The Privacy Advantages of Homeschooling

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The legitimate object of government, is to do for a community of people, whatever they need to have done, but can not do, at all, or can not, so well do, for themselves—in their separate, and individual capacities.

In all that the people can individually do as well for themselves, government ought not to interfere.

—Abraham Lincoln

I. INTRODUCTION

In 1969, the Supreme Court stated in its landmark Tinker v. Des Moines decision that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” However, over thirty years later, courts and legislatures still curtail a multitude of other student rights while those students attend school. The deterioration of student civil liberties is most evident when considering public school students’ loss of privacy. Public schools collect, extract, assimilate and distribute a sundry of personal information, including residential data, discipline reports, test scores and comparative rankings, registration and classification records, medical accounts and

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4 See infra Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY.
psychological assessments.\footnote{See infra Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY.}

In contrast to students’ loss of privacy rights while in schools, the Supreme Court expressly protects citizens’ privacy rights while in their homes.\footnote{Kyllo v. United States, 533 U.S. 27, 40 (2001) (limiting technological invasions of the home).} In 1961, the Supreme Court stated that physical invasion of the home “by even a fraction of an inch” is too much.\footnote{Silverman v. United States, 365 U.S. 505, 512 (1961).} In 2001, the Court continued, by stating that, “to explore details of the home that would previously have been unknowable without physical intrusion . . . is a ‘search’ and is presumptively unreasonable without a warrant.”\footnote{Kyllo, 533 U.S. at 40.}

Although the Fourth Amendment right against unreasonable searches and seizures traditionally protected “people, not places,”\footnote{Katz v. United States, 389 U.S. 347, 351 (1967).} the contemporary standard is determined by a “reasonable expectations of privacy” test.\footnote{Id. at 362 (Harlan, J., concurring); see also BLACK’S LAW DICTIONARY 262 (2d pocket ed. 2001) (“[E]xpectation of privacy. A belief in the existence of the right to be free of governmental intrusion in regard to a particular place or thing.”).} Nowhere else do people expect privacy more than in their homes; consequently, most homeschooled students preserve more personal privacy than those who attend public schools.\footnote{Although private schools are not a primary focus of this paper, parents may also conscribe away many of their family’s privacy rights by sending their children to so-called “private” schools.} In other words, to extend Tinker’s metaphor, students tend to retain more constitutional protections behind “picket fences” than behind “schoolhouse gates.”\footnote{See supra text accompanying note 2.}

“Homeschooling”\footnote{“Homeschooling,” “home education” or “home instruction.”} is, basically, when parents teach their children at home instead of sending their children to formal schools.\footnote{“Homeschool” is a fairly modern term (and may serve as a noun, adjective or verb. Over the last three decades, “home” and “school” have gradually been co-joined and are now most commonly phrased as one compound word. See, e.g., Angstadt v. Midd-West Sch. Dist., 377 F.3d 338, 341 (3d Cir. 2004) (“In 2001, she stopped home schooling . . . .”) (emphasis added); Olson v. Stevens, 730 A.2d 432, 433 (N.J. Super. Ct. App. Div. 1999) (consisting of various phrases which use the term “home school,” such as: “Stevens began home schooling her daughter . . . .”) (emphasis added); DAVID H. ALBERT, HOMESCHOOLING AND THE VOYAGE OF SELF-DISCOVERY (2003) (emphasis added); MARY LEPPERT & MICHAEL LEPPERT, HOMESCHOOLING ALMANAC 2002-2003 (2001) (emphasis added). Perhaps to establish grammatical consistency when discussed among “public school” and “private school,” statutes and court rulings for the most part continue to record “home” and “school” as separate words (except when used as an adjective, whereby the words are sometimes hyphenated). Another reason the two words remain separated by government agencies, however, may be to re-enforce the customary separation of home}
exist, and a variety of state regulations govern homeschools. The purpose of this paper is two-fold: 1) to expose the expansion of information gathering and dissemination via the United States public school system; and 2) to facilitate parental choices on how best to educate their children if privacy issues are a concern. Privacy is fundamentally the omission of outside interference; therefore, in attempting to demonstrate the privacy advantages of homeschooling, this work, for the most part, proves a negative by comparatively cataloguing how much privacy is denied, or potentially denied, when students attend public schools.

Section II compares and contrasts students’ legal requirements regarding the types of information students must provide to government educational institutions and the information public schools and homeschools must or may gather or release. Section III examines homeschooling’s legal foundations and regulatory issues. Section IV postulates challenges facing the future of homeschooling’s privacy advantages.

II. EDUCATIONAL INSTITUTIONS AND PRIVACY

A. Applicable Law

1. Congressional Acts

Two congressional acts substantially affect collection and dissemination of otherwise private information originally collected for educational purposes: the Family Educational Rights and Privacy Act (FERPA, commonly known as the Buckley Amendment), and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (PATRIOT Act). The federal Privacy Act of 1974, the Freedom of and school. See Olson, 730 A.2d at 433 (separating “home” and “school” throughout the opinion, except once, where J.A.D. Rodriguez consigns the term via hyphens and quotes: “She also sought enforcement of an agreement . . . so she could ‘home-school’ their daughter.”). However, detailed clarifications of how to operate homeschools are beyond the scope of this paper.

15 See infra Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING; see also Robin Cheryl Miller, Annotation, Validity, Construction, and Application of Statute, Regulation, or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students, 70 A.L.R. 5th 169 (1999).


Information Act20 and state laws also, to varying degrees, affect the dissemination of school records.21

FERPA creates a federal minimum standard limiting the unauthorized release of electronically or physically stored information about students.22 Under FERPA, education records include all records, files, documents, or other materials maintained by an educational agency, or anyone on behalf of the educational agency, containing or possessing information directly related to a student.23

A school record is like a short chronicle of a student’s academic life. School records contain information such as test scores, IQ, subjects studied, grades, teacher evaluations, psychological and psychiatric reports, and disciplinary information. Some schools even record information about religious and political beliefs in students’ records—only a few states have laws against keeping a record of students’ political activity.24

However, FERPA forbids unauthorized release of law enforcement records and health and psychological records.25 Some courts have ruled that school disciplinary proceedings against students do not constitute “education records” either.26

Under FERPA, students may review their records,27 request explanations of their contents,28 and correct or amend any

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20 Id. at § 552 (2000) (right to access, inspect and copy personal information maintained in government record systems).
22 E.g., id. at § 1232g(n)(4)(A) (2000) (“information directly related to a student”); id. at § 1232g(b)(1) (2000) (“personally identifiable information”).
26 ACLU, Ask Sybil Liberty About Your Right to Keep Your School Records Private, Dec. 31, 1997, http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=9070&c=161 [hereinafter ACLU, School Records Private] (Schools may request a reasonable fee for copying records. Legal guardians and students themselves, if 18 or older, may view records. Access age may differ from state to state. Some information, such as psychiatric reports and other non-educational records, may only be accessible to guardians.).
27 20 U.S.C. § 1232g(a)(2) (2000) (Students have the right to hearings before neutral or impartial officials to challenge records’ contents. The hearings must allow for assistance or representation and evidentiary presentations.). See also SPARC, Correcting School Records Form Letter, http://www.deltabravo.net/custody/correction.php (last visited Nov. 9, 2005).
records they feel are incorrect, misleading, or violate their privacy rights.\textsuperscript{29} FERPA allows disclosure of student information without prior consent: to officials within the school or institution who the school or institution determines have a legitimate educational interest,\textsuperscript{30} for limited access by federal and state educational authorities,\textsuperscript{31} and in emergency situations.\textsuperscript{32}

FERPA supposedly grants both civil and criminal penalties for violators of the Act.\textsuperscript{33} However, in a 2002 Supreme Court case, a mother claimed that FERPA forbade school administrators from reading aloud her son’s grades in class during peer grading, but the Court decided otherwise.\textsuperscript{34} In a companion case, the Court ruled that FERPA does not even create personal rights under 42 U.S.C. § 1983\textsuperscript{35} to enforce FERPA’s nondisclosure provisions.\textsuperscript{36} The Court stated that FERPA only directs the Secretary of Education to enforce its nondisclosure provisions and other spending conditions, and not the rights of private individuals.\textsuperscript{37} It seems, therefore, that the government has rendered civil and criminal penalties nearly useless as it rarely finds the Act is violated.

The PATRIOT Act curtails some of the privacy rights

\textsuperscript{29} 20 U.S.C. § 1232g(a)(2) (2000) (If students’ requests are denied, students have the right to include statements in their files stating why they believe the information is wrong and/or otherwise should not be in their records.); ED.gov, Family Educational Rights and Privacy Act (FERPA), available at http://www.ed.gov/print/policy/gen/guid/fpco/ferpa/index.html (last visited Nov. 9, 2005) (Questions regarding FERPA may be directed to: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C., 20202-5920; (202) 260-3887 or via TTD (800) 877-8339.).


\textsuperscript{31} Id. at § 1232g(b) (2000).

\textsuperscript{32} Id. at § 1232g(h) (2000) (situations that threaten the health or safety of the student or other individuals).

\textsuperscript{33} See Banisar, supra note 21 (“Individuals who willfully violate the disclosure provisions can be convicted of a misdemeanor and fined up to $5,000. Any party who knowingly or willfully obtains a person’s record also faces criminal penalties. Civil liability for willful or intentional acts includes injunctions against further acts, damages of not less than $1,000, attorney fees and costs.”); see also 20 U.S.C. § 1232g(a)(1)(C)-(D) (2000) (conversely, students may waive their privacy rights in writing, which allows identified third parties to access some or all of their records.).


\textsuperscript{37} Id. at 287, 289; see also 20 U.S.C. § 1232g(f) (2000); 20 U.S.C. § 1232g(g) (2000).
apparently granted in FERPA.\textsuperscript{38}

The PATRIOT Act changes the standards for sharing student records in two important ways:

i. It makes it much easier for law enforcement to gain access to student records.\textsuperscript{39} Prior to the PATRIOT Act, law enforcement agents needed to prove they had 'probable cause' before getting access to a student’s record, which requires specific evidence of wrongdoing. Now under the PATRIOT Act, law enforcement only need to have 'reasonable suspicion,' a much lower standard.\textsuperscript{40} This means student records aren’t protected as strongly as they were before.

ii. FERPA required that schools notify students if their records had been released to law enforcement agents. Under the PATRIOT Act, schools are no longer required to notify students. Students have no idea if their records have been turned over to law enforcement or for what reason.\textsuperscript{41}

Sentinel newspaper reporter, Thomas Ryan, summarizes, “[t]he Patriot Act creates an exception to the privacy protections of the FERPA\textsuperscript{42} to require 'emergency disclosure' if specified federal officials obtain a court order relevant to a terrorism investigation, which is very broadly defined in the Act.”\textsuperscript{43} FERPA, however, already contains an exception for “safety or well-being” that is arguably sufficient to deal with a true emergency caused by a terrorist suspect.\textsuperscript{44}

Any educational records that school systems\textsuperscript{45} collect and keep about public-schooled students or home-schooled students fall under the purview of FERPA.\textsuperscript{46}

\textsuperscript{38} USA PATRIOT ACT §§ 215, 507 (Section 215 can be used to access purchase records, computer files, educational files, library records and generic information, and § 507 amends section 404 of the General Education Provisions Act, 20 U.S.C. § 1232g by allowing the Attorney General to “collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation . . . .”).

\textsuperscript{39} USA PATRIOT ACT §§ 215, 507.

\textsuperscript{40} New Jersey v. T. L. O., 469 U.S. 325, 347 (1985) (“The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T. L. O. was carrying marihuana as well as cigarettes in her purse.”).

\textsuperscript{41} Textoris, supra note 24, at 2 (footnotes added).

\textsuperscript{42} 20 U.S.C. § 1232g(j)(1)(A)-(B) (Supp. II 2002) (FERPA aids in the investigation and prosecution of terrorism.).


\textsuperscript{44} 20 U.S.C. § 1232g(h) (2000).

\textsuperscript{45} See, e.g., id. at § 1232g(a)(2) (2000) (so long as the systems accept federal funding).

\textsuperscript{46} Student education records fall under FERPA. Kathleen Lucadamo et al., Secret School Files Dumped, DAILY NEWS, Nov. 14, 2004, at 2 (“Under the [FERPA], a school must protect the confidentiality of student education records that it maintains,” said Susan Aspey, Press Secretary of the U.S. Department of Education, regarding alleged mismanagement of homeschooled records.)
2. Judicial Decisions

Although nothing in the U.S. Constitution specifically mentions privacy rights, other rights hint at it. The Fourth Amendment specifically grants:

[the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.]

However, the Supreme Court currently permits a variety of exigency and “special needs” exceptions to the Fourth Amendment. The Court has also found privacy privileges in the First Amendment’s rights to freedom of speech, religion and association, the Third Amendment’s prevention against forced quartering of soldiers, and the Fifth and Fourteenth Amendments’ due process rights, equal protection provisions, and protections against self-incrimination. The Ninth Amendment ensures that just because the Constitution or the Bill of Rights does not mention a particular right it does not mean that it is not a right of the people. Thus, the Supreme Court has interpreted the Ninth Amendment to provide some privacy protection.

In 1977, the Supreme Court recognized child-rearing and education as within the scope of the right to privacy. However, Ninth Amendment protections have been applied, with few exceptions, only to out-of-school or at-home privacy protection, as delineated by landmark cases decided throughout the 1960’s, 70’s and 80’s, concerning issues such as prophylactic issues, sexual behavior, abortion rights, and wiretapping. Perhaps, then, it

48 U.S. CONST amend. IV.
49 See discussion infra Part II. C. 2. Information That School or Government Officials May By Law Require From Some Students.
51 U.S. CONST amend. III.
52 U.S. CONST amend. V, § 1 (restricts the government from forcing individuals to divulge certain information about themselves); U.S. CONST amend. XIV § 1 (same); e.g., Whalen v. Roe, 429 U.S. 589, 598-99 (1977) (explaining substantive due process privacy protection to information privacy).
53 U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).
56 See Griswold, 381 U.S. at 482-84 (also recognizing the right to educate one’s child as one chooses as part of the right to privacy).
is not coincidental or surprising that the modern rise in homeschooling\textsuperscript{60} follows the wave of privacy rights pursued in the late twentieth century.

B. The Rise of Homeschooling

The National Center for Education Statistics (NCES) reports that in 2003 about 1.1 million U.S. students were homeschooled, up from 850,000 in 1999,\textsuperscript{61} a 29\% increase in just five years.\textsuperscript{62} Ian Slatter, spokesman for the National Center for Home Education (NCHE), however, claims that the NCES statistic underestimates the number of children actually being homeschooled.\textsuperscript{63} Slatter claims that the true figure is two million children.\textsuperscript{64} This million-or-so student discrepancy exposes the informational obfuscation provided by not registering children in traditional school systems.

Nonetheless, it is estimated that homeschooled children currently represent 2.2\% of the five- to seventeen-year-old population in the United States.\textsuperscript{65} The top reasons parents give for homeschooling their children are:

- 31\% Concern about school environment.\textsuperscript{66}
- 30\% To provide religious/moral instruction.\textsuperscript{67}
- 16\% Dissatisfaction with academic teaching.\textsuperscript{68}
- 7\% Child has mental/physical health problem.\textsuperscript{69}
- 7\% Child has special needs.\textsuperscript{70}

Thus far, statistics do not reveal concern of personal

\textsuperscript{63} \textit{Id.}, See, e.g., Abby Goodnough, \textit{Kitchen-Table Classrooms}, N.Y. TIMES, Sept. 24, 1995, at §13, N.J., pg.1 ("Since New Jersey has no specific statute governing home schooling, the State Department of Education does not count the children involved from year to year.").
\textsuperscript{64} \textit{More Kids Learning at Home, U.S. Says}, supra note 62, at A5.
\textsuperscript{65} \textit{More Kids Learning at Home, U.S. Says}, supra note 62, at A5.
\textsuperscript{67} Reilly & Gonzalez, supra note 61, at A1.
\textsuperscript{68} See, e.g., GUY STRICKLAND, \textit{BAD TEACHERS: THE ESSENTIAL GUIDE FOR CONCERNED PARENTS} 12, 148 (1998).
\textsuperscript{69} Reilly & Gonzalez, supra note 61, at A1.
\textsuperscript{70} Reilly & Gonzalez, supra note 61, at A1.
confidentiality as a major rationale for homeschooling children, even though government officials, school administrators, and faculty members collect large amounts of information about the students who attend public schools. Few people realize or recognize that homeschooling provides an additional over-arching advantage over public schooling. And that advantage is privacy.

C. Information Gathering

In 1973, the Supreme Court stated, “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” Although the federal Constitution does not necessarily provide a right to education, every state has a public school education provision in its constitution. States must ensure that their education statutes do not conflict with any privacy rights. States may, and often do, provide privacy protections greater than protections granted by the federal constitution; therefore, states must balance educational and privacy standards to justify collecting otherwise private information for educational purposes.

Why should students and parents be concerned about information privacy? As a HSLDA National Privacy Report stressed:

[a] transfer of information about a private citizen to the government cannot be viewed as harmless. Once a private citizen gives personal information to a government official, the citizen no longer has any control over where that information is stored, or the purposes to which it will be put. The more information a government collects on its citizens, the greater its ability to control the citizens. Informational privacy is an important right. Home school families are concerned about family privacy in choosing to direct the education of their children.

“Privacy” generally refers to people’s right to control

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71 See discussion infra Part II. C. Information Gathering.
73 Kern Alexander & M. David Alexander, American Public School Law 978-82 (5th ed. 2001) (N.Y. Const. art. XI, § 1 provides, “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” Many state constitutions, such as Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia, utilize a “thorough and efficient” educational standard.). Id. at 981.
74 E.g., Cal. Const. art. I, § 1 (“protect[e] property, and pursuing and obtaining safety, happiness, and privacy”) (emphasis added).
information about themselves and their families. Even when considering the many state-mandated homeschooling statutes, homeschooled students and their parents overwhelmingly control much more of their personal and private information than do publicly schooled children and their parents.\textsuperscript{76}

Privacy and education issues interact daily. Parents must provide personal data even before their children may attend most public schools.\textsuperscript{77} Sometimes, schools extract private information before students may participate in school-sponsored programs.\textsuperscript{78} Parents and students “consent” – for a variety of reasons, not the least of which include frustration, ignorance, or subtle coercion – to divulging information that their families may not necessarily want others to know.\textsuperscript{79} The types of personal information that public schools gather can, basically, be organized into three general categories:

Information that most school or government officials require by law from every student;\textsuperscript{80}

Information that school or government officials may by law require from some students;\textsuperscript{81} and,

Information legally permitted to be garnered through less obvious means.\textsuperscript{82}

1. Information that Most School or Government Officials

\textsuperscript{76} See discussion \textit{infra} Part II. C. 1. Information That Most School or Government Officials Require By Law From \textit{Every} Student.

\textsuperscript{77} See discussion \textit{infra} Part II. C. 1. a. Registration.

\textsuperscript{78} See discussion \textit{infra} Part II. C. 2. a. Corporal Testing.

\textsuperscript{79} As in criminal Due Process cases, which require voluntary confessions, factors such as age, educational background, and mental capabilities, should, arguably, come into play when students and guardians are asked to provide information. When students are called into guidance counselors’ or principals’ offices, the situations mirror the world of law enforcement custodial interrogations prior to \textit{Miranda v. Arizona}, 384 U.S. 436 (1966). As noted in the landmark case, police interrogation techniques were officially:

“[i]f at all practicable, the interrogation should take place in the investigator’s office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.’”

\textit{Id.} at 449-50. This denotes the atmospheric benefit of a home environment versus an administrative institutional environment.

\textsuperscript{80} See discussion \textit{infra} Part II. C. 1. Information That Most School or Government Officials Require By Law From \textit{Every} Student.

\textsuperscript{81} See discussion \textit{infra} Part II. C. 2. Information That School or Government Officials May By Law Require From \textit{Some} Students.

\textsuperscript{82} See discussion \textit{infra} Part II. C. 3. Legally Garnering Information Through Less Obvious Means.
Require by Law from Every Student

a. Registration

A straightforward way to comprehend the type and amount of information public schools require is to review what a typical school district requests each student to submit. One school district requires parents to divulge at least four different types of information: residential, emergency contact, directory and medical. Parents must by law complete, sign and submit a Parental/Guardian Consent Form on a yearly basis for each child they wish to register. In accordance with FERPA, parents may opt their students out of inclusion in any student directory and other photo/image identifiers.

The sample district’s Student Information and Emergency Form (SIEF) is by far the most intrusive. In addition to the student’s address information, the school requests that the parents/guardians supply, among other information, the student’s Social Security number, date of birth, age, emergency and alternative emergency contact information, personal physician’s name contact information, a listing of any medical needs, parents’ and/or guardians’ contact information including employers and home and business phone numbers, and all siblings’ names, birthdates and schools. Courts generally do not protect names, addresses and phone numbers as confidential. The SIEF also asks, “[w]ith whom does [the]
student reside?" and lists check-boxes for "both parents," "mother," "father," or "guardian," and requires the dated signature of a parent or legal guardian. The sheet notes twice in bold, capital letters that a current utility bill must be submitted with the completed form. This information is far beyond the theoretically benign requests for basic contact and medical information.

The sample school district supplies copies of this "carbon-backed" triplicate form to the district's health office, guidance department and attendance controller. Text at the top of the SIEF orders that parents "complete this form and return it immediately to your student's homeroom teacher." The form permits countless eyes access to this sensitive information.

It does not take a conspiracy theorist to recognize that this seemingly benign information gathering and dissemination may, in the aggregate, be detrimental. For instance, online and hardcopy student directories may provide access for molesters and harassers to learn the names and contact information of potential victims. Further, school systems' (mis)use of Social Security numbers is particularly alarming. "Courts have ruled that there are only four (4) instances when Social Security numbers MUST be used. These are: 1. For tax purposes[;] 2. To receive public assistance[;] 3. To obtain and use a driver's (omitted)."

Id. at 2461. Contra cases titled "Doe," "Roe," "In re," etc., and witness protection programs, where witnesses are not necessarily required to identify themselves. Twp. of Ocean Sch. Dist., Student Info. and Emergency Form (unpublished form, on file with Chapman Law Review).

Id. ('YOU MUST INCLUDE A CURRENT UTILITY BILL WITH THIS FORM" and "FILL OUT COMPLETELY AND ATTACH A CURRENT UTILITY BILL").

Id.

Id.

Id.

See Kathleen Vail, Privacy Rights Versus Safety: Should Juvenile Records be Open to Schools?, AM. SCH. BOARD J., April 1997, available at http://www.asbj.com/security/contents/0497vail.html (Many states, including California, Florida, Missouri, Texas, and West Virginia, require that law enforcers notify school officials when students are charged with some crimes whether or not the offenses occurred on school property or at a school function.).

See Andrew Sickinger, A Few Words of Western Wisdom, WESTERN COURIER, Aug. 27, 2004, available at http://www.westerncourier.com/media/paper650/news/2004/08/27/Opinion/A.Few.Words.O f.Western.Wisdom-706368.shtml ("The stalker book, also known as the 'student directory,' includes your name, year, major, local address and phone number and your home address. Although the school claims it doesn't sell the book to credit card companies, you will get bombarded with offers from them shortly after the book comes out, through the mail and over the phone.").

Schools often use Social Security numbers as Student ID numbers and require disclosure of Social Security number for a variety of reasons. Stealing Social Security numbers is often a major component of identity theft.
license[; and,] 4. To register a motor vehicle.”

School attendance is not one of these instances. Nonetheless, Social Security numbers have become a de facto national ID number and many, if not most, schools use Social Security numbers as students’ ID numbers. Social Security cards, however, initially stated in capital letters, “NOT TO BE USED FOR IDENTIFICATION.” Some homeschooling parents have objected to Social Security identifiers based on religious convictions. Regardless of what information school systems claim that students must provide, the Privacy Act states: “[i]t shall be unlawful . . . to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.”

Since education is regulated variably by each state, homeschooling “registration” requirements fluctuate. In 1995, at least sixteen states lacked any homeschooling statutes and eleven states did not even require homeschoolers to notify their local school districts at all regarding their status. As of 2003, “[n]ine states allow parents to remove children from school without reporting that they are doing so. An additional 14 states require home-schoolers to report that they are keeping their children home.”

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101 See Banisar, supra note 21 (“[Social Security numbers] are considered an education record under FERPA and its [sic] collection and disclosure by government agencies is [sic] generally prohibited by the Privacy Act of 1974.”); see also Plyler v. Doe, 457 U.S. 202, 205, 215, 223 (1982) (requires undocumented children of alien immigrants be educated at public schools; such children apparently would not be able to submit Social Security numbers).

102 See Komuves, supra note 100, at 531-32, 537-38.

103 WOLFE, supra note 100, at 30; see also Home School Legal Defense Association, Social Security Inspector General Testifies Before Congress, July 27, 2001, available at http://www.hslda.org/docs/news/hslda200107270.asp? [hereinafter HSLDA, Social Security Inspector] (“Social Security was created in 1935 for the sole purpose of tracking Americans’ earnings in order to properly credit their wages. Americans were promised that it would not be used for anything else. The Department of Defense now uses the SSN for armed forces and draft registration, and the Internal Revenue Service requires it for income tax returns and bank deposits to ensure that all income has been declared. . . . Federal, state, and local governments also use the SSN for issuing food stamps and driver’s licenses, to marriage licenses and water and sewer bills.”).

104 HSLDA, Social Security Inspector, supra note 103 (Some argue that The Bible presses for a separation of church and state functions and that Social Security numbers are “a mark” which may “one day lead to chip implantation or biometric identification;” and, therefore, First Amendment freedom of religion rights should keep Social Security numbers out of school requirements.).


106 See infra notes 107, 108, 247, 303 and accompanying text.

107 Goodnough, supra note 63, at §13, N.J., pg.10.
children at home, but require very little else.”

b. Examinations

i. Academic Classifications

Public school systems generally rank students and organize classes according to many factors, including, among other things, students' ability levels and disabilities, whereas homeschoolers are not subject to class rankings or limited by aptitude placements. It is common knowledge that school systems across the country assess students using a battery of mandatory standardized tests, such as the CAT, HSPT, GEPA, ESPA, Stanford, and Regency. However, only about half the states require homeschoolers to submit to standardized testing, and a number of states do not supervise parents who keep their children out of public or private schools. States’ use of achievement tests to monitor home instruction has been found constitutional, and homeschooled children who wish to enter or re-enter public schools may be required to pass performance and classification examinations.

Actual requirements to assess homeschoolers’ achievements vary from state to state. The Homeschooling Almanac 2002-2003 advises:

[...]you can obtain an academic record of your [homeschooled] child’s schooling career in two ways. The first way is to keep records yourself

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114 Murphy v. Arkansas, 852 F.2d 1039, 1039, 1040, 1044 (8th Cir. 1988).
115 E.g., Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 929, 931 (6th Cir. 1991).
116 See infra Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING.
and then create a transcript format document for such use . . . . The other way is to enroll in an independent study program (ISP), either public or private, that maintains records and generates transcripts for you.\footnote{Leppert & Leppert, supra note 14, at 166.}

Many homeschooling parents assess and record their children’s performance in some way; however, what gets revealed beyond the home is, for the most part, a familial decision.\footnote{Telephone Interview with Dawn Lincoln, supra note 110 (“Assessment can also include more subtle forms of direct observation.”).}

ii. Medical Exams

Public schools may garner medical information.\footnote{See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 659 (1995) (“[R]equiring advance disclosure of medications” prior to a urinalysis test is not “per se unreasonable.”); see also Skinner v. Ry. Labor Executives’ Ass’n, 498 U.S. 602, 626 n.7 (1989) (The Court “[did] not view this procedure as a significant invasion of privacy.”).}

A separate letter to parents from the sample township’s health office informs:

[i]he State of New Jersey requires that all Kindergarten, 1st, 2nd, 3rd and 4th grade students have their \textit{HEPATITIS B VACCINE SERIES} completed by the beginning of the 2004-05 school year. It is also required that all Kindergarten students have one dose of the \textit{VARICELLA VACCINE} before entering Kindergarten or the date of chickenpox illness. It is recommended that 1st grade students have their Varicella Vaccine completed as well.\footnote{Letter from Ocean Twp. Elementary Sch., supra note 120 (State administrative code no longer requires that physical examinations be performed at specific grade levels; however, the sample district still requests any updated student health information. New Jersey state law prevents students from bringing personal medications into school; however, students may carry medically necessary inhalers and epi-pens if parents submit}

\textbf{Vaccinations requirements vary by state; however,}

[p]arents who choose to have their child abstain from vaccinations fall into a gray area – with little wiggle room. New York State requires that all children receive required vaccinations before entering the day care or school systems. While the Department of Education will accept a medical deferment in instances of children who are immunodeficient, exemption for parental concerns dealing with religious or philosophical issues are reviewed and granted only on a case-by-case basis.\footnote{Shannon Heaney, \textit{Vaccinations: What Every Parent Should Know}, \textit{Daily News}, Sept. 28, 2004, at Family Health 2.}

Since public schools require nearly all students to receive certain vaccinations, people can make general assumptions about individual students’ medical information.\footnote{Letter from Ocean Twp. Elementary Sch., supra note 120 (State administrative code no longer requires that physical examinations be performed at specific grade levels; however, the sample district still requests any updated student health information. New Jersey state law prevents students from bringing personal medications into school; however, students may carry medically necessary inhalers and epi-pens if parents submit} In this way, public
school students’ personal medical privacy is compromised, but such data remains ambiguous for homeschoolers.

iii. Psychological Exams

In 2000, the Third Circuit held that “[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution.”\(^{123}\)

In spite of this, in October 2004, a U.S. House of Representatives appropriations bill included a new, mandatory mental health screening of every child in America, including preschool children.\(^{124}\) Moreover, the pharmaceutical industry supported the bill because it has also been interpreted to require drugging of children deemed mentally ill, even when parents refuse.\(^{125}\) The bill has yet to pass the Senate; whether the program would be enforced or tabulated through school system rosters is also not yet apparent.\(^{126}\) The state of Illinois has already implemented a similar mandatory mental health screening program via its school systems.\(^{127}\) Arguably, homeschooled students, especially those “living off the grid,”\(^{128}\) can avoid government-imposed psychological screenings.

Many public schools utilize school psychologists and
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These professionals must abide by duties of confidentiality. Psychotherapist-patient privilege protects much of the parties’ communication; however, confidentiality may be breached in most states if revealing the information would prevent serious harm to the patient or a third party.

Sometimes, psychological exams are mandatory, particularly before students may re-enter schools after suspension or expulsion. Many parents who homeschool their children, though, allege that public school atmospheres are the source of many children’s discipline problems. “Parents and students alike have reported a great release of pressure because of the move from institutional schools to home. Problems often disappear.” Homeschooled children do not accumulate school-related discipline or psychological records unless parents decide to maintain them.

2. Information that School or Government Officials May by Law Require from Some Students

a. Corporal Testing

Nowhere is the loss of students’ privacy in schools more apparent than in Supreme Court rulings on compulsory drug testing. The Court currently permits a variety of “special
needs” exceptions to the Fourth Amendment. A “special-needs analysis” is a “balancing test used by the Supreme Court to determine whether certain searches (such as administrative, civil-based, or public-safety searches) impose unreasonably on individual rights.” In school settings, special needs exceptions permit such personal invasions as: mandatory drug testing of any students involved in school-sponsored sports or extra-curricular activities, unwarranted locker and handbag searches, and other such involuntary or unwarranted searches and seizures of students’ persons, papers and effects.

The landmark 1995 case Vernonia School District v. Acton opened the door to mandatory urine tests for any students involved in school-sponsored sports. Seven years later, in Board of Education v. Earls, the Supreme Court expanded school officials’ rights to drug test any student participating in any school-sponsored extra-curricular activity. School officials across the country have initiated programs in line with these rulings. For instance, in October 2004, the Alvin School District in Texas began random weekly drug testing of 25 to 50 students, many of whom were involved in extra-curricular

...
activities (approximately 2,000 students a year). Such tests are in line with U.S. Department of Education grants to seven school districts nationwide to create student drug testing programs in, what U.S. Drug Czar John P. Walters described as, “hopes of expanding random student drug testing to more places.” Drug or alcohol testing of individual students while they are in school usually falls under a “reasonable suspicion” rationale, but the allowance of such searches varies from state to state. In contrast, narcotics policemen are not likely to patrol homeschoolers’ residences, absent voluntary consensual invitations or probable cause.

Aside from testing for drugs, courts generally have not allowed schools to require other medical tests from students. For instance, in early 2004, the New York chapter of the American Civil Liberties Union settled a lawsuit against the U.S. Department of Education and school officials after a school required a group of female students to submit gynecological records as a condition of reinstatement. “Under the terms of the agreement, school officials are barred from demanding that

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148 Dunn, supra note 146.
149 New Jersey v. T. L. O., 469 U.S. 325, 337 (1985) (“Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’”) (citation omitted).
150 ACLU, School Records Private, supra note 27.
151 A search is considered reasonable when there is voluntary consent, even absent a warrant or suspicion. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (“It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”); United States v. Drayton, 536 U.S. 194, 207 (2002) (“Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable.”). But see United States v. Lindsay, 506 F.2d 166, 173 (D.C. Cir. 1974) (holding that silence does not equal consent).
152 The Fourth Amendment mandates a showing of probable cause as justification for a search warrant, unless exigent circumstances, “plain view,” or another exemption applies. See Aguilar v. Texas, 378 U.S. 108, 114 (1964) (holding that the information supporting an application for a search warrant must demonstrate that an informant is credible or that his information is reliable); Spinelli v. United States, 393 U.S. 410, 419 (1969) (holding that probability of criminal activity is the standard for probable cause); Illinois v. Gates, 462 U.S. 213, 238 (1983) (re-affirming the “totality-of-the-circumstances” approach to probable cause).
154 Id.
students undergo or reveal the results of pregnancy, STD [Sexually Transmitted Disease] and HIV testing and may not exclude students for being pregnant, HIV-positive or having an STD.”155 Schools may not force students to submit to HIV tests.156 However, if personal medical situations are made known to school officials, they may act in the interests of school safety.157

Although public schools are generally not permitted to gather highly confidential medical information beyond drug test results, some states have begun different types of physical testing, thereby obtaining, to a certain degree, additional medical information. Arkansas, for example, “is now the only state that screens every student in public school for body mass index. [Schools] weigh [the students] and measure their height, and with that, . . . compute their body mass index and mail the results home to the parents. We let them know if their child is overweight.”158 Whether gathering this type of information and disclosing the results will fall under the realm of impermissible testing remains to be seen.

b. Searches and Seizures

In 1985, the Supreme Court case New Jersey v. T. L. O. set forth the standard for conducting student searches.159 School officials may constitutionally search students if the search is based on reasonable suspicion and is not excessively intrusive.160 Strip searches,161 locker searches,162 and backpack/handbag searches163 have generally been upheld.

School officials, though, sometimes push the boundaries of acceptable searches.164 For instance, in 1996, Georgia school
officials and law enforcement strip-searched an entire class of fifth graders in search of a missing $26.\textsuperscript{165} Although the search was deemed unconstitutional, the judge refused to allow a jury to address the issue of damages because none of the adults involved could be held liable for their actions.\textsuperscript{166} In 2000, Michigan school officials allegedly strip-searched over twenty students in an effort to recover $354 that was supposedly stolen.\textsuperscript{167} Four years later, another Michigan school system allegedly subjected its entire student body to a mass physical search.\textsuperscript{168} According to an ACLU press release:

> [t]he unlawful sweeps were planned and scheduled in advance and therefore not based on reasonable suspicion or probable cause to believe that any particular student or group of students had committed or was about to commit a crime or violated the law in any way. No guns or drugs were found . . . .\textsuperscript{169}

In 2001, the ACLU of Southern California sued the Los Angeles Unified School District alleging that school officials chose to search some students who were late to school and that school officials randomly selected students for pat-downs in front of their classmates during class time; allegedly, none of the searches followed reasonable suspicion.\textsuperscript{170} Once again, unwarranted, government authorized, in-school strip searches are not a homeschooler concern.

Courts have ruled that general use of metal detectors on those entering school facilities is minimally invasive, and is permissible under the Fourth Amendment.\textsuperscript{171} Courts have

\textsuperscript{165} Id. at 1293-95.
\textsuperscript{167} Press Release, ACLU, ACLU of Michigan Sues School District Over Strip Search of Students (Aug. 15, 2000), available at http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=8079&c=51 ("Approximately 20 boys were ordered into the shower room one at a time. Each boy was directed to remove his pants, lift his shirt and drop his underwear while a teacher examined him. . . . The five girls in the gym class were then forced to stand in a circle in the locker room, and pull down their shorts and lift up their shirts so the teachers could inspect their underwear. The money was never recovered.").
allowed governments to facilitate in-school searches with drug-sniffing canines.\textsuperscript{172} However, in 2002, South Dakota officials “brought in a German Shepherd to conduct a suspicionless drug sweep” of elementary and high school classrooms, and the dog allegedly terrorized schoolchildren when it escaped its leash and chased them around the classroom.\textsuperscript{173}

[A school official] instructed the students to put their hands on their desks and avoid petting or looking at the dog or making any sudden movements. In some classrooms, a school official told students that any sudden movement could cause the dog to attack. In at least one instance . . . the dog escaped its leash in a kindergarten class and chased students around the room. . . . Many [students] began crying and trembling and at least one [student] urinated involuntarily.\textsuperscript{174}

Students learning at home are, arguably, not subject to such unwarranted searches.\textsuperscript{175}

3. Legally Garnering Information Through Less Obvious Means

a. Information Gleaned by Individual Faculty Members

It is common practice that during the first week of public school, teachers require students to fill out index cards or some other worksheet detailing, among other things, parent or guardian contact information, home address(es), and phone numbers.\textsuperscript{176} Many teachers also ask students to brief their personal interests, likes and dislikes, and/or clubs and organizations to which they belong.\textsuperscript{177} Students usually fill out one index card worth of personal information for each teacher they have.\textsuperscript{178} Schools collect this information for allegedly benign

purposes; however, most of this information could be obtained through the main school office or other school records.\textsuperscript{179} Teachers generally do not guarantee that they will destroy student data sheets at the end of the school year and there is no telling into whose hands this personal information may eventually fall.\textsuperscript{180}

Student information cards are only the beginning of a school-year's worth of subtle information gathering. Viewing how students are dressed, assigning in-class presentations, and performing other commonplace interactions create opportunities for overt and covert information gathering. Personal information is particularly abundant in liberal arts classes, such as social studies or English, where teachers routinely require students to comment on current events, debate, and journal write.\textsuperscript{181} For instance, the classic first essay of the year – “What did you do this summer?” – illustrates how school employees may easily glean familial and personal information.\textsuperscript{182}

For obvious reasons, slight or subtle invasions of privacy rarely instigate legal proceedings; however, in 1999, parents of some Ridgewood, New Jersey, students brought suit in protest of a proposed 156 question, in-school “'voluntary and anonymous'” survey that touched on issues such as students’ personal substance abuse, criminal activities, sexuality, sexual activity, and relationships with parents.\textsuperscript{183} The court found that, although one teacher may not have informed his students that the survey was voluntary and another teacher may have told students that they would be “cutting class” if they left the survey room, the school “did everything reasonably necessary to ensure its voluntary nature” and no privacy violation occurred.\textsuperscript{184}

FERPA allows releasing statistical information that is not

Student, James A. McDivitt Elementary Sch., Old Bridge Twp., N.J. (Dec. 6, 2004) (Sometimes, students fill out only one such form in their homerooms; then, photocopies are sent to each student’s teachers.) (unpublished interview, on file with author).

\textsuperscript{179} See supra Part II. C. 1. a. Registration.

\textsuperscript{180} Telephone Interview with Evan Billig, supra note 176; AOL Instant Message Interview with Brooke DeKolf, supra note 178.

\textsuperscript{181} Telephone Interview with JoAnn Testa, Librarian and German Teacher, St. Mary's High Sch., S. Amboy, N.J. (Dec. 9, 2004).

\textsuperscript{182} Id.


\textsuperscript{184} Id.
personally identifiable. In contrast, the HSLDA opposes any federal government method of tracking or registering homeschooling. Government agents rarely, if ever, accumulate data or statistics regarding homeschoolers’ opinions, religion, home-life or emotions.

b. Information Gleaned by Collateral Means, and Other Concerns

i. Commuting

Commuting to and from school can be an issue. Citizens retain practically no Fourth Amendment rights when inside (or recently outside) vehicles. Law enforcement is entitled to search drivers with little cause. Vehicle passengers, too, have minimal expectations of privacy. Many school systems have purchased video equipment to survey students while they are passengers on school buses. In response to a series of bombings in London, other public transportation systems like the

187 HSLDA, Privacy Report, supra note 75 (The U.S. Dept. of Education attempted to survey homeschoolers’ parents about: “[p]reschool programs and learning activities at home for young children; [a]ctivities and programs that school-age children may participate in after school, and [t]ypes of educational activities, including training at work, in which adults may take part in [sic].”).
190 United States v. Stanfield, 109 F.3d 976, 981 (4th Cir. 1997) (law enforcement may open and visually inspect inside of vehicle).
191 Pennsylvania v. Mimms, 434 U.S. 106, 111-12 (1977) (upholding police officer’s request to have driver get out of vehicle and onto shoulder for expired license plate stop; the officer may then frisk the driver for weapons if he reasonably concludes that the person might be armed and dangerous).
193 Honeywell - Silent Witness, http://www.silentwitness.com/schoolbus/ (last visited Nov. 10, 2005) (“Silent Witness is the industry leader in researching, designing and manufacturing video monitoring systems installed in school buses. Over 100,000 Silent Witness systems have been installed in buses across North America keeping children in their seats and discipline problems off the bus.”).
New Jersey rail lines and New York City bus lines are subjecting their passengers to random bag searches. Also, “police in Washington, D.C., are considering conducting random searches on the capital’s subways.”

Because homeschooled students do not commute to and from school, law enforcement officers are afforded few chances to interact with and possibly search homeschooled students, their cars, and their belongings.

ii. Electronic Surveillance and Faculty Member Observations

Throughout the school year, schools record student behaviors in a multitude of ways. Under safety rationales, some government officials have posted video surveillance equipment in schools. Arizona state officials and a local school board have experimented with facial recognition video systems. Virginia Sheriff’s Captain Fred Pfeiff summarizes: “[w]e are following national trends to use technology to make our schools safer and provide us with reasonable intelligence information in case a crisis situation occur[s].” Many schools speaker systems allow for two-way communications with classrooms; in other words, some school administrators may listen in on classroom conversations.

Most school systems require that teachers be officially observed; this entails administrators monitoring faculty members’ classroom performances and, hence, collateral observations of student behaviors. Sometimes, teachers incorporate video observation into their classrooms; although this is often for reasonable purposes such as self-improvement.

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195 Id.
196 See ACLU Protests Cameras in Colorado Schools, THE DAILY CAMERA (Boulder, Colo.), Jan. 25, 2001, available at http://www.aclu.org/Privacy/Privacy.cfm?ID=6962&c=130 ($840,000 for new security cameras in schools); Graeme Zielinski & Christine B. Whelan, Fauquier to Use Cameras to Keep Eye on Students, WASH. POST, Aug. 6, 2000, at V1 (installed $60,000 worth of cameras “even though there has been no serious violence at [the schools] in recent years”).
198 Zielinski & Whelan, supra note 196 (school system also installed new telephone system that tracks callers).
199 Telephone Interview with JoAnn Testa, supra note 181.
200 Telephone Interview with Diana Panigrosso, supra note 109.
analysis, as requested for viewing by another potential employer, or as part of a performance-oriented lesson plan.\textsuperscript{201}

iii. Libraries and Computers

Students who write, research, and communicate on public computers retain less privacy than those who research at home. School facilities are public facilities; students’ expectations of privacy on public machines may be reasonably lower than on home equipment. In fact, many schools utilize internet content filters to block objectionable material, but they can also track users’ Internet surfing habits.\textsuperscript{202} A 1988 Washington Law Review article foresaw that “[n]ot only does computer-assisted testing and instruction . . . threaten to invade privacy insidiously, its use with young schoolchildren poses the additional threat of arresting development of their privacy expectations.”\textsuperscript{203} Since their expectation of privacy is greater, students using home computers may have fewer worries about government monitoring, password retrieval or program/website blocking.\textsuperscript{204} For the most part, families remain in control of their electronic domains and access.

Similarly, students who utilize public school libraries may be subjected to lower expectations of privacy.\textsuperscript{205} For example, in 2004, the FBI requested the names and addresses of everyone who had checked out the book, \textit{Bin Laden: The Man Who Declared War On America}, from a Washington state public library.\textsuperscript{206} The library, however, did not submit to the request, and the FBI eventually withdrew its subpoena (but kept the

\textsuperscript{201} Telephone Interview with Diana Panigrosso, \textit{supra} note 109. Various legal and non-legal non-school sponsored video-taping instances occur on school grounds; see, e.g., Dolores Orman, \textit{Former Student Sues over Videos}, ROCHESTER DEMOCRAT AND CHRONICLE, Nov. 7, 2004, at 1B (custodian allegedly videotaped students undressing and using bathroom facilities).

\textsuperscript{202} HSLDA, \textit{Privacy Report}, \textit{supra} note 75. As with student records, Web pages designed or amended by students may still be used against students in school-related (or other) criminal matters. \textit{See also} Banisar, \textit{supra} note 21 (In 1992, the Higher Education Act created an exception for records collected for “law enforcement purposes.”). A famous example is the Web page maintained by the Columbine shooters. \textit{See, e.g.}, John Temple, \textit{It’s Impossible to Ignore Pain of Columbine}, ROCKY MOUNTAIN NEWS, Feb. 28, 2004, at 2A (discussing heightened security and seriousness of internet threats after Columbine shootings).


\textsuperscript{204} But see Jennifer C. Wasson, \textit{FERPA in the Age of Computer Logging: School Discretion at the Cost of Student Privacy?}, 81 N.C. L. REV. 1348, 1349 (2003) (explaining that college students are unaware how much information universities collect based on their computer usage).


\textsuperscript{206} Id.
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[The PATRIOT Act does allow government access to library circulation records listing books checked out by patrons, or records of internet use. The library again may not disclose the existence of a warrant or the fact that records were produced, not even to the patron. The Act overrides any state library privacy laws.

Therefore, if federal agents had demanded the book records under the USA PATRIOT Act, the library would have most likely had to surrender them without question or legal recourse. The amount of these requests is increasing. However, librarians are forbidden to talk about requests from the state regarding PATRIOT Act-based information gathering. "In a surreal twist, librarians are suddenly the ones being shushed."

This thesis specifically examines government interference with privacy, as activities by private citizens do not invoke the Fourth Amendment. However, the general public also has enhanced access to conversations, research and personal actions made outside of one's home. "[I]t is now possible to eavesdrop on a typist's keystrokes and, by exploiting minute variations in the

207 Id.
208 Ryan, supra note 43; USA PATRIOT ACT §§ 215, 507 (§ 215 allows the Director of the Federal Bureau of Investigation to "make an application for an order requiring the production of any tangible thing (including books, records, papers, documents, and other items) for an investigation . . ."). Section 507 allows for the collection of education records possessed by educational institutions and agencies; U.S. CONST. art. VI, cl. 2 (Under this "Supremacy Clause," absent any delegated, implied or inherent powers, federal law may pre-empt state law. Also, when Congressional acts conflict, it is traditionally implied that the more recent law is to be followed, unless specifically overruled by other provisions in the Constitution as interpreted by the Supreme Court.).
210 Christine V. Baird, Even the Library is Now Open to Expanded Powers of Spies, STAR-LEDGER, Sept. 11, 2005, at §1, pg. 1 ("Since October, 2001, 63 public libraries and 74 academic libraries surveyed received legally executed requests."). Id. at §1, pg. 16.
211 Id.
212 Id. But cf. id. (Some provisions of the PATRIOT Act may serve to help libraries—and perhaps the country—remain safe: "[a]nother little-noted provision of the Patriot Act, Section 217—known as the computer trespasser provision—could assist librarians who believe someone is using a computer in an unauthorized way, such as showing false identification when signing up for access.").
213 STEPHEN A. SALTBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 35 (7th ed. 2004) ("The Fourth [Amendment] is interpreted as providing protection only against the government and those acting in conjunction with it."). Although beyond the scope of this paper, civil tort and property law afford some protections against non-governmental privacy invasion.
sounds made by different keys, distinguish and decipher what is being typed.”

As technology advances – and camera/video phones, digital binoculars, and other such devices become more commonplace – so does the capability for unwanted intrusion.

In summary, students’ personal-computer and home-library research – unless compromised via utilization of public resources – holds greater privacy protection than public research and communication venues.

III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING

The Supreme Court has long recognized that students need not solely attend public schools, but may attend private or parochial schools. Two cases opened the gates for students to attend non-public schools. In 1925’s *Pierce v. Society of Sisters*, the Supreme Court held that children do not have to attend public schools in order to fulfill state educational requirements. Then, in 1972’s *Wisconsin v. Yoder*, the Supreme Court held that Amish children did not have to attend public school after the eighth grade. The Supreme Court has yet to rule on the legitimacy of homeschooling programs; however, the *Pierce* Court did recognize “the liberty of parents and guardians to direct the upbringing and education of children under their control.”

In 2000, the Supreme Court re-emphasized “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” However, the Supreme Court has also expressed “that the privacy right [does] not restrict the government ‘from regulating the implementation of parental decisions concerning a child’s education.’” Thus, “parents ‘have

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216 *Pierce*, 268 U.S. at 534; *Yoder*, 406 U.S. at 234.
217 *Pierce*, 268 U.S. at 533-34.
218 *Yoder*, 406 U.S. at 234.
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no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”222 “[T]he parents’ rights must give way to reasonable state regulation.”223

In 1982, only Nevada and Utah “had statutes that specifically provided for home schooling.”224 Yet, by 1993, thirty-two states provided statutes for homeschooling.225 Currently every state and province allows some form of homeschooling.226 However, requirements vary widely. Some states have no explicit requirements. Some require that parents notify public school officials that they will be homeschooling. In some states, parents must submit curriculum plans; in others, periodic reports. Some states require testing. Some states require several of these.227

Basically, homeschooling laws can be separated into three categories: private school laws, equivalency laws, and home education laws.228 Private school laws governing homeschooling are the least intrusive.229 States with specific home education laws tend to be the most regulated.230

“Equivalency laws . . . exempt children from compulsory attendance laws if they are receiving ‘equivalent instruction’ elsewhere.”231 Where and how students spend their educational time is not a private matter for public school attendees.232 Most states’ educational compulsory attendance statutes enable governments to locate children during the daytime hours.

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222 Id. (quoting Runyon, 427 U.S. at 178).
223 Id.
224 ALEXANDER & ALEXANDER, supra note 73, at 256.
225 ALEXANDER & ALEXANDER, supra note 73, at 256.
226 LEPPERT & LEPPERT, supra note 14, at 37.
227 DOBSON, supra note 112, at 8.
229 DOBSON, supra note 112, at 329-42 (Alabama, Alaska, California, Iowa, Illinois, Kentucky, Michigan, Nebraska, Oklahoma and Texas all have such laws. This article provides state-by-state tabulation of home school compulsory education law citations).
232 DOBSON, supra note 112, at 7 (“Intrusive regulations cannot be imposed upon private schools.”).
approximately 180 days a year.\textsuperscript{233}

Laws require compulsory school attendance but not compulsory education. Compulsory school attendance laws are enforceable; it is not difficult to check attendance for young people enrolled in public and private schools, including homeschools. However, laws that required compulsory education would give the state control over education.\textsuperscript{234}

Compulsory attendance is not the same as compulsory education,\textsuperscript{235} yet “[e]very state recognizes homeschooling as a legal way to meet state compulsory attendance requirements.”\textsuperscript{236}

Various state cases have challenged how homeschooling should be defined and what, if any, regulations should apply.\textsuperscript{237} Homeschooling litigation typically involves three issues: “(1) statutory interpretation of exemptions,\textsuperscript{238} (2) complaints regarding state requirements for home instructors’ qualifications,\textsuperscript{239} and (3) state evaluations of the home instruction programs.”\textsuperscript{240} In \textit{Yoder}, the Supreme Court stressed, “[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic

\textsuperscript{233} Typically, public schools have a 180-day school year. See, e.g., \textsc{Mass. Gen. Laws Ann.}, ch. 76, § 1 (West 1996) (school will be open for whatever number of days the school board designates).

\textsuperscript{234} \textsc{Dobson}, supra note 112, at 20.

\textsuperscript{235} \textsc{See McMullen}, supra note 228, at 87.

\textsuperscript{236} \textsc{Dobson}, supra note 112, at 12; \textsc{see, e.g.}, \textsc{Care & Protection of Charles}, 504 N.E.2d 592, 597 (Mass. 1987) (“[T]he Legislature intended that the approval of a home school proposal fall within the . . . standard for the approval of a private school.”).

\textsuperscript{237} \textsc{E.g.}, \textsc{Clark v. Reiss}, 831 S.W.2d 622 (Ark. Ct. App. 1992); \textsc{State v. Buckner}, 472 So.2d 1228 (Fla. Dist. Ct. App. 1985).

\textsuperscript{238} \textsc{E.g.}, \textsc{Clark}, 831 S.W.2d at 623 (“[E]rrred in construing the home schooling statute, Ark.Code Ann. § 6-15-503 (Supp.1991)”; \textsc{Buckner}, 472 So.2d at 1241 (“[A]lthough the legislature authorized one type of at-home schooling, the legislature did not necessarily prohibit other types . . . .”).

\textsuperscript{239} \textsc{E.g.}, \textsc{State v. Melin}, 428 N.W.2d 227, 232 (N.D. 1988) (finding a compelling state interest in securing certified teachers to teach homeschoolers); \textsc{In re Marriage of Riess}, 632 N.E.2d 635, 637 (Ill. App. Ct. 1994) (respondent argued that child’s “mother [was] not properly trained to provide home schooling for the child, and that such education was not in the best interest of the child”).

\textsuperscript{240} \textsc{See} Donald D. Dorman, Note, \textit{Michigan’s Teacher Certification Requirement as Applied to Religiously Motivated Home Schools}, 23 \textsc{U. Mich. J.L. Reform} 733, 753 (1990) (questions of state involvement arise “[i]f the home school ever falls below required standards”); \textsc{Lisa M. Lukasik, Comment, The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools}, 74 \textsc{N.C. L. Rev.} 1913, 1922 (1996) (“[T]he Due Process Clause prohibits laws or regulations that involve impermissible administrative discretion and may provide a due process claim to home educators if they must seek permission from a public school official before they begin home schooling.”) (citing \textsc{John W. Whitehead & Wendell R. Bird, Home Education and Constitutional Liberties} 57-58 (1986)).

\textsuperscript{241} \textsc{Alexander & Alexander}, supra note 73, at 256.
education.”

Denial of home instruction and compulsion to attend school do not violate the religious freedom of the parent. A U.S. district court has held that parents have no fundamental right to maintain home instruction for their children and that parental rights of free exercise of religion are not abridged by the state’s denial of home instruction.

The state may compel all children to attend a school, public or private, and home instruction will not suffice as an exemption from compulsory attendance requirements unless the state statute so specifies.

States which once denied homeschooling did so based on the difficulty of supervising homeschooled students and on rational basis review, stressing states’ interests in fostering students’ socialization skills. This, of course, was before the Supreme Court stressed the importance of privacy. Although rational basis review remains the current standard, the HSLDA argues, “[a] person’s right to privacy should always receive a higher protection than a government’s right to information, unless the government has a compelling interest in collecting that information.”

Ironically, considering the oft-stressed importance of socialization, the Tenth Circuit Court of Appeals upheld the right of school boards to deny part-time attendance of otherwise homeschooled students, although this is not necessarily the trend. Over the last decade, California has been experimenting with public school–home school partnerships, which often incorporate computer-age communication capabilities between homeschooled students and school facilities, teaching personnel, and other students. Arguably, such programs better facilitate parental

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243 ALEXANDER & ALEXANDER, supra note 73, at 256.
244 See Knox v. O’Brien, 72 A.2d 389, 392 (Cape May County Ct. 1950) (“Cloister and shelter have its [sic] place, but not in the every day give and take of life.”); State v. Will, 160 P. 1025, 1026-27 (Kan. 1916) (Kansas statutes neither denied nor allowed homeschooling. However, the court ruled that the exclusion of home instruction from statutes, that established private, denominational and parochial school instruction as valid, indicated legislative intent to disallow homeschooling.).
245 See supra Part II. A. 2. Information That School or Government Officials May By Law Require From Some Students.
246 HSLDA, Privacy Report, supra note 75 (emphasis omitted).
248 Lukasik, supra note 240, at 1973-74 (delineating several California part-time attendance programs).
249 Lukasik, supra note 240, at 1973-76.
monitoring of shared information. Some legislatures also allow homeschoolers to participate in interscholastic sports.250

In states that allow homeschooling, the burden usually falls on the state to show that the parent is not providing adequate instruction.251 In this way — given the privacy rights afforded the home and the overall success rates of homeschooled children252 governments may support familial rights of privacy. Nonetheless, parents who homeschooled their children in Indiana were denied damages when they alleged that a school superintendent sought information from parents while attempting to verify compliance with home-instruction law.253

Some contemporary grass-roots movements question whether public schools truly act in citizens’ best interests. Many homeschooling proponents and civil libertarians stress that public schools are more likely to promote rules and teach subjects that preserve government, not citizen interests.254 In the 1970s, educator John Holt created the term “unschooling” to describe the burgeoning “homeschooling” movement whereby students study topics in which the students show individual interests, as opposed to following cookie-cutter curriculums mandated by school systems.255 One of homeschooling’s greatest strengths is its flexible instruction because the curriculum, lesson planning and teaching approaches need not be the same as in public schools.256 Although a few states “require that homeschoolers submit their curriculum plans to officials,”257 for the most part,
homeschooling families retain private choices when it comes to what and how subjects are being taught.

IV. CONCLUSIONS AND CHALLENGES

Homeschooling and privacy laws are obviously in a state of flux.258 If the rise in homeschooling continues, there may come a time when homeschooling will no longer carry any privacy advantages in any state. Although all states guarantee some form of education,259 government officials could easily argue that they cannot guarantee educational standards without greater regulation of homeschools. Most state departments of education require compulsory attendance in school.260 If school officials do not know why a student is missing from school, they are usually required to investigate; the burden often lies with the state to insure that children are receiving appropriate or equivalent instruction elsewhere.261 For instance, the federal Individuals with Disabilities Educational Act (IDEA) requires states to ensure that disabled children receive appropriate educational services.262 In other words, child welfare, curriculum and truancy could all become excuses to supervise homeschooling families.

Currently, homeschooled children have overall impressive success rates.263 Most homeschooled students have a good chance at getting into U.S. colleges or universities, especially since homeschooling allows students to experience a wide range of unconventional activities that are sometimes not available to students who get their educations in traditional schools.264 At some point, however, homeschoolers’ performance rates could become inferior. When or if such a shift occurs, homeschooling families could be privacy disadvantaged even in their homes, the

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258 See supra Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY and Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING.
259 See ALEXANDER & ALEXANDER, supra note 73.
260 DOBSON, supra note 112, at 20.
261 Miller, supra note 16, at 186-87 (providing comparison samples of contrary state statutes and court interpretations concerning homeschooling).
263 See COHEN, supra note 252, at 10 (“[H]omeschooled students have won admission to a wide range of colleges and universities. And the list of selective schools that have accepted homeschoolers continues to grow.”).
264 COHEN, supra note 252, at 13 (Students who are homeschooled often have very impressive accomplishments that are often eye-catching to college admissions departments).
last great refuge of privacy the court currently affords.

The possibility exists, arguably, for the federal government to pre-empt the field of education – or more at issue, homeschooling – and regulate it. Schools that do not comply could lose their federal aid. Even though the U.S. Constitution does not mention education, the federal government has increasingly used its grants-in-aid spending power to exert pressure on the states to meet federal standards and requirements or risk losing federal support. On the other hand, if a federal government’s grants-in-aid program had the impact of violating the First Amendment, the Supreme Court could hold such regulations unconstitutional.

School systems administrators have long argued that their resources are harshly limited and that their schools are overcrowded. Homeschooling reduces the expense and size of public school systems, yet does not detract from the tax-based support. Currently, when parents homeschool their children, governments receive tax funding for students they do not actually have to teach. Perhaps governments have not been inclined to prohibit homeschooling because of this. This situation, of course, could change if any significant school voucher program goes into effect.

One may wonder: If the government is obligated by law or

265 But see Sandra L. Macklin, Note, Students’ Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies, 74 IND. L.J. 1321, 1337 (1999) (however, as of 1999, the department that enforces FERPA “has never attempted to withdraw federal funds based on FERPA violations”).

266 Kathleem M. Sullivan & Gerald Gunther, CONSTITUTIONAL LAW 219 (14th ed. 2001) (“[The size and range of the [grant-in-aid] programs have increased considerably over the years, and detailed federal conditions have proliferated.”); see, e.g., South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Congress may attach conditions on the receipt of federal funds).

267 Flast v. Cohen, 392 U.S. 83, 105-06 (1968) (holding that taxpayers have standing to challenge the use of federal money on textbooks and other materials for a parochial school).

268 See, e.g., Tom Ford, Burnsville Schools Scrimping, Saving to Keep Spending in Line, STAR TRIBUNE (Minneapolis, Minn.), Nov. 24, 2004, at S4 (“Several of the [New Prague School] district’s high schools are overcrowded and lack enough classrooms . . . .”); Etan Horowitz, Leaders Seek to Guide Tavares Growth: A City Council Workshop Will Focus on Managing Exploding Development and Its Effects, ORLANDO SENTINEL (Fla.), Nov. 28, 2004, at K1 (“Tavares’ middle school [near Orlando] was overcrowded by 247 students, and the high school was overcrowded by 161 students.”).

269 School districts are primarily funded via property and other taxes. E.g., Fla. Dep’t of Educ. v. Glasser, 622 So. 2d 944, 948-49 (Fla. 1993) (specific enabling legislation may authorize school districts to levy taxes).

270 Government moneys may be disbursed to schools that students choose to attend. BLACK’S LAW DICTIONARY 755 (2d pocket ed. 2001) (“[A voucher is a] written or printed authorization to disburse money.”).
The Privacy Advantages of Homeschooling

statute not to distribute personal information.\textsuperscript{271} then why should families be concerned about giving the government such information? Basically, the less information government officials collect, the less opportunity they have to legally or illegally disseminate it. For instance, it is not greatly publicized that the No Child Left Behind Act requires secondary schools to provide military recruiters access to school facilities and contact information for every student upon request.\textsuperscript{272} Also, private companies are attempting to expand access to government databases.\textsuperscript{273} For instance, in 2000, an Ohio school board allegedly sold students’ personal data to a local bank, which used the information to solicit new customers.\textsuperscript{274} Many examples of illegal, questionable, or apathetic collection, treatment and dissemination of private information exist.

Public school students have few true remedies after their rights have been violated. FERPA lays out certain rights that parents and students hold;\textsuperscript{275} however, government officials’ mistakes and apathy towards citizens’ personal information is apparent.\textsuperscript{276} A blatant example of how some school officials indifferently handle students’ private information took place in

\textsuperscript{271} E.g., FERPA, 20 U.S.C. § 1232g (2000).
\textsuperscript{274} \textit{See} ACLU, Ohio School Board, supra note 273; accord ACLU, Univ. of Nevada, supra note 273.
\textsuperscript{275} \textit{See} supra Part II. A. 1. Congressional Acts.
\textsuperscript{276} Lucadamo et al., supra note 46, at 2; accord Associated Press, Children’s Private Records Posted Online in Florida, Sept. 30, 2004, available at http://www.informationweek.com/story/showArticle.jhtml?articleID=48800362 (“Florida’s child welfare agency . . . acknowledged that confidential records for nearly 4,000 abused and neglected children were available on the Internet . . . . [The records] included names of children, as well as details such as birth dates, Social Security numbers, photographs, case histories and directions to foster homes.”); see also Alison Gendar et al., Schools Trashed Over Files: Educrats Offer Apology But Furious Parents Want Heads to Roll, N.Y. DAILY NEWS, Nov. 15, 2004, at 3; Kathleen Lucadamo, Klein Apologizes, Launches Probe, N.Y. DAILY NEWS, Nov. 16, 2004, at 7.
November 2004, when New York City educators dumped approximately 300 pounds of confidential records in a sidewalk trash pile.\textsuperscript{277} Students’ medical and psychological reports were in plain sight and passersby rummaged through them.\textsuperscript{278}

Detailed in the documents were names, dates of birth, home addresses, telephone numbers and even Social Security numbers for many of the 1,125 students from across the city who were home-schooled from 1987 to 1998. The boxes also contained confidential information on thousands of other children, including 8,300 grade and attendance sheets, 6,200 computer printouts and an audit file.\textsuperscript{279} New York City’s childrens agencies had been caught five prior times improperly disposing of private records.\textsuperscript{280}

Besides simply being more proactive when discarding old files, several straightforward and inexpensive steps could be taken to increase student privacy in public schools. Government and school officials could more actively proclaim and proliferate students’ rights by utilizing such tools as the No Child Left Behind Act’s military recruitment solicitation opt-out forms, FERPA’s student directory opt-out form, or FERPA’s school records access information and correction forms.\textsuperscript{281} Currently, the U.S. Department of Education only distributes pamphlets explaining privacy and educational rights upon specific request.\textsuperscript{282} Both parents and educators could do more to ensure that students understand their privacy rights.\textsuperscript{283} Similarly, school systems and governments should limit information collection and dissemination to only what is truly necessary.\textsuperscript{284} One particular productive and significant first step would be for all school systems to eliminate the use of Social Security

\textsuperscript{277} Lucadamo et al., \textit{supra} note 46, at 2; accord Associated Press, \textit{supra} note 276; see also Gendar et al., \textit{supra} note 276, at 3; Lucadamo, \textit{Klein Apologizes, Launches Probe, supra} note 276, at 7.

\textsuperscript{278} Lucadamo et al., \textit{supra} note 46, at 2.

\textsuperscript{279} Lucadamo et al., \textit{supra} note 46, at 3.

\textsuperscript{280} Bob Port, \textit{Foulup is Far From the First Time}, N.Y. DAILY NEWS, Nov. 14, 2004, at 3.


\textsuperscript{282} Press Release, ACLU, NYCLU Hails Victory, \textit{supra} note 153.

\textsuperscript{283} \textit{Press Release, ACLU, NYCLU Hails Victory, supra} note 153.

\textsuperscript{284} \textit{E.g.}, Krebs v. Rutgers, 797 F. Supp. 1246, 1259-60 (D.N.J. 1992) (Court issued preliminary injunction against state university enjoining it from disclosing students’ Social Security numbers to campus post office personnel; the university characterized such disclosure as a “legitimate educational interest.”). \textit{Id.} at 1260.
numbers as student IDs, as some Florida educational systems
have done.285

Supreme Court Justice Louis Brandeis emphasized that “the
right to be let alone [is] the most comprehensive of rights and the
right most valued by civilized men.”286 This paper focuses on this
one right as it concerns modern educational standards and is not
presented to skew all the good that public school programs
accomplish. Of course, government schooling presents many
advantages, not the least of which may include: social,
psychological and emotional benefits; better parental time-
management; best use of family monies;287 choice educational
supplies, equipment, facilities and programs; and qualified staffs
and certified teachers.

Nonetheless, because the law does not currently or
consistently mandate collection of personal information about
homeschooled children, privacy is an often overlooked advantage
of homeschooling in most states. Concerned parents, particularly
those willing and able to choose their state of residence, should
“shop” to find which states offer suitable educational and privacy
advantages in line with their needs and desires.288 Ultimately,
parents who believe in the freedom to make decisions about their
children’s private lives without government interference must
decide how much personal and familial information is worth
divulging in exchange for their children’s education.

285 Komuves, supra note 100, at 538 n.33; see also Fla. St. Univ. v. Hatton, 672 So. 2d
576, 577 (Fla. Dist. Ct. App. 1996) (court ordered state university to produce only
summaries of records without identifying information).
who choose to homeschool their physically disabled children may not receive full IDEA
benefits and other funding); Individuals with Disabilities Education Act, 20 U.S.C.A. §
288 See DOBSON, supra note 112, at 329-42 (provides basic state-by-state tabulation of
state regulatory approaches); Miller, supra note 16, at 176-84 (provides comparison
samples of contrary state statutes and court interpretations concerning homeschooling).