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Introduction

Several years ago the front page of a university town's newspaper carried a story entitled "Adolescent Sex Survey Raises Questions".[1] The research project in question, which was funded by the Department of Health, Education and Welfare and was to be directed by a university faculty member, is worth describing as an example of the kinds of requests researchers sometimes make of public schools and the issues raised by their requests.

The research, as originally designed and as approved by the university's Institutional Review Board (IRB), sought information from junior and senior high school students about their sexual behavior and attitudes, their experience with menstruation and pregnancy, and asked for assessment of their own physical maturity including the maturity of sex organs. One hundred of the students who answered the written questions were to be asked to consent to a physical examination at school at a later date to enable a physican to determine whether the students' assessment of their breast and male genital development matched reality. From the study the researcher apparently hoped to be able to identify the forces that "propel or deter adolescents into sexual activity." He encouraged parents to consent to their child's participation by stating that the results "could be used to prevent the unfavorable consequences which are associated with unwanted pregnancies."[2]

Once the study became public knowledge, objections were raised,

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[1] Chapel Hill Newspaper (Chapel Hill, North Carolina), May 1, 1978, p.1.

[2] *Id.*

although this was a "liberal" community. The high school PTSA president, a pediatrician, expressed a fear that the questionnaire first proposed, which asked students to estimate how the size of their breasts and penises compared with those of peers, might produce feelings of inferiority. A further concern, according to the newspaper, was whether parents' and students' consent for the physical exam would truly be informed consent. The form seeking participation in the initial or qustionnaire phase of the study did not explain the second, or physical examination phase. It merely noted, "We may request 10 minutes more time from your child for the study at a later date." The news story detailed a debate between the researcher and the university's IRB as to how fully he must explain his intentions to parents and students at the time of the second stage. The IRB originally requested a consent form for the physical examination that stated that a doctor would check the student's eyes, ears, nose, throat, thyroid, lymph nodes, heart and lungs, and make a "manual check of female breast for development" and "manual check of testes for development." The researcher asked the IRB to reconsider and approve instead a consent form describing the examination merely as one to "assess the aspects of physical development and make ratings for the purpose of the research project." He sought permission to delete the reference to breasts and testes for fear that "by deliberate singling these items out in the consent form, we are calling attention to the items out of context, and unduly inviting parental anxiety responses," a situation he considered "nearly certain to reduce parental acceptance rates without serving any worthy purpose." On reconsideration, the IRB did approve a less informative consent form than the original one naming body parts to be examined. Had the study continued in that community,[3] parents would have been asked to consent to a physical examination of their children "to assess the aspects of pubertal development and make ratings for the purpose of the research project."[4]

How unusual is this kind of research? How can law and educational policy best deal with the problems it created for school officials, parents, and students as well as the principal investigator and

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[3] The principal researcher has informed the author that the study has continued elsewhere, though not under a school district's auspices, and that in fact it is still funded. He also states that at the time of the Chapel Hill study he consulted with other pediatricians, none of whom expressed the misgivings of the PTSA president. Letter of the principal researcher to Anne M. Dellinger, University of North Carolina at Chapel Hill, December 30, 1982.

[4] Minutes of Institutional Review Board on Research Involving Human Subjects, School of Public Health, The University of North Carolina at Chapel Hill, Chapel Hill, N.C., April 18, 1978 (unpublished).

the university IRB? This article analyzes the interests of the parties involved—schools, researchers, parents and children—and reviews existing law before suggesting some ameliorative steps. First, however, a description of the extent of the problem will be helpful.

Extent of the Problem

Historically, American schools seem to have welcomed researchers. In 1959 an administrator of the Chicago school system, writing in the *American Psychologist,* strongly urged psychologists to conduct their studies of school-age children within the walls of public schools. Noting the "exciting possibilities" of such work and "boundless laboratory opportunities of the schools," she concluded that "the tremendous potential of the schools as a laboratory for research and training in almost all phases of psychological study must be more fully realized."[5] By the 1960s at least one major university's department of psychology had established an office to serve as a bridge between faculty researchers and the public schools, to facilitate the use of students as subjects. An article describing the liaison office noted that in general American public schools had been responsive to the needs of the considerable number of researchers with child-related interests.[6] Education journals published debates on whether the privacy of students was being sufficiently protected by school officials.[7] Psychologists on the staff of public schools were urged to take advantage of their unique opportunities to observe children for purposes of social science research.[8] Researchers even expressed in print their surprise that school officials and parents were so willing to cooperate.[9] Ninety-six Wisconsin school superintendents polled in 1969 agreed that their district was willing to grant access to researchers and indeed had an obligation to do so for competent meaningful research. Only two could recall ever denying a request from an outside investigator (and the requests were from toothpaste firms). Similarly, only three of the sixty-six persons reporting on their research at the national convention of the American Educational Researchers Association in that

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[5] Mullen, *The School As a Psychological Laboratory,* 14 AM. PSYCHOLOGIST 53 (1959).

[6] Castenada & Fahel, *The Relationships Between the Psychological Investigator and the Public Schools,* 16 AM. PSYCHOLOGIST 201 (1962).

[7] Longstreth, *Behavioral Research Using Students: A Privacy Issue for Schools,* 76 SCH. REV. 1 (1968); Sears, *In Defense of Privacy,* 76 SCH. REV. 23 (1968).

[8] Guttentag, *Research Is Possible: New Answers to Old Objections,* 6 J. SCH. PSYCHOLOGY 254 (1968).

[9] Kohn & Beker, *Special Methodological Considerations in Conducting Field Research in the School Setting,* 1 PSYCHOLOGY IN THE SCHOOLS 31, 36 (1964).

year had at any point in their careers been refused the privilege of conducting research in the schools.[10]

The frequency and the nature of the research that apparently became common in the 1960's provoked reaction, however, from individual communities and eventually from Congress. In what was the best-known and possibly the first such incident, the Houston school board in 1959 ordered the burning of answer sheets to six tests of "socio-psychometrics" given to 5000 ninth grade students in the system. Parents who influenced the board's decision in the matter objected to the inclusion of questions about students' perception of themselves and about their relationships with families, peers and teachers. (Interestingly, the items considered most offensive in Houston were taken from an earlier survey of 13,000 Texas school children that had elicited no recorded parental objection.)[11] Two years later, researchers studying all third graders in a rural area of New York state in order to identify stages in the development of aggressive children, saw their work become highly controversial in its fourth and final year. Although the study was concluded as planned, the final work took place amid vocal community opposition spurred by radio and newspaper reporting, and eventually involved a ruling by the state attorney general's office.[12]

By mid-decade Congress was interested. Benjamin S. Rosenthal of New York introduced a bill that would have prohibited use of federal funds to support research involving the administration of "personality inventory" tests, unless the tests were taken voluntarily and, in the case of a person under 18, with the prior informed consent of a parent or guardian (H.R. 14288, introduced April 5, 1966, 89th Congress, 2nd session). Representative Rosenthal did not refer to the earlier New York state controversy but to a recent incident involving his own New York City constituents. The City Board of Education had permitted researchers operating under a grant from the National Institutes of Mental Health to administer the Minneapolis Multiphasic Personality Inventory to 350 ninth grade students without seeking parental consent. The Congressman entered into the record more than 30 questions from the test that he found unacceptably

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[10] Clasen et al., *Access to Do Research in Public Schools,* 38 J. EXPERIMENTAL EDUC. 16 (1969).

[11] Nettler, *Test Burning in Texas,* 14 AM. PSYCHOLOGIST 682 (1959). Nettler describes the instruments as a Vocabulary-Information Profile Test, an Interest Bank, a High School Personality Test, a Student Information Bank, a "sociometric rating device," and the Youth Attitude Scales.

[12] Eron & Walder, *Test Burning: II,* 16 AM. PSYCHOLOGIST 237 (1962).

intrusive.[13]

He also referred to a recently completed congressional investigation of the role of psychological testing in federal hiring and in research sponsored by the federal government, particularly research on school children. That inquiry, conducted by a specially constituted Subcommittee on the Invasion of Privacy of the House Committee on Government Operations, heard testimony from Office of Education officials and officers of the American Psychological Association concerning current practice in public schools. Despite testimony to the effect that federal regulation of research was not feasible and that school systems,[14] children, and parents[15] had an obligation to cooperate in research, the subcommittee's report shows it was only partially convinced. Members questioned entire studies, such as one of the masculinity of kindergarten boys,[16] and numerous portions of questionnaires used by federally funded researchers. Besides sex and religion inquiries of the sort contained in the Minneapolis Multiphasic test,[17] Congressmen took exception to probings of self-image, family relationships, and facts about the student's parents (for example, parents' educational level, religion, race, "social standing," magazines subscribed to, and organizations belonged to).[18] At the conclusion of hearings, the subcommittee recommended that parental consent be obtained for research involving students beneath college level and secured the agreement of the Office of Education to that proposition. Specifically, the subcommittee's recommendation was that parents be told the nature of any questionnaire used and have an opportunity to inspect it.[19] The Office of Education promised, in addition, to submit projects to a final review by its own staff before funding. (Heretofore, the Office had delegated project approval to an outside panel of experts.)[20] The Rosenthal bill failed, but it and the subcommittee report that preceded it served notice of observation and some degree of

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[13] CONGRESSIONAL RECORD-HOUSE, April 5, 1966, p. 7733. The objectionable questions asked for information about both normal and abnormal attitudes and practices involving religion and sex; e.g., answer true or false: "I am a special agent of God," "I pray several times a week," "Christ performed miracles," "I am very strongly attracted by members of my own sex," "Sexual things disgust me," "I like movie love scenes."

[14] *Special Inquiry on Invasion of Privacy: Hearings of Subcomm. on Invasion of Privacy of House Governmental Operations Comm.*, 91st Cong., 1st sess., 330 (1969) (statement of Arthur Brayfield, Executive Officer of the American Psychological Association).

[15] *Id.* at 319 (statement of Dr. Conrad, Office of Education).

[16] *Id.* at 304.

[17] *Id.* at 322.

[18] *Id.* at 308-15.

[19] *Id.* at 302.

[20] *Id.* at 320.

concern on the part of Congress.

A second significant development of the late 1960's and 1970's was the publication of ethical standards for human subject research by professional organizations including researchers with child-centered interests. Following an earlier statement on research with children, the American Psychological Association (APA) in 1972 issued a general formulation of ethics for researchers who use human subjects.[21] In the same year, the Society for Research in Child Development (SRCD) issued guidelines for research involving children specifically.[22] These formulations are discussed below.[22.1]

It is clear that U.S. school systems have frequently granted outside researchers access to students in the past, and apparently it is still common practice to do so. Although data on the exact amount is unavailable, some portion of the research of APA and SRCD members is performed in a school setting. Several members of the APA, in fact, responding to the Association's invitation to describe ethically troubling experiments, reported anonymously on their participation in school-based experiments. In one the researcher wanted permission from parents to give children mathematics and reasoning tests so as to measure their anxiety response to the tasks. Fearing to alarm parents if his purpose were stated too directly, the researcher referred in the consent form to a "so-called" school anxiety questionnaire. Afterwards he confessed to the Association that "the quotation marks might have hidden our intention to use this test to obtain scores of both test anxiety and defensiveness."[23] In another, kindergarten children were asked to perform a simple motor task and then told (falsely) that they were performing badly. The researcher described his project thus:

> The children generally reached maximum performance in about three minutes and were told that they were not doing well. Since the time for each pair [of children] was six minutes, a great number of kindergarten children who were trying their very best were scolded for three minutes. Their anxiety was quite pronounced.
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> We ran the subjects as described, and lavishly praised the children after the ordeal, explaining that we were fooling. Most seemed to understand and were relieved, but while the condition was being run I had my doubts about

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[21] AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES IN THE CONDUCT OF RESEARCH WITH HUMAN PARTICIPANTS, ADOPTED DECEMBER 1972 (hereinafter, ETHICAL PRINCIPLES).

[22] SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, ETHICAL STANDARDS FOR RESEARCH WITH CHILDREN, September 1972 (hereinafter, ETHICAL STANDARDS).

[22.1] *See* notes 90-106 *infra* and accompanying text.

[23] ETHICAL PRINCIPLES, *supra* note 21, at 38.

whether it was ethical to subject children to psychological torment.[24]

In addition to research conducted by APA and presumably SRCD members, there is that of the American Educational Research Association (AERA). Its membership consists at present of 40,000 researchers, some portion of whom undoubtedly work from time to time in public schools. Students and faculty in schools of education constitute another source of requests for access to the public school population. Performance of an educational research project or experiment is frequently required for a graduate degree in the field. Recently (February 5, 1982) the superintendents and attorneys attending a North Carolina school law conference were asked whether their systems received requests for school research. Twenty-four of approximately 80 districts' representatives reported receiving at least one request a year with the great majority of the total received in districts located near a school of education. For instance, the district surrounding East Carolina University reported 100-300 requests annually and the superintendent of the district near Appalachian State University noted that "hardly a week goes by without a request."[25] Another superintendent of a large city school district containing a university remarked that "schools of education are hospitals without patients."

Often state education agencies perform a research function, and occasionally it is an intrusive one. Some years ago, for example, the North Carolina Department of Public Instruction undertook an assessment of the health, including mental health, of the state's sixth- and ninth-graders. Students were asked whether they were ashamed of themselves and their families, found it difficult to make friends, felt that their parents loved them, would prefer to be another sex—and similar gauges of self-image. The study provoked considerable adverse comment.[26]

Another indication that a substantial amount of research is performed in public schools—though still the amount cannot be specified—comes from a report of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.[27]

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[24] *Id.* at 81.

[25] The number of requests does not, of course, always indicate the number of experiments performed. One North Carolina district (Durham County) lcoated near three university schools of education declines almost all requests, granting only those that hold out the possibility of an immediate benefit to its own students.

[26] "Assessment Includes Sensitive Questions," *Raleigh News and Observer,* May 14, 1976, at 1; "Pupil Tests Show High Cost, Low Yield" (editorial) *Raleigh News and Observer,* May 16, 1976; "Phillips Says Privacy of Pupils Is Guarded," *Raleigh News and Observer,* May 31, 1976, at 21.

[27] DHEW, RESEARCH INVOLVING CHILDREN (Report and recommendations of the National

The report, which details the child research performed by federal agencies, lists sample projects performed in schools during the preceding year. In the medical area the federal government supported clinical trials of techniques to reduce tooth decay,[28] studies of high blood pressure,[29] and of the pulmonary function of school children in various pollution areas.[30] On the behavioral side the report notes a study of the effects of a tutoring program on school attendance and performance of sickle cell patients[31] and another "to improve the interface of parents with schools and social institutions."[32] The bulk of federal research with children was sponsored by the then Education Division of the Department of Health, Education, and Welfare;[33] both the general description of the Division's research and the examples given indicate that the majority of its projects were conducted in schools.[34] The work of other federal agencies, such as the National Institute on Alcohol Abuse and Alcoholism and the National Institute on Drug Abuse, is likely to involve schools. The report describes most of the latter's research as development and evaluation of education programs for children concerning drug abuse.[35] Witnesses appearing at the Commission's public hearing also referred to school research[36] and a university researcher employed by the Commission stated for the record that experimentation in schools is common.[37]

Analysis of Interests

Why do researchers want access to children in schools and why do students, parents and schools consent or withhold consent? Several

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Commission for the Protection of Human Subjects of Biomedical and Behavioral Research), Publication No. (05) 770004 (1977).

[28] *Id.* at 28-29.

[29] *Id.* at 30.

[30] *Id.* at 32.

[31] *Id.* at 31.

[32] *Id.* at 35.

[33] During fiscal year 1975 the Education Division was responsible for 56 per cent of the federally supported research projects involving children (1,942 of 3,460 projects)—66 percent of the total funding. *Id.* at 39. It seems likely, however, that the great majority of those projects, which are intended to improve educational techniques, do not raise the privacy/harm issues addressed in this artcle.

[34] *Id.* at 36-37.

[35] *Id.* at 33-34.

[36] Summarized testimony of William Charlesworth and Julius Richmond (Society for Research in Child Development), *id.* at 51; Elizabeth J. Levinson (psychologist, Orono, Maine), *id.* at 58-59; Gladys Kazyak (National Coalition for Children), *id.* at 68.

[37] L. Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Biomedical and Behavioral Resarch,* in RESEARCH INVOLVING CHILDREN, *supra* note 27, Appendix 4-7, 4-16.

factors lead researchers to ask the school for permission to do their work there. For a variety of reasons, too, the school may consent or refuse. This section weighs the gains and losses of conducting research in schools for the investigator, school officials, students, and parents.

A researcher's decision to approach a school system for permission to use its students as subjects is dictated by practical considerations. Once the investigator knows that his project will require contact with schoolage children, there is rarely a channel for reaching them that is more, or even as, effective. One commentator ascribed these advantages to research in the school setting: (1) the research population will contain a cross-section of the community—economically, racially, ethnically, by sex, age, and most other factors; (2) the school can encourage students' cooperation in a number of ways; and (3) because the subjects are located within the school, they are easily organized and amenable to direction (That is, there are few problems of missing children or missed appointments[38]). Add to these that parents and students solicited for their consent will be disposed to give it to projects sponsored or approved by the school, and it is apparent why researchers ask. The benefits of school-centered projects for the researcher studying children usually outweigh the inconvenience of gaining the school's approval, conducting the research under its restrictions, and sharing results or conferring some other benefit on the school.

For schools the question of whether to grant or deny the researcher's request is more evenly balanced. Natural sympathies might incline a school official toward approval. As a college or university graduate himself, he is likely to identify with the university researcher's goals. Moreover, there is often a sense of the obligation owed by one educational institution to another.[39] Defending general research in the schools before the Congressional subcommittee in 1965, Dr. Conrad of the U.S. Office of Education asserted that "every educational institution is supposed to impart knowledge and it is also supposed to contribute to the advancement of knowledge. And if the school system does not contribute to the advancement of knowledge, it is falling short of one of its purposes."[40] Additional attractions for school administrators may be the prestige attached to higher education projects and the promise of the intellectual stimulation for

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[38] Longstreth, *supra* note 7, at 2-3.

[39] This was the reason given by the Wisconsin superintendents for acceding to research requests. Clasen, *supra* note 10, at 28.

[40] *Hearings, supra* note 14, at 319.

themselves and their teachers from participation.

Besides these intangible benefits the school may hope to realize or at least further certain concrete goals. To begin with the most distant and general, there is always a reasonable expectation that any research with students will eventually improve educational techniques. Thinking closer to home, a school may agree to sponsor or permit an experiment in the hope that information derived from it will benefit others of the school's own students. For instance, in an experiment to test the efficacy of a sensitivity group as a treatment for elementary students with adjustment problems, the researcher asked to observe another group of students with similar problems as a control. The school permitted the observation, without student or parent consent, for the sake of the students then in treament and those who might benefit from the treatment in the future.[41] A researcher urging school pyschologists to perform more experiments suggested several hypothetical examples of this type: determining whether more science books than usual are checked out of the library by students exposed to a science program; noting where black and white students choose to sit before and after Brotherhood Week; looking for patterns in the statistics on referrals to the nurse's office.[42] In each of these, not the students observed, but succeeding groups of students stand to benefit.

Sometimes a school anticipates being rewarded with services rather than information—again, not always for the students who actually participate in the experiment. Researchers have been advised to establish as part of their project a service unit that will help the school address student problems unrelated to the research.[43] The services might include testing students at the school's request and making referrals for those who need psychological help.[44] For example, as part of a project to identify the social behavior expected of kindergarteners, a researcher sought permission to observe the classroom behavior of all kindergarten children referred by their teachers for evaluation of social/emotional problems. He promised in return to share his observations with the school committees that would eventually make placement decisions for the children.[45] In the same school system a project entitled "Training Students As Peer Counselors"

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[41] ETHICAL PRINCIPLES, *supra* note 21, at 34.

[42] Guttentag, *supra* note 8, at 254.

[43] Kohn and Beker, *supra* note 9, at 32, n.3.

[44] Castenada & Fahel, *supra* note 6, at 201-03.

[45] Research proposal, "Assessing the Behavioral Rules in Kindergarten Classrooms," 1981-82 research proposal files of Chapel Hill-Carrboro (North Carolina) Schools (unpublished).

was approved. Presumably, if the project were successful, the trained students could confer some benefit on their peers.[46] Another district allowed the Psychological Corporation, a national testing firm, to use its students for establishing norms on a new series of intelligence/achievement tests. A school administrator explained that the norming process offered a free chance for the system to learn how its students were progressing.[47]

While allowing research is often an attractive proposition for schools, it offers the possibility of serious disadvantages as well. As a practical matter, there will be demands on school personnel, even if the research request is not approved. Every proposal must be reviewed by an administrator and often by a committee. If it is approved, the cooperation of other administrators and staff will be needed to carry out the experiment and oversee the research team. The time required from school personnel varies markedly, but the fact that some researchers make it a practice to pay teachers whose students are used indicates that there is always some effort involved.[48] Inevitably, too, there will be some interruption of school routine and probably some loss of instructional time.

In addition to assessing inconvenience, a research proposal requires the school to review its ethical and legal responsibilities to students. School personnel owe a duty of care to students. Unless parents are asked to consent, and do so voluntarily, with full information about the project, the school retains the obligation to guard the students' interests as their parents would. Thus, if there were any possiblity of harm to a particular student without the possibility of a direct and greater benefit, the school's obligation would no doubt be to decline the research proposal. Even if parents or students consent, school personnel must concern themselves with whether the deference usually paid to the school's authority has spilled over so as to spoil the voluntariness of the consent. A school may be reluctant, too, to assume responsibility to parents and students for an activity that it does not fully control.

Two other concerns may incline the school to say "no"—both of them unlikely but threatening. One is the danger of a public relations

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[46] 1978 project directed by Janet Martin, Chapel Hill-Carrboro (North Carolina) Schools.

[47] Conversation with Dr. V.R. Thompson, Robeson County Schools, Lumberton, North Carolina, October 8, 1981.

[48] Conversation with Professor James Donald McKinney, Frank Porter Graham Child Development Center, University of North Carolina at Chapel Hill, December 9, 1981. The school district too may be paid. One North Carolina district receives $11,000 annually from the local university's school of education to compensate for the inconvenience of participation in research.

fiasco. School administrators may believe that in approving a project they have discharged their duties well and that the project is safe and potentially beneficial. Still, they will realize, as the historical information above illustrates, that occasionally a community reacts quite adversely to research in the schools. (And the strong interest recently shown in schools by conservative political and religious groups may encourage greater caution than usual in the future.) The second concern is for liability. If they were negligent in permitting a researcher access to students, school employees might be liable for breach of the duty to guard the welfare of students. Although there is no case, to my knowledge, of a judgment for damages against school officials for harm resulting from experimentation, the possibility exists.[49]

What of students? Is it in their interest to participate in research? A former Director of the U.S. Office of Education posited an obligation:

> School children-and their parents—should respect and honor knowledge and learning; and they should be willing to cooperate in efforts to extend knowledge and learning which are essential to the advancement of the entire human race even when, individually, they gain no immediate personal benefits from doing so. Some such cooperation is essential if education is to be advanced as much and as rapidly as it must be.[50]

In an article denying that invasion of privacy is a serious concern in school research, the author put the matter even more strongly to children:

> The blunt fact is that, unless our scientific understanding of man can be brought to a far higher plane within the next couple of decades than it has been in the last couple of millennia, there will be no one left whose privacy can be defended.[51]

Students may agree, and assuming as much altruism—or fear—on their parts as on adults', may wish to be used to advance science. Perhaps, too, students old enough to understand an experiment may view it as an interesting, diverting, even educational experience and want to participate for those reasons. The fuller the researcher's explanation of process and results, the greater the incentive.

Some adults, however, foresee negative consequences for students. Obviously, there will be the same loss of instructional time for them

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[49] *See Legal Implications of Psychological Research with Human Subjects*, 1960 DUKE L.J. 265. The author suggests that implied consent of the sort recognized in the doctor-patient relationship is insufficient when an experimenter does not intend to treat or otherwise benefit his subject. *Id.* at 270.

[50] *Hearings, supra* note 14, at 304 (statement of Francis Ianni).

[51] Sears, *supra* note 7, at 33.

as for school personnel, and for many children there may be slight inconvenience or embarrassment associated with the researcher's questions or classroom observations.[52] The most serious concern, though, stems from research involving a high degree of invasion of privacy, perhaps resulting in emotional harm to some participants.[53] This problem merits full examination because it is at the heart of the issue of school experimentation.

In two federal court cases the central question was whether participation in research might seriously damage children. In both the courts answered yes. *Merriken v. Cressman*,[54] a 1973 Pennsylvania case, arose when an eighth grader and his mother sued to prevent the school board from putting into effect a research and treatment program purchased from a private agency. The program was intended to identify and treat "potential abusers" of certain drugs. The first stage was a questionnaire for teachers and students concerning the students' self-images, habits, and family relationships, from which the agency intended to identify students at risk of becoming users of LSD, marijuana, amphetamines or barbiturates. The second, remediation stage would assign each identified student to a team of faculty advisors and to a peer group for counseling. The peer group could require each student to explain why he had been assigned to the program and set behavioral norms for him. Should the student display "deviant behavior," the group had the authority to impose sanctions that included "work detail, withdrawal of past privilege, recommendation to a special unit for intensive training, or the assignment of more onerous tasks." If a student still proved too much for the faculty team and peer group, he was to be referred to community agencies.

One might assume that the school would be quite careful in obtaining consent to enter such a program. In fact, the school did not seek consent from students at all—though after the action was filed, there was an announcement that they could return a blank question-

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[52] A fourth-grader told me with some concern that he had failed a test about feelings. As the child explained it, the teacher was displeased because he had not answered several questions—to name what he disliked about himself, for one, and to identify his best friend. (He had several and did not want to choose.) The teacher told him it would be necessary to repeat the test later. Whether or not the child's version was wholly accurate, his discomfort was real. Incidents of this kind, rarely even rising to the level of adult notice, nevertheless should be weighed in the balance as a cost of research with young children.

[53] An experiment may produce emotional harm without invading privacy. *See* text at note 24 for a description of prolonged scolding of kindergarten children to observe its effect on work performance of other children.

[54] 364 F. Supp. 913 (E.D. Pa. 1973).

naire—and, until legal action began, the school planned merely to send parents a letter notifying them of the program. If no answer was received, the silence was to be construed as consent. On reconsideration, it was decided to seek affirmative parental consent for each student by means of a letter and a question-and-answer sheet. The latter was described by its author as "a selling device" for the program whose purpose was "to convince parents that they ought to allow their children to participate." The communications contained "nothing . . . that is critical of or negative about the CPI [Critical Period of Intervention] program" and no offer was made to allow parents to examine the questionnaire.

After hearing testimony from two psychiatrists on possible harm from the program, the federal district judge enjoined its implementation. He found that it violated the students' constitutional right to privacy by interfering with the child/parent relationship and that parents did not have sufficient information about the program to execute a valid waiver of their children's right. The invasion of privacy without consent and the possible negative consequences of the program outweighed any potential benefits. The negative elements of the program identified by witnesses and the judge were these: (1) the danger that labeling a child, perhaps mistakenly,[55] as a potential drug abuser would be a self-fulfilling prophecy, (2) the possibility that the school and fellow students would "scapegoat" students who either declined to participate in the program or who were identified by it, (3) the creation of severe loyalty conflicts in students through questions about parent and sibling relationships, (4) harm from the psychotherapy to be given by unqualified school personnel (and peers), and (5) absence of confidentiality. On the last point, the court noted that the program's promise of confidentiality was vitiated by the stated intention of developing a "massive data bank" and assigning each child to a faculty team and a peer group. The student's individually identifiable records would be subject to grand jury subpoena as well.

The second case involved a school's ability to prevent the editor of its student newspaper from administering a questionnaire to fellow students.[56] The editor, a senior at Stuyvesant High School in New York City, proposed to pass out a questionnaire that he described as "random and completely confidential". Students were to answer only

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[55] The judge maintained that the chances of misidentification were high—"the actual testing of the students and the results gained are suspect." *Id.* at 920.

[56] Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977).

if they wished and were not to sign their names. The information solicited was on attitudes toward masturbation, homosexuality and abortion; extent of sexual experience; relationships with parents; contraceptive knowledge; and opinion on the school's responsibility for sex education. The editor planned to summarize the results and print them in the newspaper. School officials, however, refused permission to distribute the questionnaire and, eventually saw their decision upheld as reasonable by the Second Circuit Court of Appeals.

The school based its case on the testimony of five psychiatrists and psychologists who, like those in *Merriken*,[57] stated that harm might come to students merely from answering questions—even when, as in this instance, answering was both voluntary and anonymous. On volunteering, in fact, one psychologist stated that "those least emotionally able to deal with the questionnaire issues may be the very ones who most eagerly submit to them. . . . Some will expressly because of their tension and anxiety be attracted."[58] Otherwise, the concerns expressed were similar to those in the *Merriken* trial. First, the school's expert witnesses worried about labeling as a self-fulfilling prophecy, a worry not in any way lessened apparently by the fact that the student would be labeling himself. Aaron Esman, a Columbia University child psychiatrist, called the questions "poorly considered," "highly inappropriate and provocative" and concluded that "confrontation of this sort might well lead to serious emotional difficulties." He feared that persons in the normal adolescent state of flux about their values, personalities, and behavioral norms would experience considerable anxiety about classifying themselves as, for instance, a hetero-or homosexual, one who masturbates, or one who would be willing to have an abortion.[59] Vera Paster, assistant director of the New York City Bureau of Child Guidance, agreed: Answering questions is a commitment, and the more thoughtful the individual the truer this is. Considering the high degree of experimentation characteristic of adolescence, it is a mistake for the adolescent or those around him to attempt to solidify his explorations. To do so means that what might have been a passing phase may become an entrenched identification. A second concern is that adolescents may experience guilt about admitting to moral views or behavior condemned by their parents—although, again, it is usual and entirely

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[57] *Merriken*, testimony of Dr. H.A. Hanford, transcript at 30-31; testimony of Dr. K.H. Gordon, *id.* at 86.

[58] Supplementary Affidavit of Vera S. Paster at 3, Trachtman v. Anker, C.A. #76-3845 (S.D.N.Y. 1976).

[59] *Id.*, Affidavit of Aaron H. Esan 2.

appropriate for adolescents to entertain divergent views. Paster referred to the questions on behavior and on whether the student got along with his family as presenting the opportunity to choose "symbolic betrayal." Betrayal may cause anxiety as well as guilt since many adolescents remain emotionally dependent on parental approval even as they imagine themselves emancipated.[60] In sum, the school's position was that of its witness Florence Halpern, clinical psychologist and professor at New York University's School of Medicine:

> While I cannot attest with certainty that harm will result from the distribution of the survey, it is my expert opinion that emotional and psychological harm is likely to occur and the chance of this happening is far greater than the possibility that no children will be injured if it were distributed.[61]

Although plaintiffs, the editor and his father, produced an equal number of experts who asserted that harm was quite unlikely, the court ruled that school officials had a reasonable basis for prohibiting the survey.

Neither *Merriken* nor *Trachtman* involved a research request from an outsider, the situation that is the primary focus of this article. In one the board of education itself was the researcher; in the other, the request came from a student. The cases do, however, illustrate certain interests of the student as subject. Roscoe Pound's famous article, "Interests of Personality," defined privacy as "the demand which the individual may make that his private personal affairs shall not be laid bare to the world."[62] In *Merriken* the court recognized that privacy is a constitutional right of public school students that may, in certain egregious instances, be violated by research. Moreover, witnesses in both cases seemed prepared to stretch Pound's definition of privacy considerably further for school children. For them, it was suggested, privacy may mean not being induced to confide in even one person, the researcher—and that primarily because, in the context of childhood and adolescence, privacy may include the right to conceal information even from oneself.

The last group whose wishes must be considered are parents. Their stake is primarily in protecting their child's interest, but students and parents may perceive that interest somewhat differently. Parents as a group, and perhaps as individuals too, seem ambivalent about research in schools. As researchers have noted, most parents cooper-

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[60] *See* Affidavit, *supra* note 58.

[61] Affidavit of Florence Halpern 2, *Trachtman, supra.*

[62] 28 HARV. L. REV. 343 (1915).

ate even though no benefit will accrue to their own child,[63] but some can be counted on to refuse permission if it is asked.[64] Those who consent presumably do so through a combination of altruism and trust in the researcher and school not to put the child at serious risk. Those who do not consent may view the risk as higher or may fail to act through inertia. The ambivalence of parents is captured in the following statement. During the 1965 Congressional hearings on psychological testing in schools, Arthur Brayfield, the Executive Director of the American Psychological Association testified on behalf of research interests. But, when asked how he felt about his own children as subjects, Brayfield replied:

> I have four children and I have raised the questions of my children's participation in research and, for myself, I have resolved the question that in many instances of research I am not bothered about the problem of consent. It turns out that I am more bothered in this particular instance with the use of personality tests in school settings by school personnel, and there my children are instructed to be very "cagey" simply because at the present time there are not sufficient numbers of really professional people making use of such materials in the public schools.[65]

Speaking as a parent, then, the chief spokesman for researchers was dubious—though it was the school staff not the university researcher whom he doubted. Certainly, a few parents will always share his concern, regardless of the research sponsor.

The only significant division in the interests of parents and students is the issue of which of them should consent.[66] (The even more

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[63] "It is surprising that in the face of often quite vague statements, such as that cooperation will in the long run increase the knowledge of learning and developmental processes, school personnel and parents are so consistently generous with their help. Even though they may often have justifiable feelings of ambivalence and trying practical problems, it is clear that the belief prevails that research will ultimately lead to socially beneficial results." Kohn & Beker, *supra* note 9, at 36.

[64] "Our assurances of anonymity, confidentiality, and lack of interest in any particular set of parents and child, and our interest only in the general observations that could be obtained from the group as a whole, convinced some [parents], but there are obviously others who still thought we were prying into what is none of our business. And they may well be right even though our curiosity appeared to us without doubt to spring from a pure well of scientific motivation." Eron and Walder, *supra* note 12, at 244.

[65] *Hearings, supra* note 14, at 333. Mr. Brayfield did not expand on the word "cagey."

[66] Another interesting issue is whether the confidentiality promised by the researcher includes withholding information from parents or those *in loco parentis*—that is, the school. Although I believe that, in rare circumstances, divulgences to parents could violate the privacy of school age children, there is no legal and little societal support for the proposition. I find only one reference to the situation in the literature on school testing—an instance in which a researcher refused to tell parents their children's IQ test scores because he had promised the children that he alone would know the scores. ETHICAL PRINCIPLES, *supra* note 21, at 88. Another researcher has told me that he is frequently asked to share his results with school officials

important question of whether the consent of either is needed is discussed below.[66.1] While the student is the party at risk, most adults—researchers as well as parents—question whether she or he will be able to understand the risks sufficiently well to give informed consent. The Ethics Committee of the American Psychological Association has noted that "children, owing to their more limited range of experience, are particularly likely to misunderstand research procedures or to misinterpret, in highly surprising ways, routines and procedures that seem quite unthreatening to the investigator."[67] Besides the general disqualifications of youth and inexperience, there is the possibility raised by one of the school's witnesses in the *Trachtman* case: that is, the very students troubled by an area of inquiry may be the ones most eager to volunteer.[68] Although most parents probably would not object to a requirement that child and parent both consent, when consent is sought from only one, most would conceive it to be in the child's interest that the parent be that one.

Existing Controls

The federal government has made an effort to control school experimentation, both through statutes and regulations, but without marked success. Courts and state governments have scarcely recognized research in schools as a problem needing their attention. Researchers may look for some guidance to the statements of ethical principles published by their professional organizations, but the most effective control over school research at this time is that exercised by those local boards of education that choose to do so.

Federal interest in research dangers began with the House subcommittee hearings of 1965 and continued with hearings of the Senate Committee on Labor and Public Welfare, February through July 1973, in connection with a bill to continue and extend Congressional support of biomedical and behavioral research. In 1973 committee members were concerned about the adequacy of protection for human subjects and, following testimony about the administration of Depo Provera (contraceptive injections) and DES (as a morning-after contraceptive) without informed consent and a thorough review of the infamous Tuskegee Syphilis Study,[69] the committee recom-

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but feels ethically bound to decline. Conversation with James Donald McKinney, *supra* note 48.

[66.1] *See infra* notes 110-12 and accompanying text.

[67] ETHICAL PRINCIPLES, *supra* note 21, at 82.

[68] *See* Affidavit, *supra* note 56.

[69] For a description of this shocking 30-year experiment conducted by the United States

mended establishment of a national commission for the protection of human subjects.[70] The recommendation, enacted as Title II of the National Research Act of 1974 (P.L. 93-348, July 12, 1974), contained directions that the Commission address the needs of peculiarly vulnerable subject groups including children. Proposals for treatment of children in federally sponsored research were to be made to the Secretary of Health, Education and Welfare; in other research, directly to Congress.

In September 1977, the Commission issued recommendations. After endorsing the concept of research with children, it proposed that research be limited to instances in which an IRB[71] finds the experiment sound and significant; if possible, preliminary studies exist using animals, adults and older children; and the researcher minimizes risk, selects his subjects fairly, obtains consent and respects privacy and confidentiality. The recommendations suggest higher standards for research involving greater than minimal risk, especially where no benefit is expected for the child subject.[72] The following year HEW issued proposed regulations[73] based on the Commission's recommendations but weaker in important respects. Whereas the Commission had recommended that an IRB certify research as scientifically sound and significant, HEW would only require certification that "the research methods are appropriate to the objectives of the research." Defending the change, HEW explained that IRB's lack the expertise to judge scientific soundness[74]—an assertion that, while possibly correct, assumes that school employees and parents are as or better qualified. Obviously, they are not. In addition, the Commission would seek consent from children over seven and both parents, with a child's refusal binding unless the experiment were the only way to

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Public Health Service, see JAMES H. JONES, (U.S. CODE CONG. & AD. NEWS) BAD BLOOD (1981).

[70] 2 U.S. CODE CONG. & AD. NEWS 3634 (1974).

[71] An institutional review board is the body that monitors all proposals for research to be conducted or sponsored by an institution. Federal regulations require that an IRB, meeting definite specifications, exist in each institution receiving federal research funds. *See* for instance, § 46.107-46.109 of the Basic Department of Health and Human Services Policy for Protection of Human Research Subjects, 46 F.R. 8388 (January 26, 1981).

[72] RESEARCH INVOLVING CHILDREN, *supra* note 27; Publication No. (05) 77-1114 (1977); also published in 45 FED. REG. 2084 (January 13, 1978).

[73] 43 FED. REG. 31786 (July 21, 1978).

[74] Some IRBs try, nevertheless. One IRB chairman noted, "To approve an experiment we must decide that the benefits outweigh the risks. Obviously, we must first evaluate the merits so as to know what the benefits are." Conversation with William A. Campbell, Chairman, Protection of Human Subjects Committee of Family Health International (a private organization), Chapel Hill, North Carolina, November 19, 1982. For a description of the particular difficulties an IRB faces in ruling on education-setting experiments, see Duval, *Educational Research and the Protection of Human Subjects*, 1977 AM. BAR. FOUND. J. 477, 503.

improve his health or welfare significantly. HEW proposed requiring consent from only one parent for most research and took no position on how young a child should be asked to consent or whether a child's refusal should be honored.

Since they will probably soon be replaced by final regulations,[75] HEW's child research proposals merit no further discussion except insofar as they reveal the attitudes of the agency itself and some of the researchers it supervises. Some behavioral and educational researchers objected to "medical model" regulations as inappropriate for education research, claiming that behavioral research methods-questionnaires, for instance—never present a risk for children. (This is contrary to expert testimony in *Merriken* and *Trachtman*.) Other researchers saw no reason to ask consent from parents or children—and feared that if parents knew of proposed experimentation in schools they would not consent.[76] HEW demurred only slightly to the researchers' objections. Although citing *Merriken* as proof that parental consent is needed for some school research, it still agreed to consider exempting from regulation almost all research likely to be performed in schools: specifically, survey research, observational research, achievement and aptitude testing, research with already existing records, and research consisting of participation in programs similar to the rest of the school program.[77]

If such broad exemptions become part of final regulations on child research, they will parallel exemptions already contained in existing regulations of the Department of Health and Human Service (HHS) on research with human subjects generally.[78] The general regulations

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[75] The final regulations on research with children should be issued by early 1983 according to Denis Doyle, Asst. Regulations Officer, Office for Protection from Research Risks, N.I.H., November 16, 1982. [Ed. note: Final regulations were published at 48 Fed. Reg. 9814 (March 8, 1983).]

[76] The summary of comments states, "[I]f informed consent of parents and children is required, many research studies will never be conducted. School administrators are not willing to have students participate in studies requiring their [administrators'] time and effort to obtain informed consent. In the past research has been conducted without obtaining parental consent." 45 Fed. Reg. 31791-2 (July 21, 1978).

[77] *Id.* Two commentators also urged that sexual research be exempt because its unpopularity makes it difficult to secure parents' consent. They did propose formation of a special commission to consider the subject. 43 FED. REG. 31791 (1978).

[78] 46 Fed. Reg. 8386 (January 26, 1981). The regulations apply only to federally funded projects, but institutions that receive federal research funds must submit to HHS a statement of principles governing all of the institution's research. The regulations exempt the following categories:

(1) Research conducted in established or commonly accepted educational settings involving normal educational practices, such as (i) research on regular and special educational instructional strategies or (ii) research on the effectiveness of or the comparison among instructional

now in effect offer no special protection to children. On the contrary, they free research in schools from supervision by the one federal agency that both heavily regulates human subject experimentation and is likely to fund school-based projects.

Other federal agencies besides HHS fund reserachers who work in schools. Unlike HHS, however, those agencies make little attempt to regulate the treatment of human subjects in research conducted by the agency, its grantees and contractors. The Department of Education, for example, apparently does monitor closely its own collection of educational data in order to protect the privacy and confidentiality of students,[79] but its grantees are bound only by the following general admonition: "If a grantee uses a human subject in a research project, the grantee shall protect the person from physical, psychological, or social injury resulting from the project."[80] Thus, at present, federal

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techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), if information taken from these sources is recorded in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(3)Research involving survey or interview procedures, except where *all* of the following conditions exist: (i) Responses are recorded in such a manner that the human subjects can be identified, directly or through identifiers linked to the subjects, (ii) the subject's responses, if they became known outside the research, could reasonably place the subject at risk of criminal or civil liability, or be damaging to the subject's financial standing or employability, and (iii) the research deals with sensitive aspects of the subject's own behavior, such as illegal conduct, drug use, sexual behavior, or use of alcohol.

(4) Research involving the observation (including observation by participants) of public behavior, except where *all* of the following conditions exist: (i) Observations are recorded in such a manner that the human subjects can be identified, directly or through identifiers linked to the subjects, (ii) the observations recorded about the individual, if they became known outside the research, could reasonably place the subject at risk of criminal or civil liability or be damaging to the subject's financial standing or employability, and (iii) the research deals with the sensitive aspects of the subject's own behavior such as illegal conduct, drug use, sexual behavior, or use of alcohol.

(5) Research involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

The enthusiasm of the American Educational Research Association for deregulation was reflected in its newsletter, *Most Education R&D Exempt from Protection of Human Subjects Regulations,* AERA Info Memo 23 (Washington, D.C., February 1981).

[79] Telephone conversation with Lawrence Bussey, Director of the Federal Educational Data Acquisition Council (FEDAC), Department of Education, Washington, D.C., September 22, 1981.

[80] 34 C.F.R. § 75.681 (1981). It is disheartening to note that before 1981 grantees of the Office of Education and the National Institute of Education were more strictly regulated than at present. The earlier regulations required assurance that parental consent would be obtained for surveys of persons under 18 (45 C.F.R. § 100a.263 [f], (unless waived by Director); 1410.1[f] [1976]); that no inquiries be made concerning religion, sex, race or politics (45 C.F.R. §§ 100a.362[c] 1, 1410.1[c] [1976]; and that the anonymity of respondents and confidentiality

agencies exert little control over research in schools. While final HHS regulations on research with children may change that fact, the prospect does not seem likely.

In addition to the National Research Act, the basis of the regulations discussed above, two other federal statutes touch on experimentation with students. The first, the Family Educational Rights and Privacy Act, also known as the Buckley Amendment, governs access to students' records. A major purpose of the Act is to prevent school administrators from granting access unless the student or, until he is 18, his parents consent. There is an exception, however, for certain research activites. The statute allows schools to show identifiable student records to "organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction. . . ."[81] The Department of Education currently takes the position that individual researchers, as well as organizations, may qualify for the exemption. The Department does not, however, read the exemption broadly enough to include every research project that a school may allow to operate. Only research done "for or on behalf of" the school qualifies. Interpreted in that way, the Buckley Amendment affords some protection for students' privacy. At least it prevents a school from showing records to researchers whose work the school is not willing to sponsor.[82]

The second statute, entitled "Protection of Pupil Rights" (20 U.S.C. § 1232h), attempts to protect students in two ways. Subsection (a), enacted in 1974 together with the Family Educational Rights and Privacy Act, requires that all instructional material used in research projects performed in an institution receiving federal education funds be available for inspection by the parents of children engaged in the project. Subsection (b), added in 1978, provides that no student shall be required as part of a federally funded education program to submit to psychiatric or psychological examination, testing, or treatment, the primary purpose of which is to obtain information about the following:

(1) political affiliations,

(2) mental and psychological problems potentially embarrassing to the student or his family,

(3) sex behavior and attitudes,

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of responses be protected (45 C.F.R. § 100a.263[c] 2 [1976]).

[81] 20 U.S.C. § 1232g(b)(1) (1978). *See also* § 99.31(a)(6), 41 Fed. Reg. 24673 (June 17, 1976).

[82] Interpretation provided by Linda Redmond, Family Educational Rights and Privacy Act Office, Department of Education, telephone conversation, February 9, 1982.

(4) illegal, anti-social, self-incriminating and demeaning behavior,

(5) critical appraisals of other individuals with whom respondents have close family relationships,

(6) legally recognized privileged and analogous relaionships, such as those of lawyers, doctors, and ministers, or

(7) income (except when legally required as a condition of participation) unless the student (if of age) or his parent gives prior consent.

The statute represents delayed success for the efforts of Representative Rosenthal and the 1966 Congressional inquiries, incorporating the major concerns of the bill defeated in that Congress.[83] The act is limited, however, in significant ways. The inspection right refers only to "instructional materials;"[84] the prohibition against psychological probing covers only probing required as part of a project receiving federal education funds; and the probing must have as its *primary* purpose the soliciting of information on the named topics. For instance, even had it been in force, the statute would not have applied to the situation in *Merriken v. Cressman*, where the objectionable questionnaires were not instructional materials, the program was not funded by any federal agency, and, it might be argued, the eliciting of personal information was only one means of effecting the primary purpose—the diagnosis and treatment of incipient drug abusers.

If federal interest in regulation of school research is weak, state action is all but nonexistent. California since 1977 has prohibited the questioning of students (through grade 12) about their own or their families' beliefs or practices in sex, family life, morality and religion without written notice to parents and written consent from them (Cal. Educ. Code sec. 60650 [West 1978]), but the Education Commission of the States, which collects information on laws affecting public schools, is aware of no other state legislation governing student involvement in research or experimentation.[85] I know of only one state—Washington—with administrative regulations on the subject. A section of the Washington Administrative Code (§ 180-52-030) prevents schools from soliciting the views of students on sex or religion; another prohibits administration of "diagnostic personality

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[83] H.R. 14288, 89th Cong. 2d sess. (1966).

[84] The AERA has warned its members of an effort to broaden this act to require parental consent for "testing and certain types of R & D" and promised that "AERA will monitor any such attempt." Memo, *supra* note 78, at 3.

[85] Telephone conversation with Russell B. Vlaanderen, Director, ECS Information Clearinghouse, Denver, Colorado, December 30, 1981. ECS has only recently begun to collect information on states' education regulations.

tests" without parental consent (§ 180-52-035).

With the exception of *Merriken v. Cressman* and *Trachtman v. Anker* neither state nor federal courts have ruled directly on research in schools. No doubt few parents and students present themselves as litigants, and should they do so, courts would probably be reluctant to adjudicate the issues. One likely claim might be invasion of a constitutional right of privacy,[86] but the dimensions of such a right, and even its existence, have not been clearly delineated. In *Whalen v. Roe*[87] in 1977 the Supreme Court addressed the issue of privacy in a case upholding New York's requirement of identification of patients receiving the most dangerous legitimate drugs. Justice Stevens, for the majority, described the dual aspects of privacy as an "interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions." He stopped just short, however, of flatly asserting that the Constitution protects personal privacy, referring to the precedents as "the cases sometimes characterized as protecting privacy." Only in the concurring opinions is that issue squarely joined, with Justice Brennan stating that there is a constitutional privacy right and Justice Stewart that there is not.

Responding to the caution expressed at the highest level, lower federal courts have not encouraged assertion of privacy rights. In a suit seeking discovery of students' test results and files in order to prove racial discrimination, a court granted plaintiff's request for discovery holding that the students' privacy interest must give way to the court's need for information. The decision appeared to turn on the fact that no student was to be identified but even so, the court conceded that anonymity does not entirely eliminate privacy considerations. Touching briefly on this aspect of privacy in research, the opinion noted that many persons resist revealing information to researchers and suggested that consent be obtained for experimentation even when results are to be kept confidential.[88] A second court concluded that the fourteenth amendment's liberty interest includes privacy—specifically, the right not to have to divulge personal information to government employees—but still upheld the right of certain New Jersey cities to require psychological testing for firefighters' positions.[89] Distinguishing *Merriken* the court held that the applicants' privacy interest was outweighed by a compelling state interest in public safety. Tort actions (negligence, fraudulent misrepresenta-

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[86] *See* Duval, *supra* note 74, at 483.

[87] 429 U.S. 689 (1977).

[88] Lora v. Board of Education, 74 F.R.D. 565, 582 (E.D.N.Y. 1977).

[89] McKenna v. Fargo, 451 F. Supp. 1355 (D.N.J. 1978).

tion) against school personnel and researchers are another possible ground for student or parent litigants but, judging from the total failure of education malpractice suits, not a good one at this point. Even the *Merriken* court expressed great reluctance to overturn school officials' decisions, while *Trachtman v. Anker* is itself a vindication of the school's right to decide what is best for students.

Existing legal controls then are weak. Neither federal statutory or decisional law nor state law operates effectively in the area. Another form of control, whose strength cannot be gauged, is that exerted by the ethical standards of researchers. The American Psychological Association (APA), as noted earlier, has published standards—three sets, in fact. Nineteen sixty-eight APA standards on research with children prohibit research that might harm a child physically or psychologically.[90] But the Association's general standards issued in 1972 and revised in 1981,[91] which include comments on and examples of research with children, seem to approve a much greater degree of ethical relativity. APA members who had hoped to see certain research practices condemned are described as being "reconciled to the 1972 proposals as the best that could win general acceptance at this point in history;"[92] the 1981 version contains even fewer absolutes.

The APA position is that ethics are relative in almost every case. Commentary accompanying the 1972 guidelines states that the central ethical question of research is whether, giving precedence to the individual's welfare, there is a negative effect upon the dignity and welfare of subjects that the importance of the research does not warrant.[93] While the discussion of ethical issues raised by research is thoughtful and sensitive, conclusions are usually avoided. The strongest statement in the 1972 formulation is this: "Where enduring aftereffects appear to be a likely consequence of research participation, the investigation should not be conducted."[94] By 1981, that position had yielded to the view that procedures likely to cause serious or lasting harm may be used if foregoing them would expose the participant to greater harm or if the research has great potential benefit and fully informed consent is obtained.[95] When actual experiments are described and discussed, judgment is withheld, even, for example,

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[90] American Psychological Association Division on Developmental Psychology, *Newsletter* 1-3 (1968), *reprinted in* RESEARCH INVOLVING CHILDREN, *supra* note 27, at Appendix.

[91] ETHICAL PRINCIPLES, *supra* note 21; 36 AM. PSYCHOLOGIST 637 (June 1981).

[92] ETHICAL PRINCIPLES, *supra* note 21, at 6.

[93] *Id.* at 11.

[94] *Id.* at 74.

[95] 36 AM. PSYCHOLOGIST 637.

in the case of the well-known and controversial experiments involving university researchers who ordered subjects to administer severe electric shocks to other persons—supposedly volunteers, but actually actor-confederates of the researchers. The subjects suffered guilt and remorse over their participation both during and after the experiment. APA standards comment as follows:

> Studies such as these, involving the deceptive induction of psychological stress, have been criticized as ethically unacceptable by a number of writers concerned with research ethics. Others defend such research on the grounds that it contributes to an improved understanding of fundamental psychological processes and important practical problems. When such studies can be justified, the investigator incurs a strong obligation to minimize possible psychological damage to the research participants.[96]

Referring to another troubling experiment (see text at note 24, above) in which 5-year olds were scolded to observe the effect on other 5-year olds, the APA commentary, without criticizing the experiment itself, praises researchers' efforts to alleviate the children's psychological distress once the experiment has ended.[97] The APA has not stated whether it considers its original absolute statement on child studies to be superseded by its later relative standards.

APA positions on parental consent to experimentation exemplify the confusion caused by varying formulations from the same organization. The original 1968 formulation was even internally inconsistent on this point. The preamble speaks of obtaining "the consent of the parent for the study of his child;" but principle 3 refers to obtaining the "consent of parents or of those legally designated to act *in loco parentis*;" and principle 8 identifies those who act *in loco parentis* as teachers and superintendents of institutions. Thus, while not entirely clear, the 1968 standards apparently consider the consent of school officials sufficient as a substitute for consent of a child's parent or legal guardian. Commentary accompanying the 1972 standards, however, seems to indicate that when the consent of a parent or guardian is needed, the requirement cannot be satisfied by substituting consent of school authorities.[98] The contradictions of APA guidelines impair their effectiveness for member-researchers

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[96] ETHICAL PRINCIPLES, *supra* note 21, at 73, 74.

[97] *Id.* at 81.

[98] Discussing whether parents should have been asked before their children were used as a control group, the commentary finds no need for consent when the normal functioning of the school in relation to the children continues, but warns that "where special stress or risk is involved, or where the experimental variation otherwise exceeds 'normal' bounds,the investigator is not absolved of ethical responsibility [to obtain consent] by any relationship to the institution or agency, however authoritative its charter may be." *Id.* at 34.

trying in good faith to follow them.

Another professional organization with experimentation guidelines is the Society for Research in Child Development (SRCD). Its standards, apparently modeled on the 1968 APA standards, seem in general more protective of children than the latest APA formulation. Principle 9, for example, reads: "The investigator uses no research operation that may harm the child either physically or psychologically . . . . When harm seems possible, he is obligated to find other means of obtaining the information or to abandon the research."[99] But SRCD standards also follow the 1968 APA version in allowing school personnel's consent to satisfy the consent requirement. As in the APA text, the preliminary statement requires "consent of the parent for the study of his child" but the rules following specify consent "of parents or of those who act *in loco parentis* (e.g., teachers, superintendents of institutions)" (Principle 6).

No one knows of course, to what extent researchers are familiar with and follow these or other ethical guides. Presumably, most investigators do. That some do not is a matter known and of concern to the professional organizations themselves. As noted earlier, when developing its 1972 standards, the APA asked members to describe examples of research involving ethical issues in the investigator's conduct. Responding anonymously, APA members reported a number of projects conducted by themselves or others that I consider unjustified,[100] though the APA does not explicitly condemn them. One, the kindergarten scolding study, has been described above. Others, which did not take place in school settings but involved school age children or college students, are more disturbing still. They include:

(1) a proposal to study the effects of protein deprivation by withholding food from selected children while feeding their siblings protein-rich dietary supplements;[101]

(2) telling college students, falsely, that their physical reactions showed them to be latent homosexuals;[102]

(3) subjecting college students and hospitalized psychiatric patients to electromagnetic force fields at levels later found to destroy cortical tissue in monkeys;[103]

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[99] ETHICAL STANDARDS, *supra* note 22; *see also* CHILD DEVELOPMENT (1975), *reproduced in* Appendix to RESEARCH INVOLVING CHILDREN, *supra* note 27.

[100] Since reports were anonymous and members were invited to criticize the research of others as well as their own work, reports may be exaggerated.

[101] ETHICAL PRINCIPLES, *supra* note 21, at 24-25. APA commentary does describe this as a study in which "the potential risks and costs to the participants were very high."

[102] *Id.* at 61-84. Possibly two separate studies were performed.

[103] *Id.* at 63-64.

(4) falsely informing students studying to be teachers that questionnaires showed them unfit to teach;[104] and

(5) falsely informing a college student that a test showed her not intelligent enough for college.[105]

These examples, which doubtless represent rare abuses, suggest that the field of research, like all others, contains individuals of questionable character or judgment.[106] That fact, in turn, suggests that greater control over public school experimentation than presently exists may be warranted.

Recommendations

Eighteen years ago a legal journal urged the issue of protecting privacy in behavioral research on the attention of courts and legislatures.[107] It was suggested that when scientists' ethics failed to maintain a balance between research and privacy interests corrective legal actions were appropriate. These remedies, to be applied by either legislators or judges, were to include (1) recognizing a legal privilege for confidential communications to behavioral scientists, (2) creating civil or criminal remedies for invasion of privacy, (3) defining *de minimus* and justified breaches of privacy, (4) preventing public officials and employees from disclosing confidential information gained in the course of their employment and (5) enforcing the preceding by disciplinary proceedings leading to mandamus or contempt orders for public officials and disbarment or loss of license for private professionals.

The advice was good, but with the exception of (4), of which the Family Educational Rights and Privacy Act is an example, the author's proposed agenda is not even well begun. Concerns about intrusion on the privacy of school children could be allayed by Congress, state legislatures, administrative agencies, or courts, but the prospect does not seem imminent. Until other bodies assume the responsibility, it will rest with state or local boards of education. Every state board of education, as well as every school district that receives re-

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[104] *Id.* at 82-83.

[105] *Id.* at 84.

[106] The APA is to be commended for supplying documentation of that fact when much information on the subject is anecdotal and unverifiable. For example, a friend who is unwilling to be identified described to me a research proposal submitted to the university IRB of which she was then chairman. The researcher wished to identify a cohort of undergraduate women who possessed a number of the personal characteristics of anorexia nervosa victims, place them on an extremely rigid daily schedule (without telling the subjects why), and observe how many developed anorexia.

[107] Ruebhausen & Brim, *Privacy and Behavioral Research,* 1965 COLUM. L. REV. 1184.

quests to use its students as research subjects, should adopt written policies governing approval or denial of the requests.

Before developing policy the board (or other decisionmaker) must consider the question of the purpose of public schools. One view is that schools are the legally sanctioned public gathering place for youth, a location in which those who have legitimate business with children should be able to approach them.[108] Others, and I am among them, see schools as providers of particular services so essential to social and individual welfare that parents are required to cede their children temporarily for the purpose of receiving those services. To the extent that the decisionmaker approaches the latter view, he or she will be less open to requests for permission to experiment, though few may arrive at the firm stance of a superintendent who confided, "If the research promises to tell *us* something—and it's something we could do anything about—we're interested. Otherwise, not."

Assuming that research proposals are to be entertained, the review process should be as careful of individual students' interests and as convenient for the school as possible. To satisfy both goals a policy must address the following points.

Allocation of responsibility within the school system. Only in the smallest systems or in those receiving very few requests is it feasible for the board of education to review research proposals before they are approved. Elsewhere, the substantive work of review should be done by a committee reporting to the superintendent, who may reverse the committee's decision. For approved projects the board should decide whether the principals of schools in which it will be carried out may still decline to participate. The superintendent should report regularly to the board on requests and projects approved.

Nature of the review. The school committee should be prepared in the first instance to judge the scientific soundness of the project; that is, to determine how likely it is to produce valuable information. (Committee members who may not feel qualified to make that judgment should remind themselves that no earlier reviewer may have done so.[109]) The committee's second consideration should be the risk

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[108] *See* Sears, *supra* note 7, at 23, 30 for this view.

[109] Under HHS regulations many proposals will not have been subjected to IRB review at the researcher's institution. Even if the proposal was not exempt, IRB's often do not judge scientific soundness—they merely weigh anticipated risks against anticipated benefits, as described by the researcher. One conscientious university-affiliated researcher told me his reservations about what he judged to be his IRB's perfunctory review of school-setting projects. The atti-

to students, including invasion of their privacy. Assurance of anonymity should not eliminate the privacy concern. Besides reviewing the purpose, methods, anticipated risks, benefits and results and use of data from the project, the committee should examine the information and consent forms to be given to parents and students and all written material to be used in the project.

Composition of the committee. In addition to one or more school employees, the committee should include a university/college faculty member and researcher, a parent, a community resident with an interest in children (social worker, pediatrician, church youth worker, for example) and the school board attorney, if possible.

Consent. The consent of school personnel to experimentation on students should not be substituted for the consent of parents. Nor is the consent of parents always an adequate substitute for the child's consent. Parental consent should be obtained for all research with students not conducted or contracted for by school employees, unless the research consists merely of observation of unidentified children engaged in their normal activity.[110] Parental consent should also be obtained for school sponsored research that is particularly intrusive. The consent of students should be obtained, and their refusal to participate respected, whenever in the judgment of the committee they are capable of understanding the purpose and process of the research.[111] Student's consent is particularly desirable when the research is of no benefit to the participating student.[112] A parent or student's decision not to participate should be made as simple and kept as private as possible. Consent to participate should always be evidenced by a positive response.

Disclosure. Parents and, where appropriate, students asked to participate in research should be informed of the following: (1) the project's purpose; (2) how the student was selected; (3) the procedure to

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tude seems to be, he said, "if it's okay with the public schools, it's okay with us." Meanwhile, I suspect that school administrators usually operate on the assumption that the researcher's institution vouches for his project's soundness and safety.

[110] It seems unreasonable to require a researcher to obtain consent for classroom observations no more intrusive than routine visits by parents or members of the community. On the other hand, if the researcher's observation will be prolonged or repeated, focus on a few students or produce identifiable data, consent should be obtained.

[111] Expert bodies (APA, SRCD, National Commission for Protection of Human Subjects) and individual researchers recommend that children's consent be sought. Recent studies indicate that they are about as likely to consent as adults and for similar reasons. Fields, *Minors Found Able to Decide on Taking Part in Research,* CHRONICLE OF HIGHER EDUCATION 7 (1981).

[112] Duval, *supra* note 74 at 515.

be followed, including an easily understood, precise description of the child's involvement; (4) anticipated benefits for general knowledge, the student, and the school district; (5) possible physical, psychological, legal or other risk; (6) whether students will be personally identifiable and to whom; (7) to whom results will be available and for what purposes; (8) participants' or parents' right to inspect materials before consenting and to withdraw consent at any time; (9) the person to whom inquiries should be addressed before, during, and after the project, if that is the case; (10) that the school is neither conducting nor sponsoring the project; and (11) the lack of adverse consequences of failure to participate.

Favored researcher categories. Depending on the volume of requests, the committee may find it advisable to decline to review proposals from undergraduate and graduate students. Some school districts give first priority to projects proposed by their own employees acting as individuals.

Compensation. The issue of whether a researcher should be required or allowed to compensate students, parents, the school district or individual school employees for their cooperation with his project is one on which opinions will differ. In my view, payment to a student, parent or school district is ill-advised because it creates a risk that participation will be determined on an inappropriate basis. The decision to participate should be based on the intrinsic worth of the project as part of the school's education mission and on a non-monetary cost-benefit analysis for the student. It also seems improper to compensate school employees, whose activities are already fully compensated by salary. Acceptance of payment by individual school employees would seem to be double compensation and, in addition, may serve as an impediment to exercise of their best judgment on the merits of research proposals.

Conclusion

Schools should rigorously scrutinize requests to perform research on students and should regulate projects that are approved. Because state laws compel attendance, school officials have an obligation to distinguish between research participation, which must be voluntary, and the educational activities of the school, which are not. Most importantly, they must make the distinction clear to every parent whose child participates in an experiment.

There is wide, though not unanimous agreement that parents' and students' consent should be obtained for experimentation. The more

difficult issue is how to insure that their consent represents an informed choice. To return to the original example, how many parents would have guessed from the phrase "an examination of pubertal development" that their children's breasts, testes and penises would be examined for size? Very few probably, and surely not even all of the parents who could have correctly defined "pubertal." Schools must take responsibility for seeing that a researcher fully explains the purpose, risks, benefits, procedures, results and intended uses of his project in understandable terms, and that no parent or child is reluctant to decline to participate. Under those conditions research in schools may be legally and ethically acceptable. Under the conditions in which it often occurs today and in the past, it is not.