

Policing Social Media: Balancing the Interests of Schools and Students and Providing Universal Protection for Students' Rights

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ABSTRACT

The increasing popularity of social media, especially among school-aged children, has created new legal issues within the school setting. School administrators are tasked with maintaining order within their schools, while dealing with these emerging issues. In some schools, student social media activity has spurred a new set of policies that allow administrators to monitor such activity by requesting students' access information, observing the students' social media accounts, allowing third parties to monitor the students' accounts, and other similar activities. Prompted by the current trend of Americans' frequent use of social networking sites and the potential invasion of individual privacy caused by educators' undefined ability to investigate student accounts, states have begun to legislate on this important issue. However, legislators seem to be in disagreement about the required extent of the coverage of these protections, as demonstrated by the lack of uniformity in the existing state statutes.

This Comment will first balance the legitimate interests of school administrators in maintaining order, safety, and discipline within their schools against the interests of students in keeping their social media accounts private and maintaining their First Amendment, Fourth Amendment, and privacy rights. Next, this Comment will compare the operation and effects of the four major provisions—scope, retaliation prohibitions, enforcement mechanisms, and exceptions—in the existing 15 state statutes that protect students' social media privacy rights. Finally, this Comment will suggest uniform federal legislation as a way to both remedy the disparate treatment of the existing state statutes and

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balance the legitimate interests of both schools and students in social media monitoring.

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I. INTRODUCTION

In early 2012, a sixth grade student from Minnesota, R.S., was pressured by several school officials to disclose her Facebook and e-mail account information.¹ School officials were investigating R.S. after

1. See *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1134 (D. Minn. 2012).

receiving complaints from another parent about conversations R.S. was having with his son, another classmate.² When R.S. hesitated in disclosing her passwords to the officials, the officials threatened her with detention if she did not comply.³ The student sat in the office while officials and a police officer humiliatingly scoured her password-protected Facebook account.⁴ The American Civil Liberties Union (ACLU) took an interest in this occurrence, and after filing a civil action on the student's behalf, succeeded in reaching a settlement with the school district in the amount of \$70,000.⁵

In the Internet age, social media is a prevalent part of today's society and has revolutionized how people communicate with each other.⁶ Merriam-Webster defines "social media" as "forms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other content."⁷ Popular social media networks include platforms such as Facebook, Twitter, Instagram, and YouTube.⁸ Social media is especially popular among teenagers and other young adults, especially as a means of communication.⁹ While school administrators may be trying to keep up with this important medium and potential discipline issues that arise with it,¹⁰ legislators and the judiciary have not been able to stay completely up to date with their laws and policies regarding social media use by students.¹¹ State legislators have slowly begun to address these issues.¹²

2. See *id.*; Curt Brown, *ACLU Win's Settlement for Sixth-Grader's Facebook Posting*, STAR TRIB. (Mar. 24, 2014, 11:24 PM), <http://strib.mn/2cT8Utl>.

3. *R.S.*, 894 F. Supp. 2d. at 1134.

4. *Id.*

5. *Id.* See also Justin W. Patchin, *Educator Searches of Private Student Social Media Profiles: The Illinois Experiment*, CYBERBULLYING RESEARCH CTR. (Jan. 22, 2015), <http://bit.ly/2dRxbWN> [hereinafter *Educator Searches*]; Doug Gross, *ACLU: Facebook Password Isn't Your Boss' Business*, CNN (Mar. 22, 2012, 5:54 PM), <http://cnn.it/2e1Ts3e> ("You'd be appalled if [someone] insisted on opening up your postal mail to see if there was anything of interest inside.' . . . 'It's equally out of bounds for [him] to go on a fishing expedition through a person's private social media account,'" said attorney Catherine Crump in a statement from the ACLU).

6. See Meggen Lindsay, Note, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students-Tatro v. University of Minnesota*, 38 WM. MITCHELL L. REV. 1470, 1471 (2012).

7. *Social Media*, MERRIAM-WEBSTER, <http://bit.ly/2dSgbvQ> (last visited Sept. 2, 2016).

8. See, e.g., Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CTR. (Apr. 9, 2015), <http://pewrsr.ch/2d3bfoZ> (describing a study about teen social media use statistics).

9. See Lindsay, *supra* note 6, at 1471.

10. See *infra* Part II.B.

11. See Tanya Roscorla, *Student Social Media Monitoring Stirs up Debate*, CTR. FOR DIGITAL EDUC. (Sept. 30, 2013), <http://bit.ly/2cSumDK>.

Fifteen states have enacted legislation to protect their students, but these laws do not adequately protect every student's privacy.¹³

This Comment suggests the need for reform in this area. Part II will describe social media monitoring practices that are at issue and compare interests of schools with the student privacy interests that are implicated through social media monitoring. Part II will then discuss the current state of legislation in this area. Part III will compare the main provisions of the existing state statutes and show the disparity that exists in the coverage of these statutes. Part III will also propose solutions to the social media monitoring issue by describing an appropriate balance between school and student interests and recommending uniform federal legislation to equally protect all students from monitoring practices.

II. BACKGROUND

A. *Impact of Social Media*

1. The Pervasiveness of Social Media

The use of social media is undeniably widespread.¹⁴ Nearly 2.1 billion people maintain social media accounts,¹⁵ and twenty-eight percent of the total time spent on the Internet is spent on social media sites.¹⁶

Facebook, Twitter, Instagram, and YouTube are some of the most popular social media platforms.¹⁷ Facebook is the most popular social media network, with approximately 1.13 billion daily active users as of June 2016.¹⁸ Facebook allows users to post and share statuses to their news feed, message other users, and view and connect with other members' profiles.¹⁹ Twitter is also widely used, and boasts of 313

12. See *State Laws Social Media Privacy Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jun. 12, 2015), <http://bit.ly/2cTa4VR> [hereinafter *State Laws*]; see also *infra* Part III.B.2.

13. See *State Laws*, *supra* note 12; see also *infra* Part III.B.2.

14. See *infra* notes 15–16 and accompanying text.

15. Jeff Bullas, *33 Social Media Facts and Statistics You Should Know in 2015*, LINKEDIN (Apr. 8, 2015), <http://bit.ly/2dxfY0Q>; see also Lauren Davidson, *Is Your Daily Social Media Usage Higher than Average?*, TELEGRAPH (May 17, 2015, 3:00 PM), <http://bit.ly/2deFC9O> (describing social media usage statistics and stating that the average person has five social media accounts and spends an average of one hour and forty minutes browsing social media sites daily).

16. Davidson, *supra* note 15.

17. See, e.g., Lenhart, *supra* note 8.

18. *Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Sept. 2, 2016). Seventy-one percent of teenagers use Facebook. See Lenhart, *supra* note 8 (explaining results of a study relating to teen usage of the Internet, social media, and technology).

19. See *About*, FACEBOOK, <http://bit.ly/2eRuW5w> (last visited Sept. 2, 2016) (showing the ways to connect through Facebook).

million active monthly users.²⁰ Twitter users “can send a Tweet, which is a message of 140 characters or less that is public by default and can include other content like photos, videos, and links to other websites.”²¹ Instagram, which allows users to “share [their lives] with friends through a series of pictures,”²² has 300 million users and is particularly popular among younger, teen users.²³ YouTube has over a billion users, and these users watch millions of hours of video content on YouTube every day.²⁴ All four of these social media platforms have privacy policies that allow users to safeguard their accounts and limit who can view their accounts’ content,²⁵ and all four also warn users to protect their accounts’ passwords.²⁶

Social media use among teenagers aged thirteen to seventeen is especially high.²⁷ Based on results of a 2015 study, ninety-two percent of teenagers in this age group are online daily, and seventy-six percent of teenagers use social media networks.²⁸ About seventy-one percent of this group also reports using more than one social networking platform.²⁹ Furthermore, due to the widespread use of smartphones, teenagers are now able to access social media more frequently than ever before.³⁰

20. *Company*, TWITTER, <http://bit.ly/2ekDtPu> (last updated June 30, 2016).

21. *Twitter Privacy Policy*, TWITTER, <http://bit.ly/2esplhF> (last updated Jan. 27, 2016).

22. *FAQ: What is Instagram?*, INSTAGRAM, <https://instagram.com/about/faq/> (last visited Sept. 2, 2016).

23. Bullas, *supra* note 15; Lenhart, *supra* note 8.

24. *Press Room: Statistics*, YOUTUBE, <http://bit.ly/2ekzBcv> (last visited Sept. 2, 2016).

25. *See Privacy Basics*, FACEBOOK, <http://bit.ly/2d3cuoq> (last visited Sept. 2, 2016) (informing users of what steps to take to keep their accounts secure); *Twitter Privacy Policy*, TWITTER, <http://bit.ly/2esplhF> (last updated Jan. 27, 2016); (explaining the relevant privacy information for Twitter account holders); *Privacy Policy*, INSTAGRAM, <http://bit.ly/2dCm3bJ> (last visited Sept. 2, 2016); *Privacy Policy*, GOOGLE PRIVACY & TERMS, <http://bit.ly/2e7KCOj> (last updated Aug. 29, 2016) (explaining the Google privacy policy as it applies to YouTube).

26. *See Statement of Rights and Responsibilities*, FACEBOOK, <http://bit.ly/2dnr2Rv> (last updated Jan. 30, 2015); *Twitter Privacy Policy*, *supra* note 21; *Terms of Use*, INSTAGRAM, <http://bit.ly/2dTsz9R> (last updated Jan. 19, 2013); *Google Terms of Service*, YOUTUBE, <http://bit.ly/2e06nBi> (last updated June 9, 2010).

27. *See* Lenhart, *supra* note 8.

28. *Id.* Facebook is most popular among U.S. teenagers—it has more daily teen users than any other social media network. Thiago Guimarães, *REVEALED: A Breakdown of the Demographics for Each of the Different Social Networks*, BUS. INSIDER (Mar. 9, 2015), <http://bit.ly/2deG5bY>. Thirty-one percent of teenagers use Twitter. Lenhart, *supra* note 8.

29. Lenhart, *supra* note 8.

30. *See id.*

2. Social Media and Its Effect on School Settings

Social media has the ability to change and develop the ways people communicate and interact with one another.³¹ Therefore, due to the obvious popularity of social media among school-aged children, particularly those in secondary schools, school administrators are faced with the need to cope with many emerging issues, including the difficulty in regulating and monitoring what students do on social media.³² School administrators have a substantial interest in protecting the safety of students, as well as maintaining discipline within the school,³³ and, therefore, administrators may find the need to regulate what students do online. Unfortunately, the law is often rather slow at catching up to new technologies, and current laws do not always effectively address technological advances.³⁴ The expansion of social media use compounded with the lack of legislation in this area has left little guidance for school administrators with respect to what actions are and are not acceptable when maintaining school discipline through regulation and monitoring of students' social medial use.³⁵ Courts have not fully addressed these issues,³⁶ and legislatures have only just begun to address them.³⁷

B. *Social Media Policies at Issue*

In recent years, questionable instances of school administrators' investigations of student social media have appeared in both the news and the courtroom. For example, in a 2012 case that was introduced previously, *R.S. v. Minnewaska Area School District*,³⁸ a 12-year-old sixth grade student, R.S., was punished for two of her Facebook posts.³⁹ In a later instance, after school officials were informed that R.S. was

31. See Angela Goodrum, Comment, *Transcending Intellectual Property Rights: SNOPA and the PPA: Do You Know What it Means for You? If SNOPA (Social Networking Online Protection Act) or PPA (Password Protection Act) Do Not Pass, The Snooping Could Cause You Trouble*, 35 *HAMLIN J. PUB. L & POL'Y* 131, 132 (2013).

32. See Nicole P. Grant, *Mean Girls and Boys: The Intersection of Cyberbullying and Privacy Law and Its Social-Political Implications*, 56 *HOW. L.J.* 169, 172 (2012).

33. Roscorla, *supra* note 11.

34. *Id.*

35. See *infra* Part II.D; *infra* Part II.B.

36. See, e.g., *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128 (D. Minn. 2012) (illustrating that courts have not actually addressed the heart of the issue of social media monitoring). Note that, in *R.S.*, the parties reached a settlement before the court ruled on all of the underlying issues. See *Educator Searches*, *supra* note 5.

37. See *infra* Part III.A.

38. *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128 (D. Minn. 2012).

39. *Id.* at 1133.

having online, sexual conversations with another student, they demanded her Facebook and e-mail user names and passwords and threatened her with detention if she did not comply.⁴⁰ The officials then searched through R.S.'s public and private correspondence.⁴¹ In a subsequent lawsuit, R.S. alleged First Amendment⁴² and Fourth Amendment⁴³ violations.⁴⁴ The school moved to dismiss these claims, but the U.S. District Court for the District of Minnesota denied the motion.⁴⁵ The court concluded that at least some of the information and correspondence found on R.S.'s Facebook were in her "exclusive possession" because they were protected by a password; therefore, "R.S. had a reasonable expectation of privacy to her private Facebook information and messages."⁴⁶ This case, however, eventually led to a settlement where the Minnesota school district agreed to pay R.S. \$70,000 in damages, so there was no final court disposition.⁴⁷

This case is just one example of school administrators taking action to examine a student's online activity. In other schools around the country, administrators, following policies sometimes referred to as "forced consent," have asked students to turn over social media usernames and passwords, granting administrators access to the students' personal social media accounts.⁴⁸ Rather than actually requesting the student's password, other schools have hired third-party companies to oversee students' social media posts.⁴⁹ These security companies use

40. *Id.* at 1134.

41. *Id.*

42. U.S. CONST. amend. I.

43. U.S. CONST. amend. IV.

44. *R.S.*, 894 F. Supp. 2d at 1149.

45. *Id.*

46. *Id.* at 1142.

47. *Educator Searches*, *supra* note 5.

48. See Goodrum, *supra* note 31, at 145; see, e.g., Benjamin Herold, *Schools Weigh Access to Students' Social Media Passwords*, EDUC. WEEK (Feb. 17, 2015), <http://bit.ly/2dtwpMX> (discussing the Triad Community School District in Illinois that sent a letter home to students' parents warning them that students may be asked to provide their social media passwords); Brian Kumnick, *Student Sues Over Coach Accessing Her Facebook Account*, FINDLAW (Aug. 3, 2009, 11:50 AM), <http://bit.ly/2d3capr> (discussing an incident in which a cheerleading coach demanded social media login information from cheerleaders, and, upon discovering one cheerleader's private conversations, distributed the conversations to other school officials); Talon R. Hurst, Comment, *Give Me Your Password: The Intrusive Social Media Policies in Our Schools*, 22 COMMLAW CONSPECTUS 197, 207 (2013-14) (discussing university policies that ask students to turn over their social media login information).

49. See Hillary Gunther, Note, *Employment, College Students, & Social Media, A Recipe for Disaster: Why the Proposed Social Networking Online Protection Act is Not Your Best Facebook "Friend,"* 24 ALB. L.J. SCI. & TECH. 515, 522 (2014); see also Challen Stephens, *Huntsville Schools Paid \$157,000 for Former FBI Agent, Social Media Monitoring Led to 14 Expulsions*, AL.COM (Nov. 7, 2014, 12:17PM),

specially designed search engines to track student social media posts for certain keywords and send an alert to the school when these keywords are flagged.⁵⁰ Student athletes, in particular, have been affected by mandatory “friending” of coaches or compliance officers,⁵¹ in which student athletes are required to accept the friend request of their coaches or other school officials, granting the officials access to social media postings that may be viewable only by “friends” of the user.⁵² School officials may also “shoulder surf,” which is when an official demands that a student access their personal social media account with the official present allowing the official to view password-protected material on the account.⁵³ Other social media monitoring techniques include requiring students to download spy software on their computer⁵⁴ and demanding students change their social media privacy settings so that the material posted is available to school administrators or others monitoring the students’ social media.⁵⁵

Schools at all different levels have used the above-mentioned methods—referred to in this Comment as “social media monitoring.” These methods have been used to maintain school safety and discipline with current students, but have also been used by universities when evaluating prospective students.⁵⁶ School officials justify their use of social media monitoring methods by emphasizing their interests in maintaining the discipline within their school and the safety of their

<http://bit.ly/2hKI4dQ> (discussing the Alabama school district that hired a security firm for \$157,000 to investigate student social media accounts, which led to the expulsion of fourteen students); Herold, *supra* note 48 (indicating that a school district in California received criticism from the ACLU for hiring a third party to monitor students’ public social media posts).

50. Gunther, *supra* note 49, at 522–23. *See also* Laura Entis, *Illinois Law Lets Schools Requests Students’ Social Media Policies*, *SCHOOL LIBRARY JOURNAL* (Apr. 8, 2015), <http://bit.ly/2dzqlo7> (explaining how the social media monitoring companies screen social media accounts and what keywords they search for). Third-party monitoring has been used more often with student athletes, especially at universities. *See, e.g.*, Roscorla, *supra* note 11 (discussing the Utah State University policy that allowed third-party monitoring companies and the university staff to access the student athletes’ social media accounts).

51. *See* Gunther, *supra* note 49, at 524.

52. *See id.*; Hurst, *supra* note 48, at 207.

53. Timothy Buckley, Note, *Password Protection Now: An Elaboration on the Need for Federal Password Protection Legislation and Suggestions on How to Draft It*, 31 *CARDOZO ARTS & ENT. L.J.* 875, 887 (2013).

54. *See* Goodrum, *supra* note 31, at 146.

55. Brittany Dancel, Comment, *The Password Requirement: State Legislation and Social Media Access*, 9 *FIU L. REV.* 119, 129 (2013).

56. *See id.* at 125–26. These social media monitoring practices also extend beyond the educational context—employers also use these techniques to monitor social media usage of current and prospective employees. *See* Goodrum, *supra* note 31, at 144; Buckley, *supra* note 53, at 886.

students, but these methods are also likely to implicate students' constitutional rights to privacy and free speech.

C. *Comparison of School and Student Interests in Social Media Monitoring*

1. Proponents of Social Media Monitoring and Substantial School Interests

Although parents and students are opposed to social media monitoring,⁵⁷ schools and their administrators have advocated for the interests of the schools in enforcing these types of policies.⁵⁸ First and foremost, schools have a substantial interest in maintaining discipline within the school and the classroom as well as ensuring safety for all of their students.⁵⁹ Therefore, schools argue that, to maintain order, they should be able to obtain information on their students by monitoring students' activity.⁶⁰

As new technology, such as the Internet, becomes more pervasive among school-aged children, schools are faced with a new challenge: cyberbullying. Cyberbullying is "the electronic posting of mean-spirited messages about a person . . . often done anonymously."⁶¹ Cyberbullying is a pattern of repetitive behavior through an electronic medium that is deliberate and causes harm to the victim.⁶² As student Internet use increases, school officials argue that they need be able to proactively address cyberbullying issues.⁶³

Schools have also asserted a legitimate interest in preserving the reputation of the school and its students.⁶⁴ Schools want to prevent students from posting inappropriate material⁶⁵ and prevent any negative impact on the school's image that students' posts can generate.⁶⁶ Universities are especially cognizant of their reputation with regard to what their student athletes post.⁶⁷ Universities that monitor or regulate

57. See Herold, *supra* note 48.

58. See Hurst, *supra* note 48, at 208–09.

59. See *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1143 (D. Minn. 2012).

60. See Hurst, *supra* note 48, at 209.

61. *Cyberbullying*, MERRIAM-WEBSTER, <http://bit.ly/2dSgkzm> (last visited Oct. 7, 2015).

62. Grant, *supra* note 32, at 173.

63. Herold, *supra* note 48. Legislatures have also tried to address the cyberbullying issue by enacting anti-cyberbullying laws. See Grant, *supra* note 32, at 173.

64. Hurst, *supra* note 48, at 197.

65. See *id.* at 210; Gunther, *supra* note 49, at 523.

66. Hurst, *supra* note 48, at 197.

67. Gunther, *supra* note 49, at 523.

the social media usage of their athletes have also emphasized that students do not have a right to play a sport.⁶⁸ Team membership is a privilege,⁶⁹ and student athletes representing their universities should be held to a higher standard, especially with regard to their social media activity.⁷⁰

Proponents of social media monitoring policies have also argued that social media, and Internet posting in general, uses forms of communication that are not intended to be private, and, therefore, students who post on social media do not have a reasonable expectation of privacy with respect to that information.⁷¹ Furthermore, although students maintain privacy rights at school, privacy expectations within a school setting are not always evaluated by the same standards.⁷² Therefore, when balancing the schools' substantial interests in maintaining discipline and safety within the classroom against students' modified privacy expectations within the schools, it is not clear which interests take precedence.

2. Opponents of Social Media Monitoring

On the other hand, opponents of these monitoring policies have laid out arguments regarding social media monitoring, emphasizing the need to protect students' constitutional rights. Opponents to social media monitoring, first, take particular issue with the fact that school administrators are monitoring student social media when they have not actually been trained to do so⁷³ and should be focusing on their primary duty of teaching students.⁷⁴ Monitoring social media can also be very

68. Entis, *supra* note 50.

69. *Id.*

70. See Gunther, *supra* note 49, at 536.

71. See Buckley, *supra* note 53, at 877; see generally *Katz v. United States*, 389 U.S. 347 (1967) (establishing that Fourth Amendment privacy protections apply when a person subjectively expects to keep certain material private and when society would recognize that expectation as reasonable).

72. See *Educator Searches*, *supra* note 5; see also *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985) (establishing a modified standard for Fourth Amendment searches of students).

73. Roscorla, *supra* note 11.

74. *Id.*

time consuming and expensive,⁷⁵ and these resources could be used more beneficially for the students and the school itself.⁷⁶

Opponents of social media monitoring mostly focus on the students' interests in maintaining privacy as well as their constitutional rights, particularly rights under the First and Fourth Amendments.⁷⁷ As famously noted in *Tinker v. Des Moines*,⁷⁸ “[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁷⁹ Therefore, although schools may have an interest in monitoring what students are doing,⁸⁰ students do not lose all of their rights simply to satisfy the school interests served by monitoring student social media.⁸¹

a. First Amendment Violations

Social media monitoring practices implicate First Amendment rights, as they apply to public-school students. The First Amendment to the U.S. Constitution states: “Congress shall make no law . . . abridging the freedom of speech.”⁸² A student is clearly afforded this right,⁸³ but rights to freedom of speech and expression would be substantially limited if schools were able to punish students not only for their public posts on social media, but also for private account communications.⁸⁴ Although First Amendment rights still apply to students, these rights are limited in the school setting.⁸⁵ The standard for evaluating student speech was established in *Tinker v. Des Moines*, which concluded that student speech can be restricted only when it “materially and substantially disrupt[s] the work and discipline of the school.”⁸⁶ A

75. See, e.g., Stephens, *supra* note 49 (discussing the Alabama school district that hired a security firm for \$157,000 to investigate student social media accounts, which led to the expulsion of fourteen students); Roscorla, *supra* note 11 (noting that, depending on their size, universities can spend between \$8,000 to \$10,000 on social media monitoring services and education on best social media practices from a company called Fieldhouse Media).

76. See Roscorla, *supra* note 11.

77. See generally *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128 (D. Minn. 2012); Hurst, *supra* note 48, at 207.

78. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

79. *Id.* at 506.

80. See Hurst, *supra* note 48, at 209.

81. See generally *Tinker*, 393 U.S. 503.

82. U.S. CONST. amend. I.

83. See *Tinker*, 393 U.S. at 506.

84. See Hurst, *supra* note 48, at 218–19.

85. See, e.g., *Tinker*, 393 U.S. at 506 (holding that a school could not punish students for wearing black arm bands in protest of the Vietnam War because there were no facts showing that the wearing of the arm bands caused a material or substantial disruption within the school).

86. *Id.* at 513.

school's ability to restrict speech that occurs outside of the school is more limited.⁸⁷ Therefore, when an administrator forces students to reveal their password-protected social media information, this protected information would likely not be causing a "material and substantial interference" within the school.⁸⁸ By allowing school officials to engage in social media monitoring, students' rights to express themselves through their chosen social media platform would be severely abridged.⁸⁹

b. Fourth Amendment Violations

Social media monitoring also implicates Fourth Amendment concerns. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁹⁰ The Fourth Amendment protects individuals from unreasonable searches by government actors.⁹¹ The relevant standard for determining whether a search occurred, and, therefore, whether the Fourth Amendment protections apply, was established by Justice Harlan's concurring opinion in *Katz v. United States*.⁹² In order for the Fourth Amendment protections to apply, the two-prong *Katz* test requires: (1) that a person has exhibited a subjective expectation of privacy, and (2) that this expectation of privacy is one in which society will recognize as reasonable.⁹³ If a search has occurred, the search must be "reasonable" to prevent a Fourth Amendment violation.⁹⁴ Courts have held that Fourth Amendment privacy protections extend to electronic mediums.⁹⁵ For example, in *R.S. v. Minnewaska Area School District*, the Court concluded R.S. had a reasonable expectation of privacy to her

87. See *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012).

88. See Hurst, *supra* note 48, at 216.

89. See *supra* Part II.C.2.a.

90. U.S. CONST. amend. IV.

91. See *id.*; *New Jersey v. T.L.O.*, 469 U.S. 325, 372 (1985) (explaining that Fourth Amendment protections apply when the actor is a public school official).

92. *Katz v. United States*, 389 U.S. 347 (1967). The standard for determining whether a search has occurred from the *Katz* concurrence was formally adopted by a majority of the Supreme Court in *Smith v. Maryland*. *Smith v. Maryland*, 442 U.S. 735, 739–41 (1979).

93. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

94. See U.S. CONST. amend. IV. Although a search is presumed reasonable if a warrant is obtained, there are exceptions to the warrant requirement. See generally *Carroll v. United States*, 267 U.S. 132 (1925) (providing exception to the warrant requirement for searches of vehicles); *Washington v. Chrisman*, 455 U.S. 1 (1982) (providing exception to the warrant requirement for contraband that is in plain view).

95. See *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012); see also *Riley v. California*, 134 S. Ct. 2473 (2014) (holding that when a cell phone is seized from a person after an arrest, a warrant is required before searching the cell phone).

Facebook account information because that information was hidden behind a password.⁹⁶ Therefore, investigation of this information constitutes a search and would need to be reasonable to comply with Fourth Amendment protections.⁹⁷

The Fourth Amendment's protections extend to students in an effort to protect them, specifically, from invasions by public school officials,⁹⁸ but this right is not absolute as applied to students in a public school setting.⁹⁹ The reasonableness requirement for a public school official's search of a student in a school setting is a lower standard than the standard applicable in most circumstances.¹⁰⁰ In *New Jersey v. T.L.O.*,¹⁰¹ the Supreme Court held that school officials need only reasonable cause to search a student.¹⁰² The reasonable cause requirement can be met by demonstrating that the search was "justified at its inception" and that the search was "reasonably related in scope to the circumstances which justified the interference in the first place."¹⁰³ To meet these requirements, an official needs reasonable grounds to believe that evidence will be found, and the search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."¹⁰⁴ Based on these standards, one could argue that, even if school officials were to find incriminatory evidence within a student's social media account, usually, a search through the student's password-protected material would be excessively intrusive.¹⁰⁵ Furthermore, any information found would likely not be interfering with the order of the school enough to outweigh the intrusiveness of the search and the student's legitimate privacy interests.¹⁰⁶ Students may be protecting private content with their social media password, and allowing a school administrator to search a student's private account may amount to a "fishing expedition" to find any evidence of a potential violation.¹⁰⁷

96. *R.S.*, 894 F. Supp. 2d at 1142.

97. *Id.*

98. *See New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985).

99. *See T.L.O.*, 469 U.S. at 340. Opponents to social media monitoring have argued that these reduced standards apply only to minors or students in K-12, so these practices would be even more egregious in post-secondary schools. *See, e.g.,* Hurst, *supra* note 48, at 216; Edwin Darden, *Free Speech and Public Schools*, CTR. FOR PUBLIC EDUC. (Apr. 5, 2006), <http://bit.ly/2dKmhog>.

100. *See generally T.L.O.*, 469 U.S. 325 (establishing the standard of reasonableness for Fourth Amendment searches in a school setting).

101. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

102. *Id.* at 340.

103. *Id.* at 341.

104. *Id.* at 342.

105. *See Hurst, supra* note 48, at 216.

106. *See id.*

107. *See Entis, supra* note 50.

In order to circumvent the lack of ability to search a student's social media account, the school officials could ask for the student's username and password, and, therefore, have consent to search the account.¹⁰⁸ Consent given to a public official to conduct a search, however, must be voluntary.¹⁰⁹ The Court in *Schneckloth v. Bustamonte*¹¹⁰ stated that "consent must not be coerced, by explicit or implicit means, by implied threat or covert force," and, if the consent is coerced, then the government intrusion is unreasonable and is in violation of the Fourth Amendment.¹¹¹ Therefore, when school officials request students' passwords under the threat of discipline or removal from an athletic team, the students who comply are not voluntarily consenting to the social media search.¹¹² For the aforementioned reasons, if school officials had the ability to search a student's social media account, students' privacy rights under the Fourth Amendment would be substantially limited.

c. Privacy Concerns

Although there is not a specific right to privacy stated in the Constitution, the Supreme Court, in *Griswold v. Connecticut*,¹¹³ determined that the right to privacy is embedded in the Constitution and can be inferred from the Constitution's enumerated rights, such as the First Amendment right to freedom of speech and the Fourth Amendment right to be free from unreasonable searches and seizures.¹¹⁴ Therefore, like adults, students have a constitutional right to privacy under both the Fourth Amendment's protections of individuals' reasonable expectations of privacy in their persons and things,¹¹⁵ and the First Amendment

108. A well-established exception to the warrant requirement of the Fourth Amendment is when "a search is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

109. *See Schneckloth*, 412 U.S. at 219 (discussing the standards for voluntary consent to a Fourth Amendment search).

110. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

111. *Id.* at 228.

112. *See, e.g., R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1134 (D. Minn. 2012) (explaining that when R.S. hesitated in giving her passwords to school officials, she was threatened with detention before she consented). *See also Univ. of Colo. ex rel. Regents of the Univ. of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (concluding that consent given by student athletes was not given voluntarily because the failure to consent was conditioned upon the denial of government benefits and participation in intercollegiate athletics).

113. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

114. *See id.* at 484.

115. *See supra* Part II.C.2.b.

protections for those who choose to exercise their freedom of speech anonymously.¹¹⁶

Anonymous speech is exceptionally prevalent on a forum like the Internet where communication often occurs through usernames that may not reveal the user's true identity.¹¹⁷ Online anonymity is important for those who want to exercise their freedom of expression.¹¹⁸ Anonymous forums often encourage participation and "promot[e] a greater sense of community identity, [where] users don't have to worry about standing out," which can often inspire more creative thinking.¹¹⁹ If students were to lose this protection, students' autonomy and individuality may be substantially affected in their Internet usage, because their true identities would be revealed.¹²⁰ Allowing school officials to practice social media monitoring of students' accounts severely limits students' ability to express themselves openly on these forums, thereby negatively affecting open communications through online mediums.¹²¹

If school officials continue to infringe on students' social media privacy interests, the educational process may suffer due to students' distrust and anger toward the officials.¹²² Moreover, when officials snoop through a student's personal, private messages on their social media accounts, students are faced with potential embarrassment, which could impair the students' education.¹²³ Therefore, students have legitimate concerns when it comes to school officials' monitoring or accessing their social media accounts, and many of these practices could potentially lead to violations of students' First Amendment, Fourth Amendment, and privacy rights.

116. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous... is an aspect of the freedom of speech protected by the First Amendment.").

117. Grant, *supra* note 32, at 196.

118. See Gabriella Coleman, *Anonymity Online Serves Us All*, N.Y. TIMES (Aug. 20, 2014, 12:19 PM), <http://nyti.ms/2e69nMx> (noting that online speech allows for candid discussions).

119. Maria Konnikova, *The Psychology of Online Comments*, NEW YORKER (Oct. 23, 2013), <http://bit.ly/2dsD4Ih>.

120. Grant, *supra* note 32, at 197–98.

121. See Buckley, *supra* note 53, at 876. But see Konnikova, *supra* note 119 (discussing the fact that online anonymity often leads to a "culture of aggression and mockery that hinders substantive discourse").

122. Entis, *supra* note 50.

123. See, e.g., *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1135 (D. Minn. 2012) (explaining that R.S. felt "depressed, angry, scared, and embarrassed" after school officials went through her Facebook account, so she did not return to school for two days and fell behind on her school work).

D. *Password Protection Legislation*

Americans' frequent use of social networking sites,¹²⁴ coupled with the potential privacy invasions caused by educators' undefined ability to monitor this technology,¹²⁵ has created the need for new laws in this area.¹²⁶ In reaction to some of these occurrences,¹²⁷ state legislatures have begun to enact statutes that regulate or prohibit certain types of social media monitoring and aim to protect student privacy.¹²⁸ In 2012, the trend of legislating on the issue of social media monitoring began with Delaware's enactment of the Higher Education Privacy Act¹²⁹ (HEPA), which prohibited academic institutions from requesting social media access information from a student or applicant.¹³⁰ The state representative who introduced the legislation, Darryl Scott, indicated that he was intending to protect students' rights and allow them to post and share freely on their accounts.¹³¹ Three other states—California, Michigan, and New Jersey—followed Delaware's lead by enacting similar statutes of their own in 2012.¹³² Another five states followed suit in 2013.¹³³

Another proposed solution to this problem was federal legislation.¹³⁴ In February 2013, Congressman Eliot Engel introduced the Social Networking Online Protection Act (SNOA),¹³⁵ which prohibited employers and academic institutions of higher education from requesting social media account access information from employees, students, and applicants and prohibited discipline for an individual who refused to give up their password.¹³⁶ This bill was seemingly under-inclusive, as it did not cover many of the methods of social media monitoring and was

124. *See supra* Part II.A.1.

125. *See supra* Part II.C.2.

126. *See* Goodrum, *supra* note 31, at 153.

127. *See supra* Part II.B.

128. Hurst, *supra* note 48, at 219, 224; *see* Goodrum, *supra* note 31, at 147.

129. DEL. CODE ANN. tit. 14, § 8103 (2015).

130. Goodrum, *supra* note 31, at 147.

131. *Id.* at 148.

132. CAL. EDUC. CODE § 99121 (Deering 2015); MICH. COMP. LAWS SERV. § 37.274 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015).

133. *See* ARK. CODE ANN. § 6-60-104 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); UTAH CODE ANN. § 53B-25-201 (LexisNexis 2015).

134. Hurst, *supra* note 48, at 220.

135. Social Networking Online Protection Act, H.R. 537, 113th Cong. (2013).

136. *Id.*

targeted at only higher education institutions.¹³⁷ Ultimately, this bill died in a subcommittee and was not enacted.¹³⁸

Yet, states have continued the trend of enacting legislation to protect individuals' privacy. Currently, a total of 15 states have enacted statutes restricting educational institutions' ability to request students' social media account access information.¹³⁹ Some states have attempted to continue in this protective direction in 2016, where 15 more states have considered this type of legislation with respect to employers, academic institutions, or both.¹⁴⁰ However, many of these bills have failed.¹⁴¹

III. ANALYSIS

A. *Current State Legislation*

The prevalent use of social media throughout this country¹⁴² paired with the legal questions raised by the monitoring practices discussed in this Comment¹⁴³ have prompted state legislatures to consider and, in some instances, enact laws regarding password protection of social media accounts for both students and employees.¹⁴⁴ Due to the significant infringement on the rights and privacy of students caused by these practices,¹⁴⁵ password protection has received more attention,¹⁴⁶ and state legislators have clearly begun to recognize the need for protection of students and their accounts.¹⁴⁷ However, as demonstrated by the lack of uniformity throughout the currently existing state statutes, legislators throughout the states disagree as to the degree of protection that statutes should afford students.¹⁴⁸ Although all of the state statutes

137. See Gunther, *supra* note 49, at 534–35 (explaining the inadequacies of the Social Networking Online Protection Act).

138. *H.R. 537 - Social Networking Online Protection Act*, CONGRESS.GOV, <http://bit.ly/2deHjUy> (last visited Sept. 12, 2016) (indicating that the last action was a referral to a subcommittee of the United States House of Representatives in April 2013).

139. *State Laws*, *supra* note 12. States have also addressed social media access with respect to employers, arguably more aggressively, with twenty-five states enacting prohibitive legislation. *Id.*

140. *Access to Social Media Usernames and Passwords: 2012–2016 Legislation*, NAT'L CONF. OF STATE LEGISLATURES, (July 6, 2016), <http://bit.ly/2cSsICr> [hereinafter *2012-2016 Legislation*].

141. *Id.*

142. See *supra* Part II.A.1.

143. See *supra* Part II.C.2.

144. See *supra* Part II.D.

145. See *supra* Part II.C.2.

146. Hurst, *supra* note 48, at 222.

147. See *id.* at 220.

148. See *infra* Part III.A.1.

vary in their operation and effect,¹⁴⁹ the statutes all tend to have similar sections: scope, retaliation prohibitions, enforcement mechanisms, and exceptions.

1. State Legislation Provisions

- a. Scope of Restrictions

The scope of the statutes varies widely between all of the states.¹⁵⁰ Although some general provisions are similar, many of the statutes vary with respect to how students are protected, what practices are restricted, and what types of accounts are covered.¹⁵¹

Every state statute contains some general restriction preventing school administrators from requiring students to provide access information for their social media account,¹⁵² but restrictions on other social media monitoring practices vary. Some states have no other type of restriction, covering only situations in which administrators require students to hand over their password.¹⁵³ Other states have broader prohibitions covering other monitoring practices.¹⁵⁴ About half of the statutes protect students from the practice of “shoulder surfing.”¹⁵⁵ Very few states have provisions in their statutes that prohibit compulsory

149. See Dancel, *supra* note 55, at 136.

150. See *infra* Part III.A.1.a.

151. See *infra* Part III.A.1.a.

152. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8103 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.274 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-2, 16-103-3 (2015); UTAH CODE ANN. § 53B-25-201 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

153. See, e.g., 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); UTAH CODE ANN. § 53B-25-201 (LexisNexis 2015).

154. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8103 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS § 37.274 (2012); N.J. STAT. ANN. § 18A:3-30 (West 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-2, 16-103-3 (2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

155. See, e.g., CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8103 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.274 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-2, 16-103-3 (2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016). See *supra* Part II.B for an explanation of “shoulder surfing.”

friending of school agents¹⁵⁶ or that prohibit forcing students to change their privacy settings to allow third-party monitoring of their accounts.¹⁵⁷ Delaware's legislation, which was one of the first statutes enacted in this area, is one of the statutes with the most coverage.¹⁵⁸ The Delaware statute prohibits schools from using software that tracks students' social media accounts and prevents school officials from accessing students' social media accounts through a third person.¹⁵⁹ New Jersey's statute has one of the broadest provisions—it prohibits administrators from even inquiring whether a student has a social media account.¹⁶⁰ All in all, the scope and specificity of state legislation vary widely and provide many different levels of protections for the students in different states.

Another inconsistency between state statutes is the extent to which students are actually protected. Most statutes define academic institutions as only higher education or post-secondary institutions and, therefore, protect only college students.¹⁶¹ Three states' statutes, however, go even further by protecting college students as well as students in secondary and elementary schools.¹⁶² In fact, both Louisiana and Michigan's legislation even apply to officials in kindergartens, nursery schools, and certain testing services.¹⁶³ Thus, the states that cover a wider range of monitoring practices are often not the same states that broadly apply their statutes to more levels of students, creating disparities between the rights of students in different states and leaving students in need of full and consistent protection from these practices.

Finally, the existing state legislation also differs in how broadly or narrowly it defines the types of accounts to which the legislation applies. In some states, statutes protect student accounts that are referred to as "personal internet account[s]" or "personal online account[s]," which are

156. *See, e.g.*, ARK. CODE ANN. § 6-60-104 (2015); DEL. CODE ANN. tit. 14, § 8103 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-2, 16-103-3 (2015); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016).

157. *See, e.g.*, ARK. CODE ANN. § 6-60-104 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-2, 16-103-3 (2015).

158. DEL. CODE ANN. tit. 14, § 8103 (2015).

159. *Id.*

160. N.J. STAT. ANN. § 18A:3-30 (West 2015).

161. *See, e.g.*, ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8102 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-1 (2015); UTAH CODE ANN. § 53B-25-102 (LexisNexis 2015); VA. CODE ANN. § 23-2.1:3 (2016).

162. LA. REV. STAT. ANN. § 51:1952 (2015); MICH. COMP. LAWS SERV. § 37.272 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016).

163. LA. REV. STAT. ANN. § 51:1952 (2015); MICH. COMP. LAWS SERV. § 37.272 (LexisNexis 2015).

broadly defined as accounts used for personal communication, thereby protecting almost any online account.¹⁶⁴ However, other state statutes are more specific about their restrictions, stating that they apply only to social networking or social media accounts.¹⁶⁵

The varying scopes of the state statutes create disparate treatment for students throughout the country. In only a few states are students in secondary school actually protected by these statutes, and most states seem to be concerned only with administrators' requesting access information, but not with the other monitoring practices. State legislation in some states also fails to adequately define which accounts are covered by the legislation.¹⁶⁶ Overall, the inconsistent and ill-defined legislation throughout the country leaves most students in need of more meaningful and uniform protection from schools' invasive social media policies.

b. Retaliation Prohibitions

The retaliation prohibitions, usually included within the restrictions section of the statutes, are similar throughout the majority of the state statutes.¹⁶⁷ These provisions mostly prohibit schools from taking any type of disciplinary action—including expulsion, suspension, or failing to admit a prospective student—in response to a student's refusal to provide a school administrator with access to their social media accounts.¹⁶⁸ Other states' legislation goes further by preventing officials

164. LA. REV. STAT. ANN. § 51:1952 (2015) (defining "personal online account" as "an online account that the . . . student or prospective student uses exclusively for communications"); UTAH CODE ANN. § 53B-25-102 (LexisNexis 2015) (defining "personal internet account" as "an online account that is used by a student or prospective student exclusively for personal communications"); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016) (defining "personal internet account" as an "Internet-based account that is created and used by an individual exclusively for purposes of personal communications").

165. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); DEL. CODE ANN. tit. 14, § 8102 (2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-1 (2015); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016); VA. CODE ANN. § 23-2.1:3 (2016).

166. Compare *supra* note 164 and accompanying text with *supra* note 165 and accompanying text.

167. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8104 (2015); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.274 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-4 (2015); UTAH CODE ANN. § 53B-25-201 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

168. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8104 (2015); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV.

from excluding students' participation in school activities¹⁶⁹ or from even threatening a student with discipline for refusal to provide access to a social media accounts.¹⁷⁰ Only two states with this social media monitoring legislation, Illinois and Virginia, have no provision prohibiting schools from taking retaliatory action against a student who refuses to grant administrators access to the student's social media accounts.¹⁷¹

c. Enforcement Mechanisms

State statutes protecting students' social media rights have varying statutory enforcement mechanisms, which range from criminal enforcement mechanisms to civil enforcement mechanisms.¹⁷² For example, Michigan makes a violation of its statute a criminal misdemeanor that carries a fine of no more than \$1,000,¹⁷³ and Wisconsin creates a civil fine for a violation.¹⁷⁴

The most common mechanism used by several states' statutes provides for a civil action and damages for students affected by the prohibited practices.¹⁷⁵ A few states provide for reasonable attorney's fees and court costs for these actions.¹⁷⁶ On the other hand, many of the states that provide for a civil action have damage caps.¹⁷⁷ The caps are generally set at \$1,000 or lower.¹⁷⁸ Utah's statute, however, sets a cap on

§ 37.274 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (2013); R.I. GEN. LAWS § 16-103-4 (2015); UTAH CODE ANN. § 53B-25-201 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016).

169. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016).

170. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8104 (2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-4 (2015); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016).

171. See 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); VA. CODE ANN. § 23-2.1:3 (2016).

172. See *infra* notes 173–82 and accompanying text.

173. MICH. COMP. LAWS SERV. § 37.278 (LexisNexis 2015).

174. WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

175. See, e.g., MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-32 (West 2015); OR. REV. STAT. ANN. § 326.554 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-6 (2015); UTAH CODE ANN. § 53B-25-301 (LexisNexis 2015).

176. See, e.g., MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-32 (West 2015); OR. REV. STAT. ANN. § 326.554 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-6 (2014).

177. See, e.g., MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-32 (West 2015).

178. See, e.g., MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-32 (West 2015).

civil damages at only \$500 and does not provide for any attorney's fees or costs.¹⁷⁹ In many states with these low damage caps, but in particular, Utah, following through with an action for a school's violation of the statute would be costly in comparison to the damages that could be awarded for a winning case. High, uncompensated attorney's fees compared to the low damage cap would make it unlikely that a student and his or her parents or guardians would actually take any action for a violation in a state with these limits. The limitations on the enforcement mechanisms, therefore, make the enforcement mechanism relatively ineffective.¹⁸⁰

Furthermore, 8 of the 15 statutes do not create any enforcement mechanism for violation of the restrictions.¹⁸¹ Although the statutes may prohibit social media monitoring practices, without an enforcement mechanism, violation of the statute by the school or school official would not necessarily result in any repercussions, removing some deterrent effect of the statute and rendering the statute virtually ineffective.¹⁸² Therefore, schools in the states that lack explicit enforcement mechanisms may be more willing to continue to use the social media monitoring methods regardless of the existence of a statute.

d. Exceptions

The remaining provisions in states' legislation are primarily exceptions to the general restrictions on schools' handling of social media. The main exception that exists in the majority of the statutes is an exception for information that is publicly available or in the public domain.¹⁸³ This "public domain" exception provides that the restrictions in the statute do not apply to information that is visible to the public and does not require any password disclosure or other action by the student in order to observe the information.¹⁸⁴

179. UTAH CODE ANN. § 53B-25-301 (LexisNexis 2015).

180. See Dancel, *supra* note 55, at 152–53.

181. See ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8103 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); LA. REV. STAT. ANN. § 51:1954 (2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016); VA. CODE ANN. § 23-2.1:3 (2016).

182. See Dancel, *supra* note 55, at 152.

183. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.276 (LexisNexis 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-5 (2015); UTAH CODE ANN. § 53B-25-202 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

184. See, e.g., ARK. CODE ANN. § 6-60-104 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-

Several other exceptions exist in the statutes. An exception for social media monitoring of student use of “electronic communications devices” or “electronic equipment” that belong to the school or accounts opened by or at the behest of the school is another common exception that appears in many of the statutes.¹⁸⁵ One exception that appears in several statutes, but in varying ways, involves specific investigations. Some states exclude investigations from the statutory restrictions on school handling of students’ social media accounts, but, in order for investigations to qualify as an exception, they usually must be accompanied by some type of specific information showing that the student, or his or her account activity, violated a law or school rule.¹⁸⁶

2. Is Legislation Needed?

Although state legislation differs and does not provide full coverage for any student,¹⁸⁷ the states that have legislated in this area provide at least some protection for students and their rights and privacy. Currently, however, only fifteen states have any legislation to address schools’ ability to monitor, access, or investigate students’ social media accounts,¹⁸⁸ leaving students in the rest of the country unprotected.

401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.276 (LexisNexis 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-5 (2015); UTAH CODE ANN. § 53B-25-202 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

185. *See, e.g.*, ARK. CODE ANN. § 6-60-104 (2015); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.276 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-5 (2015); UTAH CODE ANN. § 53B-25-202 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

186. *See, e.g.*, CAL. EDUC. CODE § 99121 (Deering 2015) (providing an exception so as not to affect an “educational institution’s existing rights and obligations to protect against and investigate alleged student misconduct or violations of applicable law and regulations”); DEL. CODE ANN. tit. 14, § 8105 (2015) (providing an exception for “investigations conducted by an academic institution’s public safety department or police agency who have a reasonable articulable suspicion of criminal activity, or to an investigation, inquiry or determination conduct pursuant to an academic institution’s threat assessment policy or protocol”); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016) (providing an exception for a school that is “conducting an investigation or requiring a student to cooperate in an investigation if there is specific information about activity on student’s account on a social networking website that violates a school disciplinary rule or policy”); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015) (providing an exception for conducting an investigation to ensure compliance with applicable law or student conduct if the investigation is “based on the receipt of specific information about activity associated with a personal social media account”).

187. *See supra* Part III.A.1.

188. *See* ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8103 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.274 (LexisNexis 2015); N.J.

Although more states have considered protective legislation in the past year, the proposed laws have largely failed to pass.¹⁸⁹

However, some scholars have argued that the media sensationalized the current student social media monitoring situation with a few high-profile instances,¹⁹⁰ which caused the widespread concern with these monitoring techniques.¹⁹¹ Others have argued that this conduct does not occur frequently enough to create a problem that must be solved.¹⁹² On the other hand, some scholars still call for action to protect students.¹⁹³

Whether the practices are commonplace or not, the social media monitoring that has already occurred throughout this country¹⁹⁴ is more than sufficient to justify the enactment of legislation to put an end to this intrusion. If the law remains silent with regard to monitoring practices, these practices are likely to become more common and more invasive.¹⁹⁵ Social media is so frequently used among the younger generations¹⁹⁶ that allowing educators free reign in the area of social media monitoring would expose many students to intrusive behavior. Due to the useful information school officials may uncover through social media monitoring, the incentives to continue these practices will remain and potentially increase, unless appropriate action is taken.¹⁹⁷ Therefore, though the arguments that social media monitoring is not common practice may be true, the constitutional rights implications alone are enough to demonstrate the need for legislation. Students should not be exposed to potential rights violations merely because they attend school.

Besides legislation, the only method of preventing continued use of social media monitoring is judicial review. Courts have not actually addressed this issue in depth, but, even so, the role of the judiciary is to interpret and apply existing law.¹⁹⁸ Since no relevant statutes currently exist in many of the states, courts have no statutory law to apply.¹⁹⁹

STAT. ANN. § 18A:3-30 (West 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-2, 16-103-3 (2013); UTAH CODE ANN. § 53B-25-201; WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016); N.H. REV. STAT. ANN. § 189.70 (LexisNexis 2016); VA. CODE ANN. § 23-2.1:3 (2016).

189. See *2012–2016 Legislation*, *supra* note 140.

190. See *supra* notes 48–50.

191. See Gunther, *supra* note 49, at 540; Dancel, *supra* note 55, at 154.

192. See Gunther, *supra* note 49, at 540.

193. See Dancel, *supra* note 55, at 154.

194. See *supra* notes 48–56 and accompanying text (explaining social media investigation events that have occurred more recently).

195. Hurst, *supra* note 48, at 221.

196. See *supra* Part II.A.1.

197. Goodrum, *supra* note 31, at 140.

198. *Id.* at 139.

199. *Id.*

Although schools' monitoring practices raise constitutional issues that the courts would likely consider, schools and school employees may be able to raise a qualified immunity defense in response to these constitutional claims because of the lack of clearly established law in this area.²⁰⁰ Therefore, legislation is required to regulate schools' handling of social media. Having a clearly established law will bar school employees from avoiding liability through qualified immunity defenses²⁰¹ and will make educational institutions cognizant of what is and is not allowed to avoid later litigation over whether the administrators were justified in their actions. An established law in this area will also give the judiciary law to apply when it comes to judicial review of this conduct and will aid in protection of students' rights without having the judiciary legislate on its own.²⁰²

B. *Potential Solutions*

1. Balancing Interests of Schools and Students

The resolution of this issue should begin by recognizing the important interests of both sides of the dispute.²⁰³ Schools have a substantial interest in maintaining safety and discipline within the school, so school officials support their monitoring of students' social media accounts by arguing that their actions are necessary to uphold school security and foster a productive learning environment.²⁰⁴ On the other hand, students have an interest in protecting their constitutional rights and their privacy.²⁰⁵ Although school officials may have a legitimate interest in monitoring students' use of social media, the importance of this interest does not mean that students' privacy and rights should be diminished as a result.

School officials may need to ensure discipline within their walls; however, the level of intrusion created by searching a student's password-protected account is much too high in comparison to a school official's interest in the information that may be found. Although these competing interests may require a fact-specific analysis for a particular case, generally, content posted behind the password protections of a

200. *Id.* at 148. Qualified immunity is an affirmative defense that can be pled by public officers. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1942). This defense applies only when the officer violates a clearly established statutory or constitutional law that a reasonable person would have known, and a reasonable officer would know that his conduct would violate that clearly established law. *Id.* at 818.

201. *See Harlow*, 457 U.S. at 818.

202. *Id.* at 139.

203. *See supra* Part II.C.

204. *See supra* Part II.C.1.

205. *See supra* Part II.C.2.

student's social media account is likely not creating any type of disruption to the school, and, therefore, administrators have no significant, legitimate reason as to why they would need to infringe on the student's rights just to search an account.²⁰⁶ In regard to prospective students, what a student posts on his or her social media account has little bearing on the student's abilities or performance,²⁰⁷ and the content found on a student's social media account will, or, at least, should have little effect on the student's admission.²⁰⁸ Therefore, the benefits of school administrators' monitoring a student's social media account are usually outweighed by the legitimate interests of students in their constitutional rights and privacy.²⁰⁹

Additionally, a school can address social media related concerns, such as discipline issues or safety threats, by utilizing less intrusive alternative means.²¹⁰ For example, students' social media and Internet use can be monitored by their parents, rather than by a school administrator.²¹¹ Parents would also likely prefer this method to ensure

206. Hurst, *supra* note 48, at 218. See Darden, *supra* note 99 (reasoning that students have broad First Amendment protections to express themselves on the Internet and noting that there is a wide gap “between speech that is offensive, obnoxious, and insulting—all of which is protected—and speech that places the safety of others in jeopardy”).

207. Goodrum, *supra* note 31, at 148.

208. Gunther, *supra* note 49, at 539. See also Natasha Singer, *They Loved Your G.P.A. Then They Saw Your Tweets*, N.Y. TIMES (Nov. 9, 2013), <http://nyti.ms/2dsDMVF> (quoting a social media lawyer who believes that investigating social media accounts of prospective students is a “huge problem,” especially due to the fact that colleges may identify the wrong account or use false or misleading information from a social media account, which leads to unfair treatment of prospective students).

209. Compare *supra* Part II.C.1 (discussing the interests of schools in monitoring students' social media to maintain order and discipline within the school and to preserve the school's reputation), with *supra* Part II.C.2 (discussing the constitutional rights and privacy interests of students in preventing disclosure of their social media information). But see Jerome Maisch, *3 Big Reasons Universities Need a Social Media Monitoring Tool*, DIGIMIND (Feb. 10, 2014), <http://bit.ly/2egffCs> (explaining that social media monitoring is necessary at the university level for several reasons: to keep track of and quickly eliminate negative comments regarding the school, to enhance the student experience by responding and reacting to what students are saying on social media, and to attract prospective students); Goodrum, *supra* note 31, at 140 (noting that social media monitoring and investigating has proved useful for educational institutions, and even employers, in gaining a clearer picture of a candidate); Hurst, *supra* note 48, at 209 (arguing that social media monitoring furthers schools' interests in maintaining discipline and safety within the school and addressing concerns such as cyber-bullying and drug trafficking).

210. See *infra* notes 211–13 and accompanying text.

211. See, e.g., Monica Anderson, *Parents, Teens and Digital Monitoring*, PEW RESEARCH CTR. (Jan. 7, 2016), <http://pewrsr.ch/2dJMdJ5> (describing a survey of parents of teenagers that shows that these parents take a wide variety of actions to monitor their teen's online activity and to encourage their child to use social media appropriately—from checking their child's social media accounts and website history to talking to their child about what is a responsible way to use social media and the Internet).

that their children's privacy rights remain intact.²¹² Furthermore, an issue that is serious enough may lead to a criminal investigation, during which a law enforcement officer would be able to gain access to the student's social media account if probable cause existed, which would help protect both the law and the student's constitutional rights.²¹³

Upon balancing both the school officials' interests in maintaining order within their school against the students' interests in maintaining privacy rights, the need to protect students' constitutional rights seems to outweigh the school officials' interests in social media monitoring in most circumstances. Although students' rights within a school setting are somewhat abridged,²¹⁴ the intrusion of social media monitoring techniques is still too great,²¹⁵ especially considering the potential for alternative and perhaps less intrusive means to maintain order through social media. Therefore, in most situations, a school's desire to maintain safety and discipline is likely not significantly furthered by being able to monitor student social media accounts, and the students' interests in preserving their rights and privacy outweigh the school's interests.

2. State Legislation is Inadequate

The current state of the law fails to provide adequate protection to students. At this point, many students remain unprotected, as they must wait for their state to pass legislation in this area²¹⁶ or live in states in which the legislation that has been passed is inadequate or is lacking in the level of protection afforded to students.²¹⁷ The variations in state statutes coupled with the fact that many states have not legislated on the

212. See, e.g., Eun Kyung Kim, *Safety or Snooping? Schools Start Monitoring Social Media Accounts of Students*, TODAY (Sept. 3, 2015, 8:29 AM), <http://on.today.com/2dJRCRa> (stating that some parents believe that social media monitoring is a "major violation" of the students' privacy, and the school should be "let[ting] the parents parent"); Herold, *supra* note 48; Brown, *supra* note 2.

213. See U.S. CONST. amend. IV (stating "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be searched"). If there were probable cause of the activity, an officer could obtain a warrant to search the account, which would make the search constitutional. See *id.*; see also *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985) (explaining that Fourth Amendment prohibitions extend to search conduct by school officials); *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996) (determining that probable cause requirement extends to police officers performing searches in school settings).

214. See generally *supra* Part II.C.2 (describing the rights of students that are affected by social media monitoring practices).

215. Hurst, *supra* note 48, at 216.

216. See *State Laws*, *supra* note 12 (showing that only fifteen states have passed legislation concerning student social media privacy, which leaves students in thirty-five states unprotected).

217. See *supra* Part III.A.1.

issue of social media monitoring causes disparate treatment of students throughout the country.

Students should be treated equally in every state. Social media and the rest of the Internet do not face boundaries triggered by state lines, and the regulation of these accounts should also not be bound by state lines.²¹⁸ Legislation in this area should be uniform because no students in any state should have to surrender their rights to avoid embarrassment or penalization.²¹⁹

Therefore, the more uniform way to protect students equally in every state would be to enact federal legislation that provides these protections. The practices at issue implicate students' rights,²²⁰ and students should be equally protected throughout the country, which would require action at the federal level. The United States Congress could look to current state laws as a model to determine the effect and effectiveness of different types of provisions. In order to ensure the legislation provides adequate and effective coverage for every student throughout the country, federal legislators can also adjust the provisions in state laws by redefining students who are covered, practices that are covered, enforcement mechanisms, and appropriate exceptions. Federal legislation would prevent the inequities that currently exist throughout the states in this area, protect students and their constitutional and privacy rights, and provide the best balance when it comes to school interests and student interests. Although education is generally an area of state concern, the constitutional implications triggered by the social media monitoring techniques,²²¹ compounded by the lack of uniform protection in state legislation,²²² makes federal input in this area especially necessary.

3. Federal Legislation as the Proposed Solution

New legislation is required to ensure privacy protections for students, while still balancing the interests of educational institutions,²²³ and federal legislation is the best way to uniformly protect students' rights. The few state statutes that currently exist are not enough to protect students, but these statutes can serve as a model for future federal legislation. Federal legislation should include many of the provisions that

218. Gunther, *supra* note 49, at 534.

219. Hurst, *supra* note 48, at 223.

220. *See supra* Part II.C.2.

221. *See supra* Part II.C.2.

222. *See supra* Part III.A.1.

223. Goodrum, *supra* note 31, at 147.

state legislation already includes, but the federal provisions should be better defined and provide more meaningful protection of students.

a. Scope of Restrictions

When it comes to the scope of what restrictions are placed on school officials concerning social media monitoring techniques, many of the state statutes fall short. As discussed in Part III.A.1.a of this Comment, all of the state statutes restrict school agents from requiring a student to disclose his or her password or access information for a social media site.²²⁴ However, only a few of the statutes prohibit other social media monitoring techniques.²²⁵ Because there are several ways to investigate private information on a student's account besides simply obtaining their password, a statute must prohibit all monitoring methods to adequately protect students' privacy. Therefore, federal legislation should prohibit forced consent, shoulder surfing, compulsory friending, requiring students to use certain privacy settings, and the installation of software to allow for third-party monitoring.

Existing state statutes are also under-inclusive when it comes to which students are protected. The majority of the state statutes apply only to students at the post-secondary level, and not students in secondary or elementary school,²²⁶ leaving younger students susceptible to privacy violations by their school. As discussed previously,²²⁷ in most situations, the level of intrusion for social media monitoring is too great even for students in a school setting, and students' social media use is likely to be monitored to a certain extent by their parents, who are in a better position to oversee the student's Internet activity.²²⁸ Therefore,

224. See ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8103 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.272 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-2, 16-103-3 (2015); UTAH CODE ANN. § 53B-25-201 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

225. See *supra* Part III.A.1.a.

226. See ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8102 (2015); 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-2, 16-103-3 (2015); UTAH CODE ANN. § 53B-25-201 (LexisNexis 2015).

227. See *supra* Part III.B.1.

228. See Anderson, *supra* note 211 (describing a recent survey that shows that sixty percent of parents check their teen's social media profiles, eighty-four percent take some kind of step to monitor or restrict their child's online activities, and ninety-four percent at least speak with their child about what is appropriate activity for social media).

federal legislation should extend the protections of the existing state statutes so that students at the post-secondary, secondary, and elementary levels are protected.

Finally, the existing state statutes also vary in how they define the types of social media accounts that are protected.²²⁹ Federal legislation must precisely define what accounts are protected by the legislation to avoid any confusion. Specifically, federal legislation should protect all personal Internet accounts, rather than just social media accounts, including students' private e-mail accounts. "Accounts" should be defined as "personal," because these are the accounts in which students have a reasonable expectation of privacy, whereas an account that is school-related would likely not have a privacy expectation that was considered reasonable, because it would belong to the school. Clearly defining what accounts are protected will allow the federal statute to best serve the privacy interests of students and will provide guidance for school officials attempting to maintain discipline and order.

A more expansive federal legislative scheme will allow more students to receive adequate protection of their privacy rights. Broadening the activities that are restricted will also prevent schools from finding different ways to access students' password-protected material.

b. Retaliation Prohibitions

The majority of existing state statutes have a retaliation prohibition, and the provisions are all similar.²³⁰ Thus, this type of statutory provision is viewed, by states that have adopted the legislation, as both functional and necessary. Accordingly, a retaliation provision is necessary in federal legislation as well. The federal retaliation provision should restrict schools from disciplining students, discharging students, prohibiting students from participating in activities, failing to admit students, and penalizing students in any other way for refusing to disclose account information. One part of this provision, which is

229. See *supra* Part III.A.1.a.

230. See ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8104 (2015); LA. REV. STAT. ANN. § 51:1954 (2015); MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.278 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); N.M. STAT. ANN. § 21-1-46 (LexisNexis 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-6 (2015); UTAH CODE ANN. § 53B-25-301 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015-2016); see also 105 ILL. COMP. STAT. ANN. 75/10 (LexisNexis 2016).

included in only a few of the state statutes,²³¹ but should be included in the federal statute, is a prohibition on threatening a student with discipline for refusal to comply with account access requests from administrators. Restrictions on threats of discipline would prevent school administrators from gaining access to a student's social media account through involuntary consent, which would violate the Fourth Amendment.²³² These retaliation prohibitions will protect students from forced consent and from any repercussions imparted by the school if students refuse to give up their social media privacy.

c. Enforcement Mechanisms

As previously discussed, many of the state statutes include some type of enforcement mechanism, but these mechanisms vary greatly.²³³ Without an enforcement mechanism, school officials have no incentive to comply with the statute. However, merely having an enforcement mechanism is not enough if the mechanism is ineffective, so it must carry sufficient punishment to ensure school officials will comply. The most common mechanism used by the states is a civil action against the educational institution that results in damages and an injunction to stop the impermissible social media monitoring.²³⁴ This civil remedy is likely an effective way to ensure enforcement of the law. However, many states also impose a cap on the level of damages that can be awarded.²³⁵ Setting a damage cap can have an adverse impact on the effectiveness of the enforcement.²³⁶ If the damage cap is too low, it provides no incentive for a victim to pursue a claim because attorney's fees and court costs can be high, and damages that are capped at a low level may not cover these fees, making it more costly to pursue even a valid claim. If no victims actually pursue the claim, schools, again, have no incentive to comply with the statute. Therefore, if a damage cap is imposed, the cap needs to be high enough to make pursuit of a claim attractive. A provision that covers attorney's fees working in conjunction with a damage cap would also be an effective option, as it makes sure a valid claim would be worth

231. See ARK. CODE ANN. § 6-60-104 (2015); CAL. EDUC. CODE § 99121 (Deering 2015); DEL. CODE ANN. tit. 14, § 8104 (2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-6 (2015).

232. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); see also *supra* notes 109–113 and accompanying text.

233. See *supra* Part III.A.1.C.

234. See MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); N.J. STAT. ANN. § 18A:3-30 (West 2015); OR. REV. STAT. ANN. § 326.551 (LexisNexis 2015); R.I. GEN. LAWS § 16-103-6 (2015); UTAH CODE ANN. § 53B-25-301 (LexisNexis 2015).

235. See MD. CODE ANN., EDUC. § 26-401 (LexisNexis 2015); MICH. COMP. LAWS SERV. § 37.278 (LexisNexis 2015); UTAH CODE ANN. § 53B-25-301 (LexisNexis 2015).

236. See Dancel, *supra* note 55, at 152–53.

pursuing. These options will persuade victims to pursue valid claims, making the enforcement mechanisms, and therefore the statute, more effective.

Other enforcement mechanisms include civil and criminal fines or criminal charges,²³⁷ which would also be effective enforcement mechanisms, as they would deter school officials from pursuing social media monitoring that would violate the statute, but a civil remedy is the more common option in the current legislation and seems to be the more appropriate choice for this legislation as well. Opening up school officials to criminal liability may have negative public policy implications and may deter educators from these positions. All in all, even if these enforcement mechanisms are not adopted, the federal statute must contain significant enforcement mechanisms in order to ensure that schools and their agents comply with the law.

d. Exceptions

A few exceptions in the existing state statutes appear to be common.²³⁸ The most common of these is the exception for information that is publicly available or that can be found in the public domain.²³⁹ This exception should be included in the federal legislation as well. Part of the issue with school administrators' accessing students' social media accounts derives from the Fourth Amendment protections of that in which one has a reasonable expectation of privacy.²⁴⁰ When students make postings that are available to the public, they surrender any reasonable expectation of privacy related to that public posting, making Fourth Amendment considerations immaterial in that instance.²⁴¹ However, when it comes to discipline for these public postings, administrators must still consider the requirements set forth in *Tinker v. Des Moines* as to whether the post causes a material and substantial disruption in the school before punishing students for their free expression.²⁴² For the aforementioned reasons, an exception for

237. See MICH. COMP. LAWS SERV. § 37.278 (LexisNexis 2015); WIS. STAT. ANN. § 995.55 (LexisNexis 2015–2016).

238. See *supra* Part III.A.1.d.

239. See *supra* Part III.A.1.d.

240. See *supra* Part II.C.2.b.

241. See *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012) (determining that because information on a social media account is protected by a password, the information is in the account holder's possession, and therefore entitled to a reasonable expectation of privacy).

242. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (concluding that student speech can only be restricted when it materially and substantially interferes with discipline and operation of the school); see also *supra* Part II.C.2.a.

information found in the public domain should be included in the federal legislation.

Another exception concerns electronic equipment or communication devices that belong to the school and accounts that are owned or related to the school.²⁴³ This exception is necessary in the federal statute. Accounts that belong to the school or are school-affiliated also do not have a reasonable expectation of privacy, because a school could reasonably be expected to access these accounts. As for First Amendment issues, information on a school-related account is more likely to cause a material and substantial disruption. Therefore, this exception should be included in the federal legislation.

The final exception included within some of the existing state statutes allows for certain investigations into student accounts for an alleged violation of a law or school rule.²⁴⁴ These exceptions, however, seem to violate the same rights that the legislation aims to protect. Investigating students' accounts by requiring them to give up their passwords violates their Fourth Amendment rights.²⁴⁵ Students should have a reasonable expectation of privacy in their password-protected account information,²⁴⁶ and a school administrator searching through material is far too intrusive.²⁴⁷ Therefore, administrators should alternatively rely on Fourth Amendment requirements for their investigations.²⁴⁸ Because this exception allows for continued violations of student rights, including this exception in federal legislation would partially defeat the purpose that the legislation would be attempting to prevent—protecting the rights of students in schools throughout the country.

All in all, there are some exceptions that can be included in the federal legislation that fairly consider both the interests of students and interests of the schools, but the exceptions must also ensure that the protective purpose behind the legislation is met. Therefore, because including exceptions for information in the public domain and for school accounts and equipment helps to balance the school and students' interests, these exceptions should be included within federal legislation. However, a loose exception allowing some types of investigations into students' accounts would be nothing more than a loophole that would

243. See *supra* Part III.A.1.d.

244. See *supra* Part III.A.1.d.

245. See U.S. CONST. amend. IV; see also *supra* Part II.C.2.b.

246. See *R.S.*, 894 F. Supp. at 1142.

247. See *supra* Part III.B.2.

248. For example, if there is a legitimate, serious need for an investigation, the school officials may be able to involve the police, who could get a warrant and ensure that a student's rights are maintained.

allow school agents to view students' private accounts and violate the same rights that the statute was designed to protect.

IV. CONCLUSION

Social media privacy is an important issue that implicates the constitutional rights of nearly all American students.²⁴⁹ The prevalence of social media, especially as a means of communication in younger generations, makes the matter even more concerning.²⁵⁰ School administrators may have legitimate concerns about safety and discipline that motivate their belief that social media monitoring and investigation is necessary.²⁵¹ However, these practices can have a dramatic impact on students' rights.²⁵² Students' legitimate interests in protection of their First Amendment, Fourth Amendment, and privacy rights seem to outweigh the school administrators' interests in monitoring social media in most circumstances.²⁵³

Although some state legislators have begun to realize the potential for harm caused by these practices, most states have not addressed this issue.²⁵⁴ The state statutes that have been enacted lack uniformity and fail to adequately protect students' rights.²⁵⁵ The only way to resolve the discrepancies between different states' statutes and provide equal protection for all students is for Congress to enact uniform federal legislation.²⁵⁶ This federal legislation should provide protections for students at every level—elementary, secondary, and post-secondary²⁵⁷—and should contain effective enforcement mechanisms that actually deter school officials from impinging on student privacy rights.²⁵⁸ Uniform federal legislation containing adequate protection provisions is required to ensure that students throughout the country are treated consistently with respect to their social media privacy.²⁵⁹

249. *See supra* Part II.C.2.

250. *See supra* notes 27–30 and accompanying text; *see also supra* Part II.A.2.

251. *See supra* Part II.C.1.

252. *See supra* Part II.C.2.

253. *See supra* Part III.B.1.

254. *See supra* Part II.D.

255. *See supra* Part III.A.1.

256. *See supra* Part III.B.3.

257. *See supra* Part III.B.3.a.

258. *See supra* Part III.B.3.c.

259. *See supra* Part II.B.3.