

Guest View: In defense of student privacy

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When tragedy strikes, rational judgment becomes vulnerable to passions of anger, sadness and fear. Any grade-schooler knows that an accused in the United States is innocent until proven guilty. But read the news after revelation of a horrific crime, and the ordering of American values seems fuzzy. Criminal defense lawyers know this divergence well. They, and we the people, ultimately rely on the rule of law to bind us to our better selves.

Privacy is another American value we rush to sacrifice on the altar of accountability. In Ohio, reporters swarm the yards of liberated kidnapping victims. And in Massachusetts, news trucks besiege the campus at UMass Dartmouth, where I work, and where marathon bombing suspect Dzhokhar Tsarnaev was a student. Media want to know everything about Tsarnaev and his college friends. The university, bound by federal privacy law, has refused access to student academic and financial aid records.

The demand for information makes sense. Public appetite for details about these cases is insatiable, and public interest is legitimate. Through transparency, we strive for justice. In the history of our law, the public criminal process coincided with British emergence from the Middle Ages. A key consequence attained through public participation is community catharsis. As the public's eyes and ears, news media play an essential part in the justice system.

The freedom of information is not absolute, however, and it runs up against FERPA, the Family Educational Rights and Privacy Act of 1974. This conflict puts people such as me in a tough spot. I've long been an access advocate. I am on record stating, and I maintain, that public universities overreach with FERPA. Sometimes they mean well, to protect students; sometimes they mean to conceal misfeasance.

Like much of American privacy law, FERPA is about balance. Even the Student Press Law Center, whose advocates routinely battle FERPA privacy claims, acknowledges that student transcripts and test scores are appropriately shielded from disclosure. FERPA regulations, promulgated by the U.S. Department of Education, plainly protect individuals' academic and financial aid records. There's plenty left to argue about. Contention is warranted over privacy in anonymized data compilations, in campus disciplinary hearings, and in athletics.

For decades after its adoption, FERPA was known as "the Buckley amendment" for its sponsorship by New York Sen. James Buckley. Buckley had a distinguished career in Congress, in the Reagan administration, and on the bench for the D.C. Circuit. FERPA was co-sponsored by Rhode Island Sen. Claiborne Pell, whose Pell Grant program made college accessible to millions annually.

Buckley and Pell were a bipartisan team. And no wonder; access and privacy are not partisan causes. Buckley favors limited government, a meaningful 10th Amendment, and private-sector problem-solving over public regulation. Pell was an internationalist on the side of labor, the arts and the public sector. Both were willing to impose statutory student privacy on schools and colleges, private and public, through the hook of federal aid.

FERPA is a straightforward privacy measure. From admission to graduation, schools and colleges collect volumes of information about students concerning, for example, their financial resources, medical problems and grades. As a society, we keep this information private through the likes of banking and health care regulations. We worry about tax fraud, but still we don't publicize individuals' W-2s. We worry about health care fraud, but still we don't publicize individuals' blood test results.

FERPA moreover is about access as much as privacy. Buckley and Pell recognized the dangerous potential of powerful educational institutions — some like small towns, with their own police forces — to leverage information to their advantage and to run roughshod over students and parents. So FERPA, like the federal Privacy Act, guarantees college students access to their own records and the means to correct mistakes. FERPA does not afford a right to sue, but its privacy and access rules are backed up by the threat of losing federal money.

FERPA has been fine-tuned many times in its near 40-year history. It should be still. Statutory law should be responsive to changing norms of transparency, privacy and accountability. But measured reform should be the result of thoughtful and systematic review, not a feverish response to a singular heartbreak.