem). We have an equity-in-athletics disclosure act to promote gender equity. We even have a federal disclosure law to expose the salaries of college presidents. What we do not have is a disclosure law to address academic integrity.

Is disclosure a magical solution to the academic corruption in college athletics? Of course not. It is a necessary condition, not a sufficient one. Telling the truth usually is. As Stanley Fish advises:

After two-and-a-half years as a dean and 17 years as an administrator of one kind or another, I have learned that, as with most activities, there is a golden rule. The golden rule of administration is at once simple and complex, and it comes in three parts. Part one is, always tell the truth. Part two is, always tell more of the truth than you have to. And part three is, always tell the truth before anyone asks you to.<sup>216</sup>

The necessary step is simple. Either modify the Buckley Amendment or its regulations by inserting “courses” after the words

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214. George Vecsey, *College Sports Programs Need to Start All Over*, N.Y. TIMES, Dec. 16, 2002, at D7.

215. “Our consciousness level is raised when the probability of exposure is very high,” says one university president. BAILEY & LITTLETON, *supra* note 8, at 60.

216. Stanley Fish, *To Thine Own Faculty Be Truthful*, CHRON. HIGHER EDUC., Oct. 19, 2001, at B13.

“major field of study” as directory information or add to (or replace) the statutory requirement of disclosure of graduation rates with: “academic records of members of student groups such as athletic teams sufficient in number to protect the privacy of individual students.” Either modification will serve to protect against those who command secrets while providing a reasonable and commonsense distinction between public behavior and privacy rights. Neither will be harmful to students nor invade students’ privacy. And now, more than ever, these changes are needed to protect the public trust from the closed society of higher education.