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INTRODUCTION

K-12 schools have been impacted by the advent of social media, as have other institutions in our society. Many of the negative externalities created by these platforms have been given extensive attention by legislators or activists (e.g. cyberbullying), while others have taken a back seat. One of the overlooked dilemmas is the "new frontier in individual privacy."[1] That frontier is the invasion of a student's right and expectation of privacy by teachers who post photos, videos, or narratives of their students on their personal social media

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[1] *See* Shannon Sorensen*, Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 36 Child. Legal Rts. J. 156, 156 (2016).

accounts. These intrusions are currently causing harm to students, but no proper avenues exist to correct the behavior.

While such acts may seem harmless to some, the potential for abuse is clear. One can easily imagine a fifth-grade teacher, who is known to be a special education teacher, creating a post on their Twitter, Snapchat, or Instagram account about one of their students. The post might include a photo, or even video, of a student in the teacher's class. The purpose of the post might be for one of any number of reasons; perhaps the teacher is proud of one of the student's recent accomplishments; perhaps the student is shown engaging in activities the teacher deems to be comical or entertaining; perhaps the teacher is critiquing the student's appearance or behavior; perhaps the teacher just thinks the students looks cute; etc., possibly with a caption indicating such. Such a post would effectively constitute an "outing" of the student, on a public platform, as having a disability. Complicating the issue, the student likely has no idea this has happened; and neither do the student's parents, who may only spend time on Facebook (or not use social media at all), instead of other platforms.

The above scenario is an actual example of the issue at hand.[2] One can imagine a multitude of other scenarios that are likely commonplace. At the secondary level, for example, one could easily imagine a teacher making a social media post about a student, in which the student's first name is mentioned, who they believed had flirted with them in class. The post might take a tone of frustration, in

[2] *Mooresville teacher shames special needs student on social media*, FOX46 CHARLOTTE (Aug. 30, 2019), https://www.fox46.com/news/mooresville-teacher-shames-special-needs-student-on-social-media/.

which the flirting is presented as sexual harassment; or it might take a more humorous tone. Regardless, such an act would constitute an invasion of the student's right and expectation to privacy. Such invasions of privacy need not be so dramatic, yet still injure students all the same.

While the examples cited above may be deemed relatively harmless by some, it is impossible to predict the various ways such an act might negatively impact a student.[3] Additionally, some posts clearly are out of bounds, in terms of their inappropriateness and potential harm caused.[4] And the incidents cited here are just the tip of the proverbial iceberg of potential for misconduct by millions of teachers across the U.S.[5] And even in cases where a post may not be deemed facially inappropriate or harmful, the fact that they are being made at all bothers some parents,[6] and violates children's basic rights. The principle at work here is the idea of "privacy for its own sake,"[7] not only for the

[3] *See infra* Part IIIC. *But see* In re M.H., 205 Cal. Rptr. 3d 1 (Cal. Ct. App. 4th Dist. 2016) (a student committed suicide two weeks after an embarrassing video was posted of him by another student).

[4] Lexi Sutter, *5th Grade Teacher on Leave After Vulgar Social Media Post About Students, Officials Say*, 5CHICAGO (May 2, 2019, 10:45 PM), https://www.nbcchicago.com/news/local/5th-grade-teacher-on-leave-after-vulgar-social-media-post-about-students-officials-say/158522/.

[5] *Teachers Posting Pics of Students on Social Media*, WHAT TO EXPECT (Nov. 21, 2014, 9:10 PM), https://community.whattoexpect.com/forums/hot-topics-1/topic/teachers-posting-pics-of-students-on-social-media.html?page=3 (blog post from a parent complaining that their child's teacher posted a photo of the child on a friend of the teacher's Facebook wall with the caption "I think this is your long lost son.").

[6] *Id.*

[7] Sorensen, *supra* note 1, at 157.

occasional posts that are plainly offensive. Additionally, such posts likely violate the teacher's obligation to their students as outlined in the Code of Ethics of the National Education Association (NEA).[8]

This article makes the argument that such social media posts constitute a serious invasion of a child's privacy right, and that the responsibility for enforcement should fall on schools and school districts. However, since such enforcement is currently lacking, this article argues that potential remedies may exist within the framework of federal law. And if local education authorities continue to fail to address the problem, the article argues that a legislative approach might be called for, at the state, or even federal, level.

Part II of the article begins, below, with an exposition of the problem, what is not the problem, and how it has come to exist. This section will then discuss the present status of a right to privacy for children. In Part III, current legal remedies available to resolve the issue (including the occasional lack

[8] *Code of Ethics for Educators,* NAT'L EDUC. ASS'N. (Sept. 14, 2020), https://www.nea.org/resource-library/code-ethics-educators ("In fulfillment of the obligation to the student, the educator… 5. Shall not intentionally expose the student to embarrassment or disparagement [and]… 8. Shall not disclose information about students obtained in the course of professional service unless disclosure serves a compelling professional purpose or is required by law."). *See also* About NEA, NAT'L EDUC. ASS'N. https://www.nea.org/about-nea (last visited Oct. 21, 2021) While it is the case that the NEA's Code of Ethics is technically not binding on teachers, from a legal standpoint, it does establish widely-accepted parameters for professional conduct within the teaching profession, and is generally regarded as a set of norms that protects the integrity of the profession and helps ensure fair and responsible teaching practices; additionally, the more than half of the practicing teachers in the U.S. who are NEA members could reasonably be considered to have an additional obligation to abide by its Code of Ethics.

thereof), under the framework of current federal law, will be discussed. The article then pivots to touch on cases that have addressed situations with similar issues, which are instructive of the current case law. The final section, Part IV, will discuss additional possible solutions to this uniquely modern problem, first through federal, and then state, legislative action.

I. CURRENT LANDSCAPE OF A RIGHT TO PRIVACY

A. Exposition of the Problem

Minor children find themselves in a unique situation. They are legally obligated to attend school, and they are not empowered to make legal decisions for themselves. A child's parents or guardians serve as trustees of the child's best interest, but they are not present for the daily activities of the child's school.[9] Children are, therefore, for most purposes, at the mercy of the school's protection during their time there. School is their "workplace" run by the government.[10] Though the school administrators may do everything they can to protect the child's interest, the ultimate well-being of the child rests in the hands of their teachers for much of their time at school.

Before the proliferation of social media, children's lives at home and at school were kept

[9] *See* Barbara Bennett Woodhouse, *"Who Owns The Child?": Meyer and Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995, 1039 (1992) (discussing the evolution of the philosophy that a child is a parent's property, to that of a trustee of their "best interests").

[10] Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 Marq. L. Rev. 563, 628 (2004) ("Schools are the government.").

mostly separated from each other, ensuring a certain degree of privacy.[11] Some have commented on the fact that technology use has eliminated privacy in many minor children's home lives; but that, at least, falls within the purview of their parents or guardians.[12] Importantly, however, this "most watched over generation" can no longer escape intrusion outside the home, either.[13] In 2015-16, over a third of all elementary school teachers were under the age of thirty.[14] Of adults, this is the age demographic that typically uses the widest array of social media, and uses it the most frequently.[15] These statistics conjure an image of a large portion of elementary school teachers who may be frequent social media users. Clearly, that in itself is not an issue. It is when those social media posts include narratives and depictions of students that issues may arise.

The damage done in Part I's hypothetical scenarios may be seen as limited in scope; but some invasions of children's privacy can take on much larger proportions. One can imagine a teacher

[11] Sorensen, *supra* note 1, at 157.

[12] *See* Holly Kathleen Hall, *Oversharenting: Is It Really Your Story to Tell?*, 33 J. Marshall J. Info. Tech. & Privacy L. 121 (2018).

[13] Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 Colum. Human Rights L. Rev. 759, 760 (2011).

[14] *Characteristics of Public School Teachers,* NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/indicator_clr.asp (last updated May 2021); *Condition of Education,* NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/ (last visited Oct. 21, 2021).

[15] Andrew Perrin & Monica Anderson, *Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018*, PEW RESEARCH CTR. (April 10, 2019), https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/.

potentially capturing something like the world famous "Charlie Bit My Finger" video.[16] The wildly popular clip now sits at over 800 million views, and, even if taken down by the publisher, would live on through countless downloads and saves to computer hard drives. The child involved had no say in the video being posted, but will now live with the reputation of that video in perpetuity. And while this particular video seems to be quite innocuous, had it featured content that was not just entertaining, but also highly compromising or embarrassing, the damage caused could involve serious emotional injury to the child. "During the early elementary grades, children develop more abstract privacy concerns with a significant shift in attention from simple spatial privacy to more sophisticated ideas of their own autonomy."[17] Young adults and teenagers desire to fashion their own identity, and it should be assumed that younger children have such desires as well.[18] It is difficult to see how conditioning students to violations of their privacy as children will positively contribute to this endeavor.[19]

To be clear, this is not the same thing as the school itself creating website or social media posts involving students. There are several differences between these scenarios. First, schools often have a consent form that parents can choose to sign, which gives parents the option to decide if the school may

[16] HDCYT, *Charlie Bit My Finger - Again !*, YOUTUBE (May 22, 2007), https://www.youtube.com/watch?v=_OBlgSz8sSM.

[17] Stuart, *supra* note 10, at 617.

[18] KJ Dell'Antonia, *Don't Post About Me on Social Media, Children Say*, NEW YORK TIMES (March 8, 2016 6:45 AM), https://well.blogs.nytimes.com/2016/03/08/dont-post-about-me-on-social-media-children-say/?mtrref=www.google.com&assetType=REGIWALL.

[19] *See* Stuart, *supra* note 10, at 626.

make posts that include their child.[20] Furthermore, the school's accounts are usually run by an administrator with a more complete understanding of the implications of displaying such content. Finally, school websites and social media accounts tend to be public.[21] This is important, as parents are much more likely to become aware of social media posts of their child that are made on a school account (although teachers can obviously have public accounts as well).

In 2015, an internet company survey found that a five year-old child will already have an average of 973 photos of their person uploaded to the Internet, with the average per year increasing as they age.[22] The purpose of this article is not to argue that posting photos on social media of minors should stop altogether.[23] This article only takes issue with postings made by teachers without authority. The potential effect of parents posting thousands of photos of their children to the Internet, while concerning (especially in a time of rampant and

[20] David Row, *Why You Should STOP Posting Pictures of Students online!*, Make Moments Matter (Jan. 28, 2017), https://makemomentsmatter.org/classroom-ideas/why-you-should-stop-posting-pictures-of-students-online/ (This is complicated by the fact that some schools' consent forms are opt-out, rather than opt-in, which could be a problem if this is not clearly communicated to parents.).

[21] Public accounts are accounts that anyone on the platform can access and view. Private accounts are accounts that require the account owner's permission for individuals to access and view.

[22] *Today's children will feature in almost 1,000 online photos by the time they Reach Age Five*, NOMINET (May 26, 2015), https://www.nominet.uk/todays-children-will-feature-in-almost-1000-online-photos-by-the-time-they-reach-age-five/.

[23] *See, e.g.*, Hall, *supra* note 12. *See also* Ashley May, *18-year-old sues parents for posting baby pictures on Facebook*, USA TODAY (Sep. 16, 2016, 11:14 AM), https://www.usatoday.com/story/news/nation-now/2016/09/16/18-year-old-sues-parents-posting-baby-pictures-facebook/90479402/.

unregulated artificial intelligence innovations potentially ending privacy as we know it), is not the focus of this article.[24]

This issue is not at the forefront of privacy or education debates, but not because it is unimportant. Part of the problem may be that many parents seem to be unaware that it is happening. The social media platforms on which such postings often take place are not the same platforms that many parents with school age children are likely to use. Adults thirty years or older are much less likely to use Snapchat or Instagram than the age group just below them.[25] 62% of people in the age range of 18-29 use Snapchat, while only 25% of people from ages 30-49 use it.[26] Furthermore, the fastest growing social media app, Tik Tok, has a userbase that is 81% under the age of forty.[27] Instead, the most common social media used by people ages 30-49 is Facebook, with 79% use. Parents may, therefore, have a false sense of security when they do not see such posts on Facebook, without necessarily knowing what is taking place on other platforms.

A second reason why this issue may not be as well-known is perhaps due to the fact that other social media-related issues have dominated the public's consciousness, thus overshadowing issues that are perceived as less egregious. For example, the problem of teachers "friending" their students on social media platforms such as Facebook, and then

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[24] Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, THE NEW YORK TIMES (Jan. 18, 2020), https://www.nytimes.co m /2020/01/18/technology/clearview-privacy-facial-recognition.html.

[25] Perrin & Anderson, *supra* note 15.

[26] *Id*.

[27] Mansoor Iqbal, *TikTok Revenue and Usage Statistics (2021),* BUSINESS OF APPS (Sept. 28, 2021), https://www.businessofapps.com/data/tik-tok-statistics/.

engaging in virtual relationships with them outside of school (including, in some cases, sexual relationships), is a well-known and hotly debated First Amendment issue,[28] which may serve to obscure other social media-related issues.

Another reason this issue may not be on the public's radar is possibly because of a perception that it has not led to any major issues yet. However, that does not mean it is not happening. People may not have seen a major news scandal,[29] but that may be because the debate is happening outside of the traditional media. The public is discussing it online on message boards and blogs,[30] while education websites are advising against such postings.[31] Clearly, this practice is taking place, and a quick survey of the discussion boards will likely reveal frustration and confusion regarding what is legal under current law.

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[28] Lumturije Akiti, *Facebook off Limits: Protecting Teachers' Private Speech on Social Networking Sites,* 47 Val. U. L. Rev. 119 (2012).

[29] Erin Anderssen, *Should This Teacher be Fired for Posting an Inappropriate Photo to Facebook?*, THE GLOBE AND MAIL (Jan. 23, 2013), https://www.theglobeandmail.com/life/the-hot-button/should-this-teacher-be-fired-for-posting-an-inappropriate-photo-to-facebook/article7675619/ (showing a teacher in Ohio was suspended for a Facebook post with a picture of her student's with their mouths duck taped, but the main issue there is probably her conduct, not the post itself).

[30] *See Teachers Posting Pics of Students on Social Media, supra* note 5; Kristi Gustafson Barlette, *Why are Teachers Posting Photos of their Students on Social Media?,* TIMES UNION (Mar. 30, 2017, 3:07 PM), https://blog.timesunion.com/kristi/2017/03/30/why-are-teachers-posting-photos-of-their-students-on-social-media/.

[31] *See* Row, *supra* note 20; Tanner Higgin, *Protecting Student Privacy on Social Media: Do's and Don'ts for Teachers*, COMMON SENSE EDUC. (Mar 28, 2017), https://www.commonsense.org/education/articles/protecting-student-privacy-on-social-media-dos-and-donts-for-teachers.

B. Basis for the Right of Privacy for Children

1. Origins of the Right to Privacy

The constitutional right to privacy has an amorphous meaning.[32] The idea of a right to privacy first truly reached the American legal consciousness in a law review article authored by Samuel Warren and Louis Brandeis.[33] The article had significant influence, and was the first step on a path towards recognition of a right of privacy.[34] Concerned with the intrusion of the gossiping press into peoples' personal matters, the authors argued there is an inherent "right to be let alone" in the United States.[35] They felt "[a person] has certainly a right to judge whether he will make [his sentiments] public, or commit them only to the sight of his friends."[36] Without debate, they took it as a matter of fact that such a right to privacy existed.[37] But, they did not go so far as to claim that the right to privacy was a recognized natural right or liberty at that time, because such invasions by non-state actors were a relatively new dilemma.[38]

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[32] *See* Dorothy Glancy*, At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet,* 16 SANTA CLARA HIGH TECH. L.J. 357 (2000) (describing privacy law as diverse, decentralized, and dynamic).

[33] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[34] Benjamin E. Bratman, *Brandeis and Warren's* The Right to Privacy *and The Birth of The Right to Privacy*, 69 TENN. L. REV. 623, 623–24 (2002). (Hereinafter *Brandeis & Warren*)

[35] *Id*. at 195.

[36] Stuart, *supra* note 10, at 589 (quoting Millar v. Taylor, 4 Burr. 2303, 2379 (1769)).

[37] Vernon Valentine Palmer, *Three Milestones in the History of Privacy in the United States*, 26 TUL. EUR. & CIV. L.F. 67, 74 (2011).

[38] *Id.* at 73.

Even with its importance to the creation or advancement of a right to privacy, the article neglects to define the right to privacy further than "the right to be let alone;" and that vagueness is part of the reason the definition is so intractable today. Based on the invasions that concerned the authors, it appears they wanted protection for three types of privacy: "(1) control over the use of one's name, likeness or photograph, (2) a reserved sphere of personal and family life, and (3) control over one's creations, writings and thoughts."[39] It is primarily that first privacy right, and partially the second, that is most violated by the social media postings of students by their teachers.

Warren and Brandeis' concern isn't so different from the issue faced here, albeit in more antiquated form. "Column upon column is filled with idle gossip"[40] and "instantaneous photography" (a technological advancement of the late nineteenth century)[41] were intruding into ordinary peoples' everyday lives then, in a similar manner to the effects of the technological advancement of social media today.[42] Actually, the problem today far surpasses those of the past, because now there is instantaneous *publication* of the "instantaneous photography" through social media, and very little of it is of public interest. Unfortunately, Warren and Brandeis' advocacy for recognition of the right to privacy came

[39] *Id.* at 74.
[40] *Brandeis & Warren*, *supra* note 33, at 196.
[41] Palmer, *supra* note 37, at 72.
[42] *See* Stuart, *supra* note 10, at 593. Additionally, they were concerned with lack of legal redress to solve their problem, as this paper is here.

without instructions for a path forward on how to protect it.[43]

2. Right to Privacy in the Supreme Court

The idea of a right to privacy was first mentioned by the Supreme Court in *Union Pacific Railway Co. v. Botsford*.[44] In this case, the Court overruled a court order forcing the plaintiff in a personal injury case to submit to a physical exam.[45] Quoting *Cooley on Torts*, the Court said, "[t]he right to one's person may be said to be a right of complete immunity: to be let alone."[46] Although it seems like a right of privacy is established in this case, the case was only cited by the Supreme Court five times over the next six decades. Additionally, the Court's concern was spatial privacy.[47] Afterwards, the issue of privacy became temporarily dormant, at least in the Supreme Court.[48]

Through Supreme Court caselaw development, the right to privacy has come to guarantee a minimum amount of freedom from government intrusion into the most personal

[43] Palmer, *supra* note 37, at 78 ("They offered no doctrinal steps, constructed no new torts…[t]he solutions were simply entrusted to judges").

[44] Union Pacific Railway Co. v. Botsford, 141 U.S. 250 (1891).

[45] *Id*. at 257.

[46] *Id*. at 251; Brandeis & Warren *supra* note 33, at 193 ("To be let alone"); Major B. Harding, *Right to be Let Alone?*, 14 ND J. L. ETHICS & PUB POL'Y 945, 946 (2000) ("In 1880, Thomas M. Cooley coined the phrase 'the right to be let alone' in his treatise on the law of torts.").

[47] Planned Parenthood v. Casey, 505 U.S. 833, 926 (1992) (dissent) (which is one reason why it was quoted in the Dissent in *Casey*).

[48] *See* Palmer, *supra* note 37, at 79-83.

individual matters.[49] The line of privacy cases has two variations of the right. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[50] *Roe v. Wade* and its progeny focus on the latter of the two variations – decisional privacy – and are not quite consistent with the issue at hand.[51] Those cases are about the right to "assert [one's] destiny and identity in the world."[52] When put in such general terms, one can see how decisional and image control privacy fall under the same umbrella. The theory of a right to privacy in this article is like the understanding of the right that originated in *Griswold v. Connecticut*, [53] and was expanded upon in *Lawrence v. Texas*,[54] even though those cases also delve into personal autonomy.

Griswold claimed to be dealing with a "right of privacy older than the Bill of Rights… [and] older than our school system."[55] There, the Court recognized a "zone of privacy" upon which the government cannot intrude.[56] In that case, the right meant that the government could not prevent the use of contraceptives by married couples, because family planning conduct in their own homes, which had no effect on the general public, was beyond the scope of

[49] *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003).

[50] Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

[51] *See* Roe, 410 U.S. at 154; Planned Parenthood v. Casey, 505 U.S. at 851.

[52] Palmer, *supra* note 37, at 94.

[53] Griswold v. Connecticut, 381 U.S. 479 (1965).

[54] Lawrence v. Texas, 539 U.S. 558 (2003).

[55] *Griswold*, 381 U.S. at 486.

[56] *Id.* at 484.

government intervention.[57] That idea is taken to maturation in *Lawrence*, where the court solidifies a wide-ranging right to privacy as a constitutional liberty.[58] The Court created a presumption of liberty from government interference when the government has no affirmative right, and also a right to privacy for its own sake, not just in relation to government intrusion.[59] Though there is still a degree of personal autonomy at issue in *Lawrence*, the opinion does the most complete job of taking privacy back to its roots of "the right to be let alone."

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[60]

[57] *See id.* at 484-6.
[58] *Lawrence*, 539 U.S. at 574.
[59] Stuart, *supra* note 10, at 573.
[60] *Lawrence*, 539 U.S. at 562.

The language "freedom extends beyond spatial bounds" was likely directed at decisional privacy but has the undertones of disclosure and image control privacy.

The Supreme Court drew closer to the image control understanding of privacy in *Cruzan v. Director of Missouri Department of Health*.[61] Quoting *Botsford* [62] the Court said, "no right is held more sacred… than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."[63] Though the Court determined that the state can continue to keep a patient on life support against her parents' wishes, the dissent makes a strong acknowledgment of the right at issue here.[64] The dissent acknowledges the petitioner's right to self-image by saying she "has an interest in being remembered for how she lived rather than how she died."[65]

While there are those who would prefer not to decide the meaning of the right of privacy,[66] it must be attempted here in order to delineate what interests are at issue.[67] The right to privacy created and expanded upon in Supreme Court precedent changed the original concerns of trespass upon personal image and public disclosure of facts. Instead, the Court focused on the right to make personal decisions and freedom from intrusions. The

[61] Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990); *See also*, Sorensen, *supra* note 1, at 163.

[62] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[63] *Cruzan*, 497 U.S. at 269 (emphasis added).

[64] *See id.* at 281–85.

[65] *Id.* at 353.

[66] *See* DANIEL J. SOLOVE, UNDERSTANDING PRIVACY, HARVARD UNIVERSITY PRESS (2010).

[67] It is not a singular "interest" because the right to privacy refers to a subset of rights, as this paper makes apparent.

issue here is similar, but not the same.[68] Overall, as a function of the Fourth[69] and Fifth[70] Amendments, along with Supreme Court precedent (specifically *Lawrence v. Texas*), there is a general right to privacy, including the reasonable expectation of protection from public disclosure of one's personal life. Unfortunately, the Court has mostly punted this component of privacy to the states.[71]

For the purpose of this article, the protected right is privacy as control. "Privacy-as-control means the right to exercise control over oneself and over information about oneself. Under this approach, a person would have the right to determine what others know about him or her, and how they are able to obtain such information."[72] This is different from other components of privacy, like privacy as access or autonomy.[73]

3. State Constitutional Rights to Privacy

Since the U.S. Constitution fails to explicitly create a right to privacy in disclosure and control, people have turned to state constitutions for protection.[74] The Supreme Court in *Katz v. United States*

[68] There is still the aspect of government intrusion that the Supreme Court has focused on. The misconduct here is committed by teachers who are employed by schools that are extensions of the government. Talon R. Hurst, *Give Me Your Password: The Intrusive Social Media Policies in Our Schools*, 22 COMMLAW CONSPECTUS 196, 196–97 (2014).

[69] U.S. CONST. amend. IV.

[70] U.S. CONST. amend. V.

[71] *See infra* Part IIB3.

[72] Shmueli, *supra* note 13, at 767.

[73] *Id*.

[74] Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361, 361–62 (2005).

established that the specifics of a right to privacy can be best handled by the states.[75] There, the Court said, "the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."[76] As with other constitutional rights, the U.S. Constitution only sets the floor of the right to privacy, while the full extent is to be determined by the states.[77]

The U.S. Constitution has only been amended twenty-seven times. State constitutions are much more malleable and many have been amended hundreds of times.[78] This malleability allowed states to respond to the *Katz* decision and add particular provisions to their constitutions aimed at protecting privacy. This evolution began in 1968 and continued for the next two decades.[79] At least ten states adopted explicit provisions in their constitutions that may provide personal information protection: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington.[80] In 1980, Florida adopted one of the most extensive amendments, which unambiguously created a right to be let alone. The Florida Constitution states that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."[81] That provision creates

[75] Katz v. United States, 389 U.S. 347, 351 (1967).
[76] *Id*. at 350–51.
[77] *See* Harding, *supra* note 46, at 952.
[78] Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997, 1036 (2010).
[79] Harding, *supra* note 46, at 951.
[80] Stuart, *supra* note 74, at 365–66. (Not all of the provisions are centered on the type of privacy at issue here.)
[81] FLA. CONST. art. I, § 23.

a claim against the government for such violations., but the Supreme Court of California has gone so far as to allows its constitutional right to restrict conduct by non-state actors.[82] These were important developments. Since the boom of constitutional privacy amendments in the late twentieth century, there has been very little advancement of similar amendments in additional states.

Other states have created a right to privacy through their highest court. The supreme courts in Kentucky, Minnesota, New Hampshire, New Jersey, Pennsylvania, Tennessee, and Texas found such a right existing implicitly in their state constitutions.[83] The courts usually found it implied in their bill of rights,[84] similar to the way the Supreme Court did in *Griswold*.[85] Similar to when the right was created from Constitutional text, the courts are usually referring to spatial privacy. Unlike the statutory privacy right, it is easier for a court to find new variations of the implicit right to privacy, which could include image control privacy.

In several of these states, an individual may find refuge in the state constitution to curb the unwarranted posting of school children on social media. A parent may claim that the state, by imputing the conduct of its employee – the teacher – has violated their child's right to be let alone. Courts would likely be forced to balance this right against a teacher's right to free speech. There is little to no public value in such social media posts, making it likely that such a defense would often fail. Unfortunately, this remedy is only available in some

[82] Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 642 (Cal. 1994).

[83] Stuart, *supra* note 74, at 373–74.

[84] *Id.* at 374.

[85] Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

states, and even in those states the children's parents will likely prefer to avoid the effort and expense of bringing an action. Tort claims against the government for wrongful disclosure of private information are rarely successful, due to the high burden on the plaintiff.[86] Additionally, reliance on states' general right to privacy to enforce the specific privacy right at issue is also not guaranteed to succeed. Some states may attribute a right of privacy to their state constitutions, but even in those states, it will likely not be sufficient to eliminate the unwanted behavior.

4. Children's Constitutional Right to Privacy

The determination of what rights are guaranteed to minors is an ongoing debate. On one side, children clearly cannot exercise the full extent of every constitutional right; while, on the other, some rights are fully vested at birth.[87] "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[88] "[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[89]

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[86] Stuart, *supra* note 74, at 393.

[87] *See In re* Gault, 387 U.S. 1, 12 (1967); Martin Guggenheim, *A Paradigm for Determining The Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1408 (1996) ("In some circumstances, children possess virtually the same autonomy rights as adults.").

[88] Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

[89] Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (quoting *In re Gault*, 387 U.S. at 13).

Although the ideas of self-image and privacy are beyond the capacity of children to fully grasp, children remain human beings "entitled to be treated by the state in a manner compatible with human dignity."[90] This article supports the position that "privacy right[s] already exist[] as a function of the American cultural and political condition and belong[] to children no less than to adults."[91] Because "[t]he Constitution's liberty interest contains no caveats… it takes no stretch of the imagination to extend that general privacy interest into a special category of education privacy for children."[92] Thus, privacy is a constitutional right, and, therefore, belongs to children in spite of the government, and not at the government's will.[93] A child's right to privacy encompasses a subset of the privacy right, a right to privacy in education. Scholars have acknowledged this as necessary, because, without privacy, children will not properly develop their individuality.[94]

5. Children's Right to Privacy Established by the U.N.

The right to privacy may also be considered as belonging to most children in the world by virtue of their nation's membership in the United Nations. In 1990, the Convention on the Right of the Child,[95] drafted by the U.N., went into effect, and is the most

[90] Darryl H. v. Coler, 801 F.2d 893, 901 (7th Cir. 1986).
[91] Stuart, *supra* note 10, at 565.
[92] *Id.*
[93] *Id. See also* Lawrence v. Texas, 539 U.S. 558 (2003).
[94] Shmueli, *supra* note 13, at 772.
[95] Convention on the Rights of the Child, Nov. 20, 1989, 144 U.N.T.S. 123 (entered into force Sept. 2, 1990) (opened for signature) [hereinafter UNCRC].

widely ratified human rights treaty in history.[96] Article 16 states:

> 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour [sic] and reputation. 2. The child has the right to the protection of the law against such interference or attacks.[97]

As is typically the case with international treaties, many details of the right are left out, but the creation of a right to privacy is undoubted.[98] Unfortunately for American children, the United States signed the treaty, but then failed to ratify it, which makes the U.S. not a true party to the treaty.[99] As a result, this is not an available method to protect the privacy of school children in the U.S. It is also unclear how privacy rights created under the U.N. would be enforced by a judicial body.

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[96] *What is the Convention on the Rights of the Child?*, UNICEF (MAR. 2, 2020), https://www. unicef .org/child-rights-convention/what-is-the-convention.

[97] UNCRC, *supra* note 95, at art. 16.

[98] Shmueli, *supra* note 13, at 785 (mentioning it is unclear if this right only prevents interference from government action).

[99] Even though in 2008 President Obama called for the ratification, it was never sent to the Senate for ratification. Karen Attiah, *Why won't the U.S. ratify the U.N.'s child rights treaty?*, WASHINGTON POST (Nov. 21, 2014), https://www.washingtonpost.com /blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/.

II. CURRENT LEGAL SITUATION

A. Possible Solutions Through Federal Law

Congress has passed legislation that may be useful in the protection of privacy, including children in educational contexts. For example, under the Civil Rights Act of 1871, a plaintiff can file a Section 1983 lawsuit, alleging a civil rights violation based on 42 U.S.C. 1983.[100] 42 U.S.C. 1983 is merely a procedural device based on federal statute which gives federal courts jurisdiction to hear civil rights cases (i.e., no one can be liable under Section 1983). It creates liability for violating other federal laws, which is why 1983 cases always include an alleged violation of another law.[101] In theory, a child's legal guardian could use this method to bring a claim on the child's behalf for violation of their right to privacy, but there still must be proof of a "right" that was violated.

FERPA is an example of a law that could apply in situations involving school children's privacy.[102] In 1974, the federal government enacted The Family Educational Rights and Privacy Act (FERPA), which "affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of personally identifiable information from the education records."[103] If

[100] 42 U.S.C. § 1983.

[101] *Id.*

[102] Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1974).

[103] *What is FERPA?*, U.S. DEPT. OF EDUCATION (Mar. 2, 2020), https://studentprivacy.ed.gov /faq/what-ferpa.

institutions fail to keep certain information private, they risk losing federal funding.[104]

At first glance, this control over disclosure of student information would seem like the proper avenue under which social media postings by teachers may be prevented. Unfortunately, the law creates a much more limited zone of protection. According to the U.S. Department of Education, FERPA provides "certain protections with regard to [] children's education records, such as report cards, transcripts, disciplinary records, contact and family information, and class schedules."[105] It is understandable that the law fails to assist in all modern-day issues, since it was instituted before the internet became widely used. Additionally, the statute's breadth and significance, as it relates to privacy, was under dispute for the first three decades following its creation, because there were few cases that prosecuted the issue.[106] During that time, some argued that FERPA created a universal, individual right to privacy for school children.[107] That was until *Gonzaga University v. Doe*.[108]

In *Gonzaga University*, the plaintiff was an undergraduate student with plans to become a public school teacher.[109] The teacher certification specialist at the university overheard accusations of sexual misconduct by the plaintiff.[110] The school employee began an investigation into the matter, contacted the state agency responsible for teacher certification, and

[104] 20 U.S.C. § 1232g (2020).

[105] *Parents' Guide to the Family Educational Rights and Privacy Act*, U.S. DEPT. OF EDUC. (Oct.2007), https://www2.ed.gov/policy/gen/guid/fpco/brochures/parents.html.

[106] Stuart, *supra* note 10, at 564.

[107] Stuart, *supra* note 74, at 363.

[108] Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

[109] *Id*. at 277.

[110] *Id*.

informed them of the student's situation.[111] Plaintiff did not learn of the investigation until months later when he was told that he would not be receiving his teaching certificate.[112] He filed suit, claiming, among other things, a FERPA violation.[113] The case traveled to the Supreme Court, which held that plaintiff could not bring a FERPA suit under §1983 because the statute did not "confer enforceable rights."[114] This was because "the provisions entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights," and, instead "speak only to the Secretary of Education" regarding funding.[115] Accordingly, hope of a federal right to privacy for school children under FERPA ceased to exist after *Gonzaga University*.

However, this is where a 42 U.S.C. 1983 claim might succeed, in some instances. While it is true that there is no private right of action to enforce FERPA, it is possible that one could successfully argue that a teacher who violates FERPA (e.g. by making a social media post of a minor student) has, in many instances, violated the federal constitutional rights of privacy of that student. In fact, this argument is strengthened when considering the breadth various federal courts have given to the conception of privacy rights in the past. For example, in both the Sixth and Tenth Circuits, a government official who reveals the intimate details of a sexual assault for reasons other than a criminal prosecution can be personally liable for violating the victim's constitutional right to

[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*. at 287.
[115] *Id*.

privacy.[116] Furthermore, in the Seventh Circuit, the constitutional right of privacy prohibits the revelation of information that would enable "skillful 'Googlers'" to identify the individual.[117] Moreover, in Open Records disputes between public universities and the press, the courts have consistently held that FERPA prohibits the university from releasing education records concerning adults.[118] If such broad understandings of privacy were to be universally adopted, there would be little need for further legal action on this matter.

Another federal law that might hold promise for helping curb teachers' practice of making social media posts about students does not pertain to education at all, but is, rather, about patient privacy in the medical industry. While the Health Insurance Portability and Accountability Act (HIPAA)[119] addresses privacy issues regarding medical records, rather than educational privacy, there are clear similarities between them.[120] Healthcare systems, like schools, have a problem with physicians and nurses making social media posts about their patients.[121] And while both FERPA and HIPAA lack a

[116] *See* Bloch v. Ribar, 156 F.3d 673, 685 (6th Cir. 1998); Anderson v. Blake, 469 F.3d 910, 914 (10th Cir. 2006).

[117] Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 929 (7th Cir. 2004).

[118] United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002).

[119] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 262(a), 110 Stat. 1936, 2021 (1996) (codified at 42 U.S.C. § 1320d).

[120] Martha D. Bergren, *HIPAA-FERPA Revisited*, 20 J. SCH. NURSING 107, 107–112 (2004).

[121] Amy Hader & Evan Brown, *Legal Briefs: Patient Privacy and Social Media*, 78 AANA J. 270, 270–73 (2010).

private right of action,[122]many healthcare systems have solved this problem by explicitly prohibiting physicians and nurses from revealing patient information to others in any context.[123] Many institutions routinely fire employees and dismiss medical students and residents for making social media posts about a patient's medical condition.[124] This use of the HIPAA law could be established as the basis for using FERPA in a similar manner, thus providing an avenue for systematically curbing violations of student privacy. After all, if a medical center can fire a twenty-five-year-old nurse for revealing details about a patient's medical information online, then surely a public school can discipline a twenty-five-year-old teacher for doing the same thing with a student.

Other federal laws might appear, on their surface, to address this issue, but closer examination makes clear they do not. For example, the Children's Online Privacy Protection Act (COPPA), based on its name alone, would appear to prevent the posting of children's likeness on the internet, but is, in fact, only tangentially related. The law "is basically a fair information practices regime" that controls how and when websites can store data on children under the

[122] Acara v. Banks, 470 F.3d 569 (5th Cir. 2006); Slovinec v. Depaul University, 222 F. Supp.2d 1058 (N.D. Ill. 2002).

[123] *Social Media Policy: Patient Privacy Clause*, Practical Law Health Care, (2021); In The Matter of Arbitration Between: [Grievant 1-Labor Union] [Grievant 2], Termination [Respondent] (Health Services), 2013 WL 2146615 (AAA) Case No. [REDACTED] (2013).

[124] *Id.*; *Nurses Fired After Posting to Social Media*, PEDAGOGY: ONLINE LEARNING SYS. (2021), https://pedagogyeducation.com/Main-Campus/News-Blogs/Campus-News/News.aspx?news=715.

age of 13.[125] The law applies to "operators of commercial websites and online services (including mobile apps) directed to children under 13 that collect, use, or disclose personal information from children," and, thus, does not restrict the behavior of school teachers.[126]

B. Existence of Current, and Lack of Appropriate, Torts

Although a right to privacy is recognized as existing for all school children, no right is of practical value if there is no way to enforce it. The Constitution generally protects people from government interference, but not necessarily from misconduct by private actors.[127] Therefore, aside from the Constitutional right to privacy, certain torts exist to protect privacy interests against people acting in their individual capacity. These torts may provide a way for parents to bring claims against teachers – to prevent and correct the privacy violations that result from their social media posts.

Around the time of the highly influential Warren and Brandeis article, there was action in the courts and in government towards creating privacy torts. The first case on the issue came in 1902, when a woman sued a company for publishing her image on

[125] *See* Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1187 (2006).

[126] *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (Mar. 20, 2015), https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions.

[127] This is the requirement of "State Action." *See* David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, 43 HUM. RTS. MAG. 4 (2018).

flyers without her permission.[128] The court denied relief, because such a privacy tort was not in existence and the court feared creating one would result in "a vast amount of litigation."[129] The decision was so reviled by the public that the New York Legislature created a tort in its next session to prevent the unauthorized use of a person's likeness for advertising or trade.[130] As similar cases unfolded in other state courts,[131] the Restatement of Torts gave more credence to the creation of privacy torts. The Restatement had a provision on privacy, creating the tort in essentially the mold that the Warren and Brandeis article sought.[132] It stated, "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[133] The illustrations along with the language show a major focus of the tort was to prevent publication of peoples' photographs without permission, but it would expand in reach over time.[134]

C. Prosser's Four Torts

Although these legal and scholarly advancements in privacy tort law were important, the true

[128] Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 544–45 (1902).

[129] *Id*. at 545.

[130] Palmer, *supra* note 37, at 80.

[131] *See*, Itzkovitch v. Whitaker, 39 So. 499, 500 (La. 1905); Melvin v. Reid, 297 P. 91, 91 (1931 Cal. Ct. App.); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 193 (Ga. 1905).

[132] Palmer, *supra* note 37, at 81.

[133] RESTATEMENT OF TORTS § 867 (AM. L. INST.1939).

[134] Palmer, *supra* note 37, at 81 n.53.

revolution began with William Prosser's *Privacy* article in 1960.[135] This extensive literature reviewed over three hundred cases to analyze how courts have dealt with lawsuits involving privacy up to that point.[136] He argued that courts had already implicitly acknowledged four types of privacy torts that "protected against emotional, reputational, and proprietary injuries."[137] The four categories are, "(1) public disclosure of private facts, (2) intrusion on seclusion, (3) depiction of another in a false light, and (4) appropriation of another's image for commercial gain."[138] Prosser himself acknowledged these have little in common, other than stemming from the desire "to be let alone."[139] Soon after, these categories were taken almost verbatim from Prosser's article and placed into the Restatement (Second) of Torts in 1979:

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by
>
> (a) unreasonable intrusion upon the seclusion of another, or
>
> (b) appropriation of the other's name or likeness, or

[135] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

[136] *See Id.* at 388–89.

[137] Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1809 (2010).

[138] *Id.*

[139] Palmer, *supra* note 37, at 83.

> (c) unreasonable publicity given to the other's private life, or
>
> (d) publicity that unreasonably places the other in a false light before the public….140

This section of the Restatement was especially influential, as almost every state recognizes at least one of these four torts.[141]

The development of these torts was a positive step for privacy law generally, but they fall short as enforcement mechanisms against violations of students' privacy. Appropriation (from item (b)) is not an adequate remedy for the issue at hand, because the violating material must be used for benefit of the tortfeasor.[142] It would be challenging to explain how a teacher benefits from such a post. False light (from item (d)) is similar to defamation but requires only a false impression being made.[143] That would not be an appropriate claim here because there is not usually an issue with false information in teacher social media posts that violate their students' privacy. Intrusion into seclusion (from item (a)) is meant to deal with a "special concept of privacy," which is not a present concern.[144] Only one "torticle"[145] remains from the general privacy

[140] RESTATEMENT (SECOND) OF TORTS § 652A (AM. L. INST. 1977). A Restatement (Third) of Torts was published in 1998, but it did not replace or supersede the portions of the Second Restatement that address protection of privacy.

[141] Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234 (Minn. 1998) ("Only Minnesota, North Dakota, and Wyoming have not yet recognized any of the four privacy torts.").

[142] RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. L. INST. 1977).

[143] Hall, *supra* note 12, at 131.

[144] Palmer, *supra* note 37, at 85.

[145] *Id.* at 84.

interest – that of unreasonable publicity (from item (c)).

The unreasonable publicity tort created liability for "[o]ne who gives publicity to a matter concerning the private life of another… if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[146] Because these posts are not of public concern, the second prong's protection of newsworthy content is not an issue here. However, this tort faces other obvious challenges in its application to social media posts by teachers. It would be fair to say that making a social media post is giving something publicity, but does a child's activity at school constitute part of their "private life?" Additionally, few such posts contain facially offensive content (other than the fact that the post was made at all), so it is fair to question if many such posts will be considered sufficiently offensive to a reasonable person to invoke this tort. Another important issue is how this tort would intersect with the First Amendment's free-speech guarantee, because the tort is constrained by Constitutional limits.[147] It is not necessary to conduct a full First amendment analysis here, because it is already evident that the tort is not sufficient.[148] Overall, even the closest fitting of Prosser's torts is an unsuitable method to solve the matter at hand.

[146] RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

[147] Palmer, *supra* note 37, at 92.

[148] *See* JOHN NOVAK & RONALD ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.36 (8th ed. 2010) (arguing that truth should always be a defense, even in a privacy action).

D. Right of Publicity

The privacy right must be akin to a property interest, of which intrusion into is similar to trespass.[149] This property interest component of image control is the basis of the right of publicity,[150] which is the complementary opposite of privacy.[151] In fact, the right of publicity is a variation that grew out of the right of privacy.[152] Judge Jerome Frank gave name to the right of publicity in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* in 1953.[153] The property interest in the right of publicity allows an individual control over the distribution of their image for commercial purposes.[154] It is similar to the appropriation tort already discussed, but a violation of a right of publicity must be done commercially.[155] It exists in a different Restatement section as such:

> One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate

[149] *Id*.

[150] Natalie Grano, *Million Dollar Baby: Celebrity Baby Pictures and the Right of Publicity*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 609, 621 (2010).

[151] Sorensen, *supra* note 1, at 162.

[152] Claire E. Gorman, *Publicity and Privacy Rights*, 53 DEPAUL L. REV. 1247, 1251 (2004).

[153] Grano, *supra* note 150, at 616.

[154] *Id.* at 621.

[155] Rose v. Triple Crown Nutrition, Inc., No. 4:07-CV-00056, 2007 U.S. Dist. LEXIS 14785, at *8 (M.D. Penn., Mar. 2, 2007).

> under the rules stated in §§ 48 and 49.[156]

The publicity tort exists in twenty-eight states, as either a common law right or by statute.[157] The tort has grown in recognition, but with significant variations from state to state.[158] This tort is also subject to a newsworthiness exception for occasions when the use of a person's likeness is of public interest.[159] To be sure, the right of publicity applies equally to all individuals, famous or not.[160] However, the tort is used almost exclusively by celebrities, because non-celebrities' likeness is not valuable enough to recover damages that would pay for the litigation costs.[161] For this reason, and because the teachers' post are not commercial in nature, the right of publicity tort fails as a cure for teachers' social media posts of students.

E. Right of Confidentiality

The right of confidentiality tort is another possible pathway to correcting the behavior at issue. Teachers in our society occupy a position of trust. Parents would not send their children to school

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[156] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST 1995).

[157] Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 226 n.5 (2005); *See* Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000) (stating that twenty-seven states acknowledge the tort of publicity).

[158] *See* Grano, *supra* note 150, at 638-39.

[159] *Id.* at 634.

[160] J. Thomas McCarthy, *The Human Persona As Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 134 (1994).

[161] *See Id.*

without placing trust in their child's teachers, and parents would not confide in teachers without an assumption of confidentiality. Therefore, teachers' relationships with their students' parents contain the two elements of a "confidential relationship," and "the assurance of secrecy and the reliance it evokes[.]"[162] This relationship is in the same vein as, but to a lesser degree than, the confidentiality we expect from our doctors, lawyers, and counselors.[163] "A plaintiff can establish a breach of confidence action by proving the existence and breach of a duty of confidentiality."[164] A teacher-parent relationship fulfills the requirements of the relationship aspect of the tort.[165] Parents are put in a vulnerable position in which they must rely on teachers' discretion without having any oversight over teachers' actions. Therefore, teachers should be considered bound to maintain the confidentiality of their students.[166]

Although a prominent cause of action in the United Kingdom, this tort of breach of confidentiality has not received wide acceptance in the United

[162] Alan B. Vickery, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1428 (1982).

[163] *See* Sorensen, *supra* note 1, at 168-70.

[164] Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 157 (2007).

[165] Blair v. Union Free Sch. Dist., 324 N.Y.S. 2d 222 (D. N.Y 1971) ("Although the relationship of a student and a student's family with a school and its professional employees probably does not constitute a fiduciary relationship, it is certainly a special or confidential relationship.") *Id.* at 228.

[166] *See Code of Ethics*, *supra* note 8, at 1 (8) ("[Teachers] shall not disclose information about students obtained in the course of professional service unless disclosure serves a compelling professional purpose or is required by law.")

States.[167] A concern for breach of confidence was given brief attention in Warren and Brandeis' article, but it did not gain the same kind of traction as their other ideas.[168] Once considered "an emerging tort,"[169] the tort has faced opposition in the United States for multiple reasons.[170] Various arguments against it include claims that it overlaps too much with privacy torts; that it, at times, runs afoul of the First Amendment; and that it is impractical for courts to impose liability for simple gossip.[171] This is not to say the tort is totally lifeless in the United States. It is most frequently used in the context of a physician-patient relationship but has been acknowledged in the context of relationships with banks, hospitals, insurance companies, attorneys, accountants, and psychiatrists.[172] A problem in its application to the conduct at issue is that the focus of this tort is primarily on information disclosures. Generally speaking, problematic social media posts are not always exposing secret information, but, instead, are publicizing an image, conduct, or event. Due to its limited acceptance and slightly different purpose, this tort is not the solution to ending the conduct at issue.

In all, torts are an inadequate vehicle to prevent teachers from making posts of and about their students on social media. No new privacy torts have been created since Prosser's death, and the ones

[167] G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2395-96 (1992) (Explaining that the tort is the basis of privacy protection in the UK.).

[168] Warren & Brandeis, *supra* note 33, at 211.

[169] *See* Vickery, *supra* note 162.

[170] Harvey, *supra* note 171, at 2392-93.

[171] *Id.*

[172] Richards & Solove, *supra* note 164, at 157.

he fashioned do not fit the conduct at issue.[173] Even if the torts were better aligned with the issue, the damages would rarely be worth the effort of bringing a claim. It is also possible that courts would prefer to err on the side of protecting free speech if there is doubt as to the Constitutionality of the claim.

F. Cases Addressing Similar Issues

Litigation under current law has not yielded significant legal action on this issue, which is likely a partial explanation for the lack of awareness around the issue. Case law covering the precise issue is practically nonexistent, but that does not mean that courts have not been tasked with handling issues at the intersection of privacy and social media in schools.

For example, a California state court case, *In re M.H.*, addresses school children's expectation of privacy.[174] In that case, Matthew, a ninth grade student, was in the boys restroom with a friend.[175] The two were in separate stalls when Matthew began masturbating, or pretending to do so, and making audible moans.[176] M.H., an older student, entered the bathroom and took a video in which the moaning could be heard and Matthew's socks and shoes could

[173] Palmer, *supra* note 37, at 92.

[174] In re M.H. 205 Cal. Rptr. 3d 1 (Cal. Ct. App. 2016); A number of other cases have addressed issues related to students and social media, but most of these are unrelated to the issue at hand, as they tend to deal with First Amendment issues related to student use of social media, rather than teacher use of social media and student privacy. *See also Mahanoy Area Sch. Dist. v. B.L., No. 20-255 (U.S. June 23, 2021); Wisniewski v. Board of Educ., 494 F.3d 34 (2nd Cir. 2007); Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 89 S. Ct. 733 (1969).

[175] *In re M.H.*, 205 Cal. Rptr. at 4.

[176] *Id.*

be seen under the stall.[177] M.H. posted the ten-second video to his Snapchat story,[178] thinking it would be funny.[179] Matthew was later identified as the person in the video, and he took his own life two weeks after the video was posted.[180] The State of California brought a criminal action against M.H. for violating California Penal Code 647(j)(1). This section makes it a disorderly conduct violation to:

> look through a hole or opening, into, or otherwise view[], by means of any instrumentality, including, but not limited to, a… camera, motion picture camera, camcorder, mobile phone, electronic device, or unmanned aircraft system, the interior of a bedroom, bathroom… or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside."[181]

M.H. appealed his trial court conviction and the appellate court upheld the conviction. The appellate court stated that Matthew had a reasonable expectation of privacy[182] in the school bathroom, and that "the right to privacy is not one of total secrecy, but rather the right to control the nature and extent

[177] *Id.*

[178] This is a social media post that lasts only twenty-four hours before automatically deleting.

[179] *Id.*

[180] *Id.* at 5.

[181] Cal. Penal Code § 647 (West 2011).

[182] California is a state with a constitutional right to privacy. *See* CAL. CONST, ART. I § 1.

of firsthand dissemination."[183] The court felt M.H.'s conduct showed the requisite intent to invade Mathew's privacy.[184] Importantly, the court held that "[t]he 'mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.'"[185] However, the fact that Matthew was in the restroom was a large part of the reasoning behind the court's finding of his reasonable expectation of privacy.[186] Still, this case is illustrative of the danger of online posts, and it stands for the proposition that children at school have a reasonable expectation that their likeness will not be distributed on social media.

Another case involves inappropriate use of social media by a teacher in regard to a student, but not in the manner considered in this paper. In *Chaney v. Fayette County Public School District*, the plaintiff was a seventeen-year-old student attending a county-wide seminar at her high school.[187] Defendant "Curtis Cearley, director of technology services for the District, created and presented at the seminar a PowerPoint presentation entitled 'Internet Safety.'"[188] The slide immediately preceding the controversial slide had a cartoon in which a child is questioning their mother's past social media posts that make the mother seem like a "sexually-promiscuous, anti-establishment[] abuser of alcohol."[189] The Defendant then continued to a slide which showed a photo of the plaintiff in a bikini,

[183] *In re M.H.*, 205 Cal Rptr. at 3.
[184] *Id*.
[185] *Id*. (quoting Hernandez v. Hillsides, Inc., 211 P.3d 1063 (Cal. 2009)).
[186] *Id*. at 6.
[187] Chaney v. Fayette Cnty. Pub. Sch., 977 F. Supp. 2d 1308, 1312 (N.D. Ga. 2013).
[188] *Id*. at 1312.
[189] *Id.*

standing next to a cut-out of Calvin Broadus (Snoop Dogg), along with her full name and a caption that read "Once It's There—It's There to Stay."[190] This photo was taken from the plaintiff's Facebook page.[191] The plaintiff claimed the slides, in conjunction, had created the "implication [] that [plaintiff] is also or would also be branded as a sexually-promiscuous abuser of alcohol who should be more careful about her Internet postings."[192] The school had guidelines that "required a District employee to notify a student's parents beforehand of his intended use of and interaction with a student's social media page," but neither plaintiff nor her parents were notified nor consented.[193] Plaintiff brought a claim alleging the post violated her Fourth and Fourteenth Amendment rights to privacy.[194] Unfortunately, the result of the case is not particularly instructive for the concerns of this paper. The court ruled that plaintiff did not have a reasonable expectation of privacy of her Facebook photos, as her posting was voluntary and constituted intentional distribution of the image.[195] Regardless, this case stands as evidence that school district policies requiring parental consent for social media use by teachers of their students does not prevent such misuse.

III. COULD THERE BE A LEGISLATIVE SOLUTION?

[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.* at 1313.
[194] *Id.* at 1314.
[195] *Id.* at 1310.

The problem of teachers sharing photos, videos, and stories involving their students on social media may be a relatively recent problem, but it will persist and worsen without action. As previously illustrated, no current tort serves as an appropriate remedy, and this article does not advocate the creation of a new one. Aside from the fact that such a tort could create a flood of litigation, it would, additionally, constitute an unequal response by subjecting teachers to civil liability. Instead, the authors have identified, broadly speaking, a two-pronged approach to develop solutions to the problem. The first prong advocates for federal laws as a potential source of the solution. As described above, individual plaintiffs could bring an action against offending teachers or schools, using a 42 U.S.C. 1983 claim to vindicate the federal constitutional right to privacy, in instances where a teacher has allegedly violated student rights via a social media post. Alternately, FERPA could be used by school administrators, using HIPAA as a model, to create organizational rules and policies, the violation of which would invoke a series of disciplinary procedures which could ultimately include suspension or termination.

If an appeal to federal law is not successful at curbing the practice of violating school children's privacy, a second potential solution could involve targeted legislative action. While this may seem like a request for proactive (and, therefore, unnecessary) legislative action, this paper has already explained that the harm is real and is presently occurring.

A. A Federal Solution: An Ombudsman Office

Most of the decisions impacting a child's education are made at levels close to the people, by

either school boards or local governments. But, as discussed earlier, the federal government has a history of enacting laws aimed at privacy for children in schools (e.g. FERPA), and it could do so again. Federal funding for public education has consistently risen over time, with a corollary increase in the ability of the federal government to impose its will.[196] Still, on average, only about 8% of a school district's funding comes from the federal government.[197] Additionally, the federal government does not create unfunded educational mandates.[198] Accordingly every requirement put on public schools by the federal government comes with conditional funding.[199] Thus, the ability to create a federal solution is dependent on finding money for it, and then tying that money to the solution.[200]

For the purposes of this article, we will assume that sufficient funding exists. Statutorily defining what is considered a violation should not be challenging. In fact, there need not even be a reference to social media. The operative language only needs to prohibit the posting or publishing of any image, name, video, likeness, or other depiction of or reference to students, by a teacher, for a non-school-approved purpose. Theoretically, this leaves open the possibility that schools will approve inappropriate postings, but that seems like a fairly remote possibility; and one that is at least nominally

[196] *10 Facts About K-12 Education Funding*, U.S. DEPT. OF EDUC. (Jun. 2005), https:// www2.ed.gov/about/overview/fed/10facts/index.html.

[197] *The Federal Role in Education*, U.S. DEPT. OF EDUC., https:// www2.ed.gov/about/overview/fed/role.html. (last modified June 15, 2021),

[198] *10 Facts*, *supra* note 196.

[199] *Id.*

[200] It is beyond this paper to speculate from where in the budget the funding would come from.

associated with a policy of parental opt-in (or opt-out), giving parents some recourse even if such an event were to occur.

Next comes the question of who will investigate the potential violations. It is unrealistic to ask the Department of Education to monitor the social media feeds of teachers, and unfair to make teachers give the government access to their private profiles.[201] Instead, the system could rely on an ombudsman office, to which the public at large may report violations. The Department of Education Office of Inspector General already handles a variety of investigations, so a small division could be created within it fairly easily.[202] Specifically, there could be a new subdivision created in the Investigation Services unit.[203] "Investigation Services is the law enforcement arm of Ed. This team of law enforcement professionals conducts criminal and civil investigations, covering a wide range of wrongdoing, including Federal student aid fraud, diploma mill schemes, fraud and corruption in after-school programs, and fraudulent billing of contracts."[204] The investigations and reports would be simple, so only a small group of people would be needed to staff such a division, keeping costs low.

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[201] Although the similar policies already exist in schools. Schools have "forced consent" policies that require students to give school administrators access to their social media accounts. Hurst, *supra* note 68, at 196-97.

[202] *Office of Inspector General*, U.S. DEPT. OF EDUC., https://www 2.ed.gov/about/offices/list/oig/index.html (last modified July 15, 2021).

[203] See, *U.S. Department of Education – Office of Inspector General*, U.S. DEPT. OF EDUC. (July 2021), https://www2.ed.gov/about/offices/list/oig/organizationalstructure.pdf.

[204] *Investigation Services*, U.S. DEPT. OF EDUC., https://www2.ed.gov/about/offices/list/oig/investpage.html (last modified Mar. 9, 2021).

The investigation would start with a formal complaint in which a whistleblower identifies media that allegedly violate student privacy. Then the investigator would have to confirm the basic elements of the violation. Was this a student? Was it posted by a teacher? Did the event constituting the subject of the post take place at school? Did the school consent to the post? The investigation could be conducted outside of the courts and without law enforcement, because "[w]hen a social media user disseminates his postings and information to the public, they are not protected by the Fourth Amendment."[205] This would not be an extensive, nor fact intensive, investigation, but it would require communication with the school and teacher. The violating school would be allowed to appeal an adverse finding to the office of the Assistant Inspector General for Investigations. The outcome of the appeal would be the final result of the case in the executive branch.

The final issue to address is what the appropriate penalty should be. The penalty must be based on losing the conditional funding that the law promises with compliance. It would be too harsh a punishment to revoke all of an offending school's conditional funding for a single infraction. Instead, each of the first three confirmed violations over a two-year period could cost the school district 20% of the funds it receives for compliance. After three "strikes," the district should be considered a serial violator, and the entire conditional funding could be lost until the end of the two-year period (starting with the first violation), or the government could

[205] United States v. Meregildo, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012) (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

choose to just remove another 20% of the funding. These numbers are arbitrary and are used here merely to serve as an example. They could easily be adjusted in the future, based on further information.

Many, if not most, violating social media posts would likely still go unreported, and some investigations would likely be fruitless. But the goal is not punishment, it is deterrence and awareness. Egregious violations or independent serial violators may require actual repercussions, but the creation of the law alone would, hopefully, end much of the misconduct. Presumably, offending teachers are not acting out of a desire for gain, but, instead, because they enjoy posting on social media, and likely view the action as harmless. It seems unlikely they would continue to do so if made aware that it is not only illegal, but that they (or their school) could face repercussions.

The authors recognize that such a federal response to this problem may appear unrealistic to some. It is presented here in an attempt to explore all possible solutions to the problem. Certainly, motivation to push such through Congress, as well as sufficient appetite to fund it, likely do not exist at present. However, as the extent of the problem becomes apparent, demands for change may emerge. Potentially, an update to FERPA would be an easier change. If that law's protection were extended to prevent the revealing of a student's likeness, for instance, the same results could potentially be achieved in a simpler and easier fashion. Other (possibly more feasible) potential solutions to the problem exist and are explored below.

B. A State Solution: The State Strike System

Education is a local responsibility, and perhaps this issue can be best handled at a level closer to the people than at the federal level. As with the previous section, assuming that public sentiment is in full force behind the need for change, and, thus, that legislative willpower is not an issue, the issue could become more manageable at the state level through the implementation of a "State Strike System."

In some ways, this would be similar to the federal solution described above, in the form of an investigative unit, serving under the umbrella of the department or agency responsible for education in the state.[206] Investigations would begin the same way and serve to determine the same facts as in the federal solution. At the state level, it is possible the entire office would require a staff of only a few people, depending on the number of investigations required, making the cost to the government and taxpayer minimal. As with the federal solution, there would be a simple appeal process that would remain within the department or agency, with the result of that process being final.

Where the federal and state solutions would vary would be in the penalty for violations. Instead of the federal approach of forcing compliance through conditional funding, the State Strike System would utilize nonmonetary repercussions for violating schools and teachers. This would be a scaled system, with punishments increasing in magnitude as the number of incidents increase.

For the first confirmed violation, the offending teacher would be required to watch a state-created education program, which would emphasize the

[206] Every state has a unique structure to its government; so, this Article can only speak in generalities.

importance of protecting student privacy.[207] They would then be required to pass a corresponding test upon completion. The school district would be required to send out correspondence to all teachers describing the violating conduct, reminding them of the law, and asking them to refrain from such conduct or face repercussions. Overall, the first violation could be considered to be the proverbial "slap on the wrist." In keeping with this spirit of wrist-slapping, it would make sense to, additionally, create a safe harbor provision for the first offense, which would prevent the firing of a teacher for a single transgression.

For an individual teacher's second violation, the penalty would become more severe. The teacher would face a multi-day suspension, without compensation, and be required to complete supplemental education on student privacy law and its purpose. There would be no safe harbor provision after the first offense. For a school's second infraction, the entire teaching staff would be required to spend a portion of the next professional development day[208] participating in the same education program used for an individual teacher's first violation.

At the third individual infraction, the penalty would become even more severe, as the teacher has now become a serial violator. The penalty would be immediate suspension for the rest of the school year

[207] Other than the child's privacy being violated by social media posts, there is risk of exposing the child to predators or cyberbullying.

[208] Workdays are professional development days for teachers in which no students come to school. *See* Linda Myers, *What Happened to the Teacher Workday?*, EDUC. WEEK (Feb. 28, 2018), https://www.edweek.org/leadership/opinion-what-happened-to-the-teacher-workday/2018/02.

from the offense date, without pay. It would be for the school to decide if they wished to retain the teacher for the following school year. They may not wish to, because the penalty for the school district's third offense would likely be harsher as well (e.g. being put on a published list of serial offender schools for a period of time).

This punishment regime serves only as an example of how such a system could be implemented, to avoid funding the program other than what it takes to pay employees to run the investigations. Modifications to the details of the above recommendations would, of course, be necessary as such a policy was developed and actually implemented.

CONCLUSION

As society adapts to the pervasive use of social media, it cannot overlook its intrusion into school children's privacy. The K-12 years of schooling are a formative period for children, during which they are entitled to create their own self-image, with relative freedom from interference from those to whom society has entrusted their care. When a teacher posts a depiction of a student to their social media account, without parental permission, the student's right of privacy is violated, and their ability to form their self-image is, to a certain extent, taken out of their hands. This issue is not widely appreciated as of yet, but the injuries are current, real, and potentially long-lasting.

It is logical and apparent that children have a right to privacy, regardless of their full appreciation of it. However, there is currently little legal recourse to protect that right and address the issue. The U.S. Constitution's relationship with privacy is very

challenging to pin down, and faces outright opposition from some, given its connection to abortion rights. Various states have created a right to privacy, either in their constitutions or through their highest court; but there is no guarantee that such general rights to privacy make provision for the kinds of controls necessary to protect children from the issue at hand.

While federal laws could provide some protection, that has, to date, not been an avenue that seems to have been much explored, either by individual plaintiffs (e.g. through a 42 U.S.C. 1983 claim) or by schools (by creating rules that impose penalties on teachers for violating FERPA). Parents can, of course, try to vindicate their child's rights through litigation; but few will find that an appealing avenue, due to burdensome cost and effort. Additionally, it would be difficult to find a recognized tort on which to base their claim. This lack of legal remedies has resulted in a corresponding lack of case law. The little that does exist seems to approve of a child's reasonable expectation of privacy at school and illustrates both the danger of online posts and the insufficiency of current school or district guidelines to prevent misconduct.

This is why a legislative solution might remain the only viable alternative. The federal government could address the problem through the use of conditional funding for schools. Of course, funding a federal office to accomplish this task might prove difficult, in addition to the fact that most schools receive little of their funds from the federal government, which may remove some of the "teeth" from this solution. As such, a legislative solution might be best accomplished at the state level. In place of a federal solution, states could develop a State Strike System. This system would mostly avoid the

need for funding and would combine reasonable punishments with additional education and preventive action.

The misconduct appears to be fairly widespread, but knowledge about the issue seems to be limited. Thus, without a legislative solution, the problem is not likely to go away or diminish. As self-image and informational privacy for adults continue to slip away from contemporary society, the need to protect children remains strong. Action should be taken now, because the harm is current, and because that harm has the potential to permanently injure a child's development of a healthy self-image.