

2012

Drawing a Line in the Shifting Sand of Social Media: Attempting to Prevent Teachers From "Liking" a Student Outside the Classroom

James R. Baez

Kerri E. Caufield

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlelj>



Part of the [Law Commons](#)

Recommended Citation

Baez, James R. and Caufield, Kerri E. (2012) "Drawing a Line in the Shifting Sand of Social Media: Attempting to Prevent Teachers From "Liking" a Student Outside the Classroom," *Hofstra Labor and Employment Law Journal*: Vol. 30: Iss. 1, Article 8.
Available at: <http://scholarlycommons.law.hofstra.edu/hlelj/vol30/iss1/8>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

DRAWING A LINE IN THE SHIFTING SAND OF SOCIAL MEDIA: ATTEMPTING TO PREVENT TEACHERS FROM “LIKING”¹ A STUDENT OUTSIDE THE CLASSROOM

I. INTRODUCTION

It is a main tenet of our modern American society that the innocent youth must be protected from those who wish to do them harm.² Nowhere is this more evident than in the context of the American classroom.³ Scandals in recent times constantly remind the population that even in the facilities we entrust to educate and mold our children as they mature towards adulthood, they are still threatened by those who wish to satisfy their own needs by violating the separation between student and teacher.⁴ It stands to reason that the institutions of learning within our states would strike back, trying to keep the wall between those who wish to harm, and those too young to protect themselves, strong and impenetrable. However, how far is too far? When does the desire to protect the youth of our generation become overzealous, so that it infringes upon the rights state teachers are entitled to have? One state, along with a multitude of school districts throughout the country, has begun to grapple with this dilemma.⁵ The outcome will likely be a delicate tightrope walk, which will rarely be feasible to perform.

The Amy Hestir Student Protection Act (Amy Hestir Act), passed in Missouri on July 14, 2011 was designed to help the state school system fight sexual abuse inflicted on students by their teachers.⁶ In

1. This term is common among the users of Facebook. It denotes an action that may be taken by a user on this social media website. A user who intends to show approval of an item on another user's webpage clicks an icon marked “Like,” which appears next to photos, comments and other features of the webpage. *See generally What Does It Mean to “Like” Something?*, FACEBOOK, <http://www.facebook.com/help/110920455663362> (last visited Oct. 19, 2012) (explaining the “Like” function of Facebook).

2. *See infra* Part II.

3. *See infra* Part II.A.

4. *See infra* Part II.C.

5. *See infra* Part II.

6. *See infra* Part II.A–B.

particular, section 162.069 of the law directed every school district to develop a written policy concerning teacher-student communications, while subsection 4 provided further that: "No teacher shall establish a nonwork-related internet site which allows exclusive access with a current or former student."⁷ This type of prohibition is overly broad for its intended purpose, overly vague in that it does not allow a teacher to understand what conduct will violate the statute, and it tries to control the activities of teachers outside the schoolhouse. Therefore, this type of prohibition should be rewritten in order to prevent such restrictions on the private lives of teachers, and any confusion over what a teacher can and cannot do online with their students. In addition to looking at other school districts' attempts to create similar regulations to stem the possible tide of teachers harassing students via social media⁸ websites, such as Facebook,⁹ Twitter,¹⁰ MySpace,¹¹ and other similar social networking sites, this note will demonstrate how Missouri and other states could write such a statute.

This note will propose a hypothetical regulation that states could adopt in order to protect students from unwanted communication with teachers, while simultaneously remaining narrow enough so that the construction does not cause states to violate teachers' free association rights under the First Amendment or public policy.

This note will first explore the history of the statute, including why the statute was enacted and what the repercussions have been since its adoption in Missouri. Part II will give glimpses of other similar provisions that other state school districts have implemented in response to the growing concern about the Internet as a portal for teachers to abuse students. The focus will then shift in Part III to the concept of an

7. S. 54, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

8. Social media are "forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)[.]" *Social Media*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Oct. 19, 2012).

9. "Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet." *About*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Oct. 19, 2012).

10. "Twitter is a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting." *About*, TWITTER, <http://twitter.com/about> (last visited Oct. 19, 2012).

11. "Myspace drives social interaction by providing a highly personalized experience around entertainment and connecting people to the music, celebrities, TV, movies, and games that they love. These entertainment experiences are available through multiple platforms, including online, [and] mobile devices" *About Us*, MYSPACE, <http://www.myspace.com/Help/AboutUs> (last visited Oct. 19, 2012).

employer controlling the outside activities of its employees in order to satisfy an intended purpose of the employer. Part IV will confront the limitations the courts have placed on overbroad laws which seek to control the right to freedom of association of teachers. Through Part V, the Amy Hestir Act will be applied to current cases to show the possible applications of this new law. The final section of this note will propose suggestions as to how the Amy Hestir Act can be improved in order to serve the important goals of the state, while simultaneously protecting the rights of the teachers.

II. HISTORY OF THE MISSOURI LAW AND OTHER SIMILAR REGULATIONS

Similar to many other statutes, the Amy Hestir Student Protection Act was not simply created on a whim; it has a clearly articulated purpose. The story of an abused student, and a concern for other children, proved to be enough of a driving force to convince the state of Missouri to pass a law unseen in any other state.¹² However, real-world ramifications that stemmed from this novel action would distort its purpose, and require changes in the law before it could even achieve any of the legislature's goals.

A. The Amy Hestir Case and the Statute It Spawned

On May 12, 2011, a press release was issued by Missouri Senator Jane Cunningham's office.¹³ The statement calls the Amy Hestir Student Protection Act Senator Cunningham's work and indicates that it was legislation aimed at protecting children from sexual abuse.¹⁴ While the bill received a vast amount of support in the Missouri House of Representatives, Senator Cunningham was the actual sponsor behind it.¹⁵ "After five years of fighting, I'm proud to see this legislation finally sent to the governor's desk – children in our state are now one big step closer to having solid protection from sexual predators in their schools,"

12. Mikel J. Sporer, *Social Media Laws Aim to Curb Bullying and Abuse of Children Online*, SILHA CTR. FOR THE STUDY OF MEDIA ETHICS & LAW BULLETIN, <http://www.silha.umn.edu/news/Fall2011/socialmediabullying.html>.

13. Press Release, Sen. Jane Cunningham, Senator Cunningham's "Amy Hestir Student Protection Act" Sent to the Governor (May 12, 2011), available at <http://www.senate.mo.gov/media/11info/Cunningham/releases/Cunningham-AmyHestirPassed051211.htm> [hereinafter Cunningham Press Release].

14. *Id.*

15. *Id.*

said Senator Cunningham.¹⁶ She stated further that the legislation was “vital” for protecting students from acts of sexual misconduct by school employees.¹⁷ She maintained that “[her] bill” would make extensive background checks mandatory and make it possible for school officials to use knowledge of sexual misconduct to make staffing and potential hiring decisions.¹⁸

Missouri school districts have been plagued by an unsafe practice that has become known as “passing the trash.”¹⁹ This phrase refers to a common Missouri practice whereby teachers and employees with records of sexual misconduct are able to move from one school district to another.²⁰ They were enabled to do so by Missouri’s prior employment laws and a belief that sharing information about past employees would lead to lawsuits.²¹ According to her press release, Cunningham’s bill would put an end to “passing the trash,” and create safer hiring practices that would protect school children.²² The new law would allow school districts in Missouri to discuss information about their employees with other school districts.²³ Perhaps more importantly, it would hold school districts liable for damages if they failed to disclose any actions of sexual misconduct in a reference request from another school district.²⁴

On February 6, 2008 Amy Hestir Davis appeared in front of the Missouri legislature to speak in support of the bill titled “The Amy Hestir Davis Student Protection Act.”²⁵ She recounted her tragic childhood tale of abuse before the Missouri House Education Committee, in order to provide some context for the reasoning behind the writing of the bill.²⁶ Although this was only the second time she discussed her haunted past, Amy was willing and eager to explain her story and answer any questions posed by her audience.²⁷

Amy was abused beginning when she was twelve-years-old and

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.*

23. *Id.*

24. *Id.*

25. *Missouri: Amy Hestir Davis Student Protection Act - Student Abused by a Jr. High School Teacher*, SEXLAWS.ORG, http://www.sexlaws.org/amy_hestir_davis_student_protection_act (last visited Oct. 24, 2012) [hereinafter *Student Abused By Jr. High School Teacher*].

26. *Id.*

27. *Id.*

entering the seventh grade.²⁸ The mistreatment continued for nearly two years, until she left her junior high school upon graduating from eighth grade.²⁹ Amy recounted: “I was a shy kid. I came from kind of a troubled home and I appreciate[d] the extra attention that I got from a teacher at my Jr. High School that was nicknamed the ‘Art Coach’.”³⁰ Amy would meet the teacher during free periods and was also a babysitter for his young daughter.³¹ The teacher would drive her home from babysitting, but take elongated routes to create opportunities for abuse.³² Amy would also ride her bike to the teacher’s house after the school day was over, and remain there until just before the teacher’s wife would return home around five o’clock.³³ Amy classified that time in her life as “the darkest period of my life growing up and the wors[t] thing that has ever happened to me.”³⁴ She admitted that she consented to an ongoing sexual relationship with her teacher out of fear, and that the relationship lasted for more than a year.³⁵ However, she was adamant about taking that horrible experience and using it to do something positive, not just to benefit the children of Missouri, but children throughout the nation.³⁶

By the time Amy gained the courage to discuss her abuse with an adult, it was nearly ten years after the events.³⁷ At that point, the statute of limitations had nearly expired and the prosecuting attorney chose not to file the complaint.³⁸ Amy had not told her story earlier because of her feelings of guilt and shame, and the teacher’s statements that if others knew what she had been a part of, it would ruin her life and the lives of her family members.³⁹ She decided to speak to the Missouri legislature because she realized that sharing her experience is one way to prevent future incidents such as hers from happening to other innocent children.⁴⁰

With Amy Hestir Davis’s testimony echoing in their ears, the

28. *Id.*

29. *See id.*

30. *Id.*

31. *Id.*

32. *See id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *See id.*

Missouri legislature turned Senate Bill 54 into law in 2011.⁴¹ In section 162.069, the statute required that each school district formulate a written policy by January 1, 2012, laying out the ground rules for communications between students and teachers and students and employees.⁴² While the statute did not specifically dictate what these new policies were required to say, it did provide some necessary elements. The first necessary element was a description of appropriate oral and nonverbal personal communication, which could be combined with the school's policies on sexual harassment.⁴³ That requirement was to be accompanied by a section addressing the appropriate use of electronic media for both instructional and educational purposes.⁴⁴ Examples of electronic media that were addressed include text messaging, websites, and social media sites.⁴⁵ Ironically, in Amy's story of abuse, the teacher did not create his opportunities for molestation through any type of electronic media.

While those beginning requirements were broad and left the language of the restrictions mostly in the hands of the individual school districts, the remaining subsections of the statute impose highly stringent controls on the school districts, specifically in regard to the use of electronic communication. No teacher is allowed to "establish, maintain or use a work-related [I]nternet site unless such site is available to school administrators and the child's legal custodian, physical custodian, or legal guardian."⁴⁶ In the same sense, no teacher is allowed to establish, maintain, or use a non-work-related Internet site that allows for exclusive access with a current or former student.⁴⁷ Furthermore, the Act provided that, by July 1, 2012, every school district must "include in its teacher and employee training a component that provides up-to-date and reliable information on identifying signs of sexual abuse in children and danger signals of potentially abusive relationships between children and adults."⁴⁸ This training must "emphasize the importance of mandatory reporting of abuse . . . and how to establish an atmosphere of trust so that students feel their school has concerned adults with whom they feel comfortable discussing matters related to abuse."⁴⁹

41. S. 54, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

It is clear from the language of the statute and the use of Amy Hestir Davis's testimony that this law was aimed at preventing the sexual abuse of children. More specifically, the law aims to stop incidences of sexual abuse that occur through electronic portals by limiting the interactions teachers and school employees have with the children.⁵⁰ It discourages any communication outside of the classroom, especially communication through technological mediums, such as cell phones and the Internet.⁵¹ In an attempt to cover all of their bases, the Missouri legislature unintentionally enacted a broad statute that would soon be attacked as overstepping the boundaries of its admirable purpose.

B. Post Amy Hestir: The Backlash, the Lawsuit, and the Amendment

Missouri Governor Jay Nixon signed the bill on July 14, 2011,⁵² and the Amy Hestir Student Protection Act was slated to take effect on August 28, 2011.⁵³ However, litigation quickly began, arising from the concerns of the Missouri State Teachers Association (MSTA or "the association").⁵⁴ The MSTa brought suit against the state, requesting that the court grant injunctive relief and a declaratory judgment.⁵⁵ The MSTa first contended that section 162.069 of the Amy Hestir Student Protection Act infringed upon state teachers' First Amendment right to freedom of speech in denying them the use of social media sites.⁵⁶ Further, the association argued that the Act was unconstitutionally overbroad, because prohibiting teachers from using social networking sites to communicate with students would "deter legitimate exercise of first amendment rights."⁵⁷ The MSTa also put forth the argument that

50. *See id.*

51. *See id.*

52. Jackson Buckley, *Missouri Facebook Law: Why Can't Teachers and Students be Friends*, THE CHRISTIAN SCIENCE MONITOR (Aug. 23, 2011), <http://www.csmonitor.com/USA/Education/2011/0823/Missouri-Facebook-Law-why-can-t-teachers-and-students-be-friends>.

53. *Id.*

54. *See* Stephanie Backus, *Teachers' Association Files Lawsuit Over Social Networking Law*, CONNECTMIDMISSOURI.COM (Aug. 19, 2011, 4:55 PM), <http://www.connectmidmissouri.com/news/story.aspx?id=653721#.TpM9pbKtluE>.

55. Petition for Injunctive Relief and Declaratory Judgment, Missouri State Teachers Ass'n v. State of Missouri, No. 11AC-CC00553 (19th Jud. Cir. Mo. Aug. 26 2011), available at http://www.msta.org/news/Petition_final.pdf [hereinafter Petition for Injunctive Relief and Declaratory Judgment].

56. *Id.* at 4.

57. *Id.*

the act was unconstitutionally vague, lacking sufficient standards to control school districts' discretion under the law.⁵⁸

The MSTA also argued that the law violated the Due Process Clause of the Fourteenth Amendment.⁵⁹ It claimed that the law prevented parents who are also teachers from communicating with their own children who are students.⁶⁰ The law also infringed upon the parents' right to educate and raise their children, and limited the ways in which parents could communicate with their children without a compelling governmental interest to do so.⁶¹

Seven days after the submission of their motion, on August 24, 2011, Judge Jon. E. Beetem granted the MSTA's motion for a preliminary injunction.⁶² Judge Beetem agreed with the MSTA stating that, "the breadth of the prohibition is staggering."⁶³ He further found that section 162.069 would have a chilling effect on teacher speech, constituted immediate and irreparable harm, and therefore, should be prevented with a preliminary injunction.⁶⁴ This injunction stopped the implementation of section 162.069, and was to last until February 20, 2012, or until the case was decided on the merits.⁶⁵

On the same day that the decision of the Missouri court was handed down, Governor Jay Nixon called for the legislature to repeal the parts of the Amy Hestir Student Protection Act that involved communication between students and teachers.⁶⁶ While stating that other parts of the bill could be saved, the Governor called for teachers, parents and others that would be affected by the bill to give their input on the subject.⁶⁷ Gail McCray, counsel for the MSTA supported the idea of using the extra time to "come to a proper resolution rather than rushing to piece together language that doesn't resolve the concerns of educators or allow time for

58. *Id.* at 5.

59. *Id.*

60. *Id.*

61. *Id.*

62. Order Entering Preliminary Injunction, *Missouri State Teachers Ass'n v. State of Missouri*, No. 11AC-CC00553 (19th Jud. Cir. Mo. Aug. 26, 2011), available at <http://www.msta.org/files/resources/publications/injunction.pdf> [hereinafter Order Entering Preliminary Injunction].

63. *Id.* at 2.

64. *Id.*

65. *Id.* at 3.

66. Ned Potter, *Missouri 'Facebook' Law: Judge Grants Injunction Against Limits on Online Contact Between Teachers and Students*, ABC NEWS (Aug. 26, 2011), <http://abcnews.go.com/Technology/missouri-facebook-law-injunction-granted-law-ban-teachers/story?id=14388569>.

67. *Id.*

teacher input.”⁶⁸

The Missouri Senate responded quickly to the court’s decision by revising the bill and sending it to the Missouri House of Representatives for a floor debate on September 22, 2011.⁶⁹ This debate in the House culminated in the adoption of amendments to the bill on September 23, 2011.⁷⁰ The amendments discarded the definitions describing former student, exclusive access and work-related and non-work-related Internet sites.⁷¹ Teachers were also no longer prohibited from having and using Internet sites that allowed them to communicate with students.⁷² With his signature, Governor Nixon effectively repealed section 162.069 of the Amy Hestir Act on October 21, 2011,⁷³ seemingly ending the debate over the statute. However, a portion of the bill still requires school districts to create their own social media policies to control student-teacher interactions.⁷⁴ Groups such as the American Civil Liberties Union have encouraged Governor Nixon to veto the repeal based upon this requirement, fearing that instead of actually solving the problem with the original law, Missouri has now left local school districts to create policies that may not address any of the issues raised.⁷⁵

Even after the repeal of section 162.069, there are still new concerns being raised over the wording of the act and the implications of its far reach into the way teachers and students use websites for educational purposes inside the classroom.⁷⁶ Additionally, while they were successful in getting section 162.069 repealed in Missouri through a lawsuit, the MSTA had to decide whether they would drop the lawsuit that had won them a preliminary injunction until February 20, 2012.⁷⁷

68. *Id.*

69. ‘Facebook Law’ Revised in Senate, on to the House, JOPLIN GLOBE (Sept. 16, 2011), <http://www.joplinglobe.com/local/x2127773043/Facebook-Law-revised-in-Senate-on-to-the-House>.

70. See Tim Sampson, *Missouri House Sends Facebook Fix to the Governor*, MO. NEWS HORIZON (Sept. 24, 2011), <http://missouri-news.org/news/education/missouri-house-sends-facebook-fix-to-the-governor/9294> (noting that the amendments changed the controversial social media provision of the bill).

71. S. 1, 96th Gen. Assemb., 1st Extraordinary Sess. (Mo. 2011).

72. *Id.*

73. See David A. Lieb, *Mo. Repeals Teacher-Student ‘Facebook’ Ban*, NBC NEWS (Oct. 21, 2011, 5:54 PM), http://www.msnbc.msn.com/id/44994464/ns/technology_and_science-tech_and_gadgets/t/mo-repeals-teacher-student-facebook-ban/#.Tsr55f1SSo.

74. *See id.*

75. *See id.*

76. *See id.* (“[O]ne teacher feared the law could have prevented her class from communicating with students in Australia through a closed website. Others raised concerns about the law’s effect on editing software for school yearbooks or on virtual classrooms, in which students communicate with direct messages[.]”).

77. *Id.*

The MSTA also had to determine what other protective measures to take in regards to the March 1, 2012 deadline set by the Missouri Senate for school districts to create their own social media policies.⁷⁸ In response to the need for a model social media policy, the MSTA released their own social media policy to guide the Missouri school districts.⁷⁹ In this model policy, the association stresses the importance of maintaining a proper boundary between students and teachers.⁸⁰ The model policy also stresses the growing importance of electronic resources in the modern world, emphasizing that skill in utilizing such technologies is critical in preparing students to become citizens of the workforce.⁸¹ While indicating that the restriction of work related electronic activities might be monitored and controlled by the school districts, the MSTA's policy uses a stern tone in indicating that the same will not be true of non-work related activities.⁸² In the final part of its model policy, the MSTA firmly states:

The [School District] shall not implement any policies regarding non-work-related employee communications conducted by its employees in general, or which allow exclusive access with current and former students. It shall not prohibit employees of the district from engaging in any non-work-related activities or using non-work-related electronic communications or new technology platforms. The balancing of the individual employee's Constitutional rights to freedom of speech, association, and religion outweigh the interests of the school district in the non-work-related activities of its employees, subject to conduct and communications already regulated by local, state and federal law.⁸³

The release of the MSTA's proposal was timely. Only a short time after the model policy was released a Missouri school district began contemplating the implementation of a social media policy.⁸⁴ Aside from the multitude of Missouri school districts that will soon have to

78. See JoLynne Martinez, *Missouri State Teachers Association Offers Model Communications Policy to Districts*, KC EDUC. ENTERPRISE (Dec. 20, 2011), <http://kceducationenterprise.org/2011/12/20/missouri-state-teachers-association-offers-model-communications-policy-to-districts/>.

79. See *id.*

80. See Mo. State Teachers Ass'n, *Employee-Student Relations and Communications Policy*, MO. STATE TEACHERS ASS'N, http://www.msta.org/files/comm_policy.pdf (2011).

81. See *id.*

82. See *id.*

83. *Id.*

84. See JoLynne Martinez, *Liberty Board of Education to Meet Monday Evening*, KC EDUC. ENTERPRISE (Dec. 19, 2011), <http://kceducationenterprise.org/2011/12/19/liberty-board-of-education-to-meet-monday-evening/>.

implement their own social media policies, other school districts around the country have launched their own assault against the social media terror they now find themselves grappling with.⁸⁵

C. A Multistate Front: Other School Districts That Have Confronted the Facebook Conundrum

While Missouri stands alone when it comes to action taken by a state legislature, other states' school districts were attempting to tackle the problem of electronic communications between students and teachers before the passage of the Amy Hestir Student Protection Act. One such effort, which has been suggested for use throughout the Massachusetts school system, is the social media policy created by the Massachusetts Association of School Committees.⁸⁶ This proposed statewide policy is aimed at stopping "improper fraternization" between students and teachers through social media.⁸⁷ It requires superintendents to remind teachers not to have inappropriate communications with students.⁸⁸ Particular emphasis is placed on actions such as "friending"⁸⁹ a student on a social media site and giving a student your personal phone number.⁹⁰ Such actions, if discovered by the superintendent, may lead to disciplinary action or even termination.⁹¹

Another attempt to curb student and teacher communication was implemented in Pennsylvania.⁹² After a scandal erupted over comments a teacher made regarding her students on a blog, a local school board proposed a policy to deal with social media.⁹³ The policy banned online activities by teachers that would "jeopardize the professional nature of

85. See *infra* Part II.C.

86. See Peter Schworm, *Norton Warns Teachers Not to 'Friend' Students*, BOSTON GLOBE (Oct. 25, 2010), http://www.boston.com/news/education/k_12/articles/2010/10/25/norton_warns_teachers_not_to_friend_students/?page=1.

87. *Id.*

88. *Id.*

89. This term refers to the action of one person on a social media site, such as Facebook, toward another user on the site. Upon accepting another users request to "friend" them, the two users are given access to view each other's webpage, interact on the webpage itself and communicate through the website.

90. Schworm, *supra* note 86.

91. *Id.*

92. See Julie Bonner, *School District Proposes Social Media Policy for Teachers*, BLOG WORLD (Sept. 14, 2011), <http://www.blogworld.com/2011/09/14/school-district-proposes-social-media-policy-for-teachers/>.

93. *Id.*

the staff-student relationship.”⁹⁴

Shortly after section 162.069 was passed and repealed in Missouri, a school district in Dayton, Ohio passed its own similar social media policy.⁹⁵ The policy bans teachers from communicating with students using text or instant messaging, or even responding to a student if it would mean communication on a private account not approved by the school district.⁹⁶ Unlike the adverse reaction shown by the teachers union in Missouri, the Ohio teachers union supported the measure, indicating that it could be beneficial to the safety of schoolteachers,⁹⁷ directing them away from any actions that could be interpreted as being improper.

After two teachers had criminal charges brought against them based on communications with students, an Idaho school district passed its own social media policy.⁹⁸ It bans teachers from talking to students on social media websites about anything other than the student’s education or on a subject for which the teacher has been made responsible.⁹⁹

Western states are also no stranger to this controversy. In Arizona, some school districts have implemented policies that control whether teachers may communicate with students on social media sites.¹⁰⁰ In Mesa public schools, teachers are not allowed to talk to students over social media sites about subjects not related to school.¹⁰¹ Dysart schools instead tell their teachers to keep their social media pages viewable only to their friends, and teachers may not friend students.¹⁰² This aims to prevent students and teachers from having one-on-one interactions, which would include interaction on these sites.¹⁰³

Along with the multiple examples of various school district policies discussed above, in the wake of the Amy Hestir Act, a multitude of state

94. *Id.*

95. Elizabeth Reed, *Dayton Teachers Banned from Facebook, Texting Students*, NORTHWESTOHIO.COM (Aug. 31, 2011, 8:16 AM), <http://www.northwestohio.com/news/story.aspx?id=657945>.

96. *Id.*

97. *See id.*

98. Laurie Welch, *Minidoka County OKs its Own Version of Social-Media Policy*, TIMES-NEWS (Twin Falls, Idaho), (Dec. 24, 2010, 1:15 AM), http://magicvalley.com/news/local/minidoka/article_c780982a-8ce6-59c5-b627-b94ece72bd82.html.

99. *Id.*

100. *See* Jazmine Woodberry, *Facebook Friendships Between Teachers, Students a Concern*, ARIZONA REPUBLIC (Aug. 14, 2011, 12:00 AM), <http://www.azcentral.com/news/articles/2011/08/14/20110814facebook-teachers-students.html>.

101. *Id.*

102. *Id.*

103. *Id.*

school districts were set to reevaluate their online policies for the fall semester.¹⁰⁴ While not an exhaustive listing, the local provisions, along with the Missouri statute, paint a comprehensive picture of a nationwide attempt to combat the feared threat of inappropriate student-teacher interaction through electronic mediums. However, thus far the focus has been placed upon the reasoning and language behind these measures. The Amy Hestir Act has already stirred up possible challenges to the enforcement of such policies,¹⁰⁵ which require deeper exploration and discussion.

III. RESTRICTIONS ON THE PRIVATE LIVES OF EMPLOYEES

State employers have long-possessed the abilities to control how their employees act within the workplace. However, in some instances, employer control can extend beyond the jobsite, by attempting to control the personal associations of its employees. For example, if an employee's relationship or association with a particular person can have some impact on their job performance, or the effectiveness of the employer's competitors, the employer may have the right to regulate those activities, despite their occurrence outside of the workplace. This same principle can be used to attempt to control the actions of schoolteachers outside of the classroom, by dictating with whom they can communicate, and in what ways.

A. Court Limitations on Employer Control over the Private Lives of Employees

Multiple cases from varying jurisdictions address this issue. While they do not all specifically refer to school district controls over teachers, the same rules clearly apply. The case with the most relevant fact scenario is *Shelton v. Tucker*.¹⁰⁶ In this case, a group of schoolteachers brought an action challenging the constitutionality of a state statute that required teachers in public schools to file affidavits stating the names

104. See John H. Tucker, *National Ink for Missouri's Teacher-Student Facebook Law*, RIVERFRONT TIMES (St. Louis, Mo.), (Dec. 19, 2011, 1:15 PM), http://blogs.riverfronttimes.com/dailyrft/2011/12/new_york_times_missouri_teachers.php (stating that school boards in California, Florida, Georgia, Illinois, Michigan, New Jersey, New York, Texas and Virginia will or have updated their online media policies).

105. See, e.g., Kevin Murphy, *Missouri Teachers Sue to Block Social Media Law*, REUTERS (Aug. 20 2011, 1:48 PM), available at <http://www.reuters.com/article/2011/08/20/us-schools-missouri-suit-idUSTRE77J1QW20110820>.

106. 364 U.S. 479 (1960).

and addresses of all the organizations to which they belonged or contributed within the previous five years as a prerequisite to their employment.¹⁰⁷ The court held that this requirement was unconstitutional.¹⁰⁸ Teachers were hired on a year-to-year basis, they were not covered by a civil service system, and they had minimal job security past the end of the school year.¹⁰⁹ They were already in a position with minimal leverage to create job security and the school districts could not be entitled to this extra information.¹¹⁰

In *American Federation of Government Employees, Local 421 v. Schlesinger*,¹¹¹ the court arrived at a comparable conclusion. The court excused employees of the Department of Energy from having to answer portions of a detailed questionnaire.¹¹² Certain questions were deemed overbroad and unreasonable, because they required employees to list the names of all corporations, other business enterprises, partnerships, nonprofit organizations, and educational or other institutions in which they, their spouses, their minor children or dependents were connected as an employee, officer, owner, director, trustee, advisor, partner or consultant.¹¹³

The schoolteachers in Missouri are in a similar situation. “Without exception, the state controls virtually every aspect of the teaching profession, particularly licensing and tenure,”¹¹⁴ but also the curriculum they are required to teach and the educational background they need. With so many restrictions already in place, it would be unreasonable to allow school districts to control how, when, and with whom teachers communicate while not on the job. However, that is precisely what the Amy Hestir Student Protection Act presumes to do. The courts have proven, through these past decisions, that they prefer to respect the privacy of employees rather than the curiosity of employers.¹¹⁵ Activities that employees partake in on their own time, which threaten neither their ability as an employee nor the success of the employer, should remain privileged and private.¹¹⁶

107. *See id.* at 480.

108. *See id.* at 490.

109. *Id.* at 482.

110. *See id.* at 490.

111. 443 F.Supp. 431 (D.D.C. 1978).

112. *See id.* at 433, 435.

113. *See id.*

114. Kate Walsh, *Introduction to NAT’L COUNCIL ON TEACHER QUALITY, MO. STATE TEACHER POLICY YEARBOOK (2008)*, available at www.nctq.org/styp08/reports/stpy_missouri.pdf.

115. *See, e.g., Shelton*, 364 U.S. 479; *American Federation*, 443 F.Supp. 431.

116. *See Ken LaMance, Employee Privacy During Off-Work Hours*, LEGALMATCH,

There are other cases whose logic can be equated to the situation the Missouri schoolteachers currently face. In *Rulon-Miller v. International Business Machines Corp.*,¹¹⁷ an employee of IBM was successful in her claims of wrongful discharge and intentional infliction of emotional distress.¹¹⁸ The employee was accused of having a romantic relationship with the manager of a rival product's firm.¹¹⁹ As a result of those accusations, made by the employee's supervisor, the employee was terminated.¹²⁰ At trial, the employee presented facts demonstrating that her relationship with the manager did not have a negative impact on her job performance, and as a result, she received awards of both compensatory and punitive damages.¹²¹ There was no conflict of interest created by her relationship, therefore the jury's finding that her termination was wrongful was upheld.¹²²

This case demonstrated several important rules that govern employer-employee relationships. Specifically, this case includes a discussion of the covenant of good faith and fair dealing, which amounts to a requirement that parties in at-will relationships must deal openly and fairly with one another.¹²³ In order to be fair, employers must treat like cases in the same manner by following the same evaluative procedures, and ensure that all employees are afforded the protections of the rules and regulations set out by the company.¹²⁴ The Missouri-schoolteachers are entitled to this same standard of fair dealing, and protection under the regulations of the school districts. Therefore, they should not be susceptible to termination based on interactions outside of school that do not have a negative impact on their job performance, especially if other school employees are not held to that same standard.

B. The Role of Public Policy in Balancing Employer Control Over Employee Freedom

There is also a public policy angle to the wrongful termination of an employee. The courts in many states utilize a two-part test when

www.legalmatch.com/law-library/article/employee-privacy-during-off-work-hours.html (last visited Sept. 24, 2012).

117. 208 Cal. Rptr. 524 (Cal. Ct. App. 1984).

118. *See id.* at 530, 535.

119. *See id.* at 527.

120. *See id.* at 528.

121. *See id.* at 527, 531.

122. *See id.* at 533.

123. *See id.* at 529.

124. *Id.*

attempting to determine if an action to deprive someone of their privacy is constitutional or not.¹²⁵ First, the person must have an actual or subjective expectation of privacy.¹²⁶ Second, society must be willing to recognize that expectation as reasonable.¹²⁷ In *Klein Independent School District v. Mattox*,¹²⁸ the court further expanded on the autonomy portion of the right to privacy.¹²⁹ The court's discussion explained that constitutional rights were afforded to protect "intimate personal relationships or activities, and freedoms to make fundamental choices involving oneself, one's family, and one's relationship with others."¹³⁰ A personal privacy interest has to fit into that categorization in order to succeed in the personal versus public balancing test. Teachers do not automatically "shed their constitutional rights . . . at the schoolhouse gate."¹³¹ However, only very specific rights are protected. For example, the protection of personnel records is not recognized as a normally protected federal privacy right.¹³²

Communication is essential to a teacher's success.¹³³ Unless the lines of communication between the teacher and the students are open and easily accessible, a teacher will have difficulty fostering a close bond with the students.¹³⁴ This can hamper an effective learning environment.¹³⁵ Education is a highly valued asset in modern society,

125. See, e.g., *Missoulain v. Bd. of Regents Higher Educ.*, 675 P.2d 962, 967 (Mont. 1984).

126. *Id.*

127. *Id.*

128. 830 F.2d 576 (5th Cir. 1987).

129. See *id.* at 580.

130. *Id.* In *Klein*, a teacher sought to protect her college transcript from becoming public knowledge, but the court held that the public's interest in evaluating the competency of teachers significantly outweighed the teacher's privacy interest. *Id.* at 577-78, 581.

131. *Hovet v. Hebron Pub. Sch. Dist.* 419 N.W.2d 189, 192 (N.D. 1988) (quoting *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 506 (1969)).

132. See, e.g., *id.* *Hovet* contended that opening the personnel file to the public would not only violate the teacher's privacy interest, but also the privacy entitlements of students mentioned within the file. See *id.* at 190-93. The court rejected the latter notion based on the rules of standing, claiming that "[a] litigant may assert only his own constitutional rights, unless he can present 'weighty countervailing policies.'" *Id.* at 193 (citing *State v. Woodworth*, 234 N.W.2d 243, 249 (N.D. 1975); *State v. Benjamin*, 417 N.W.2d 838 (N.D. 1988); *City of Bismark v. Materi*, 177 N.W.2d 530 (N.D. 1970)).

133. See *Teacher Student Communication: Some Strategies to Make It Successful*, CLASSROOM MGMT. SUCCESS, <http://www.classroom-management-success.org/teacher-student-relationship.html> (last visited Nov. 10, 2012).

134. *The Teacher Student Relationship: 10 Things Teachers Can Do to Make It Successful*, CLASSROOM MGMT. SUCCESS, <http://www.classroom-management-success.org/teacher-student-relationship.html> (last visited Nov. 10, 2012).

135. See *id.*

with its furtherance at the forefront of many political platforms.¹³⁶ It seems apparent that the value of effective education, coupled with the Constitutional right to protections of personal privacy, would outweigh nearly any public interest that did not amount to something as serious as criminal activity. The teacher's side of the scale is weighted with concerns that are twofold. First, there is the priority that education be promoted and delivered effectively. Second, there is the policy that a person's intimate relationships should be protected from the public eye. The Missouri legislature also had serious concerns adding weight to their end of the balancing test.¹³⁷ Protecting vulnerable young students from being taken advantage of and sexually abused is, indisputably, a strong policy goal.¹³⁸ However, teachers who use social networking and the Internet, either to enhance their effectiveness as an educator or to develop their own personal relationships, should not be forced to submit to public scrutiny as a result of employer disciplinary actions for that one reason alone.

In the case of *Salazar v. Furr's Inc.*,¹³⁹ an employee claimed she was terminated because of her marriage to an employee of a competitor.¹⁴⁰ The court did not find in favor of her wrongful termination and intentional infliction of emotional distress claims, but public policy issues were raised.¹⁴¹ The employee argued that allowing employers to terminate their employees based on what relationships they form would discourage family unity,¹⁴² which is an important public policy consideration. A similar argument can be applied to the schoolteachers of Missouri. Firing schoolteachers based on appropriate communications and personal relationships goes against the public policy of protecting an expected right to personal privacy.

The most successful and effective teachers are the ones that are able to communicate openly and honestly with their students.¹⁴³ "The

136. See, e.g., Barack Obama, *Introduction to U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT I* (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>.

137. See generally Tanya Roscorla, *The Reason Why Missouri Passed the Amy Hestir Student Protection Act*, CTR. FOR DIGITAL EDUC. (Oct. 31, 2011), <http://www.centerdigitaled.com/policy/Missouri-Electronic-Communications-Part-One.html> (outlining the background and history of the Amy Hestir Student Protection Act).

138. See *id.*

139. 629 F.Supp. 1403 (D.N.M. 1986).

140. *Id.* at 1406.

141. See *id.* at 1409, 1411-12.

142. *Id.* at 1409.

143. See *The Positive Teacher-Student Relationship*, CAL. ST. U. NORTHRIDGE, <http://www.csun.edu/~acc50786/Education.html> (last visited Nov. 12, 2012).

communication between the student and the teacher . . . provides a better atmosphere for a classroom environment The more the teacher connects or communicates with his or her students, the more likely they will be able to help students learn at a high level and accomplish quickly.”¹⁴⁴ Just as allowing employers to fire their employees would discourage family unity in the *Salazar* case, intruding on teachers’ private lives would discourage open, honest and enthusiastic communications with students. Teachers will be encouraged to hide their relationships and actions outside of the workplace, in an attempt to protect their jobs, instead of acting honestly and candidly. Many teachers were outraged when they learned about the additional restrictions the Amy Hestir Act would impose on their personal lives,¹⁴⁵ while others were confused by what the vague language actually prevented them from doing.¹⁴⁶ Aspiring teachers who learn about the personal intrusions and confusion that will accompany the job may be scared away from that career, or unwilling to sacrifice their social networking freedoms. For example, Kimberly Hester, a teacher’s aide at an elementary school, was fired for refusing to provide her Facebook username and password to her employers.¹⁴⁷ She chose to maintain her personal privacy and usage of Facebook rather than continuing with her employment as a teacher’s aide.¹⁴⁸ This demonstrates how the overly restrictive policies within the Amy Hestir Act could limit the number of willing teachers available for schools to hire, thereby lowering the quality of teachers from which potential employers can make their selections.

While the invocation of a public policy defense can be difficult, especially when it competes with another strong policy like preventing sexual abuse, there are situations where it has proven to be effective for teachers attempting to protect their privacy rights. In *Armada Broadcasting, Inc. v. Stirn*,¹⁴⁹ a schoolteacher was the subject of a school

144. *Id.*

145. Bob Buckley, *Buckley: Law to Protect Students Will Have Unintended Consequences*, EXAMINER (Independence, Mo.) (Aug. 16, 2011, 11:10 PM), http://www.examiner.net/news/law/x27453375/Buckley-Law-to-protect-students-will-have-unintended-consequences?zc_p=0.

146. See Gabrielle Biondo, *Teachers Suing Over Missouri Social Network Law*, TOWN AND COUNTRY-MANCHESTER PATCH (Aug. 19, 2011), <http://townandcountry-manchester.patch.com/articles/teachers-suing-over-missouri-social-network-law>.

147. Matt Rego, *Teacher’s Aid Axed for Not Giving School Her Facebook Password*, VALUE WALK (Apr. 2, 2012), <http://www.valuewalk.com/2012/04/teachers-aid-axed-for-not-giving-school-her-facebook-password/>.

148. *See id.*

149. 516 N.W.2d 357 (Wis. 1994).

district investigation of employees who had allegedly engaged in sexual harassment.¹⁵⁰ The court held that the teacher had a general right to privacy, because of the public policy right of protecting the reputation of citizens.¹⁵¹ The report that the school district created was based on speculation and uncorroborated information,¹⁵² therefore, the risk of damage to the teacher's reputation was serious and unwarranted.¹⁵³

This reasoning can be transferred to scenarios in which teachers are using social networking for personal reasons or to communicate with their students. An assumption that the communications are inappropriate, or invasive of the private interactions in a teacher's life, could be extremely damaging to that teacher's reputation. A recent trend in court decisions suggests that a teacher's interest in protecting her privacy for the sake of her reputation could outweigh the public's right to information.¹⁵⁴ Teachers are dependent on their reputations for their careers and livelihoods.¹⁵⁵ The public's curiosity concerning how a teacher socializes outside of the school environment pales in comparison to protecting that teacher's ability to earn a living. Furthermore, a false assumption that a teacher's communications with a student via social networking or e-mail are inappropriate could be extremely harmful to the reputations of both the teacher and the student.¹⁵⁶ This is not to say that improper communications should not be pursued or that the resulting information should not be made available for public protection. However, invading a teacher's privacy or restricting their actions outside of the workplace, without corroboration and proof of some wrongdoing,

150. *Id.* at 358.

151. *See id.* at 361-62.

152. *Id.* at 361.

153. *See id.*

154. *See* Matthew V. Munro, *Access Denied: How Woznicki v. Erickson Reversed the Statutory Presumption of Openness in the Wisconsin Open Records Law*, 2002 WIS. L. REV. 1197, 1198-1200 (2002) ("The Wisconsin Supreme Court's decisions raise the issue of whether the WORL is still good law, or whether its stated goal of openness has been superseded by the court's more recent concern of privacy and reputational interests."); *see also* Ralph D. Mawdsley & James L. Mawdsley, Commentary, *Balancing Teacher Privacy With the Public's Right to Know: Bellevue John Does v. Bellevue School District No. 405 and Public Access to Reports of Teacher Sexual Misconduct*, 242 EDUC. L. REP. 1 (West), at 5 (Apr. 30, 2009) (discussing how the public does not have a legitimate interest in matters that are deemed part of a teacher's private life and "personal information").

155. *See generally* Rob Frappier, *Teacher Fired Over Facebook Profile*, REPUTATION.COM (Nov. 13, 2009) <http://www.reputation.com/blog/2009/11/13/teacher-fired-over-facebook-profile/> ("School boards are extremely sensitive to parents demands, so much so, in fact, that even the most innocuous pictures can get a teacher fired if they're viewed in the wrong context.").

156. *See* Mawdsley, *supra* note 154, at 6-7.

would be unjust.¹⁵⁷

In *Golden v. Board of Education of the County of Harrison*,¹⁵⁸ the court addressed the issue of whether a guidance counselor could be fired where she engaged in a “serious act of immorality” under West Virginia law.¹⁵⁹ In the opinion, the court established that unless the alleged immoral conduct had an impact on a teacher’s fitness to teach or upon the school community, dismissing the teacher would improperly intrude “upon the teacher’s right of privacy.”¹⁶⁰ The court further laid out specific guidelines for drawing the line between a teacher’s right to privacy and when that right yields to the public interest.¹⁶¹ Conduct of a teacher is no longer afforded privacy protections in at least two circumstances:

(1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of the school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position.¹⁶²

The court’s reasoning from this case can be applied to a situation where a teacher is using the Internet to communicate with students. A teacher’s privacy and private activities should not be intruded upon unless their conduct is affecting their job performance.¹⁶³ How a teacher conducts themselves in their private time, pending anything dangerous or illegal, is not relevant to their job performance and should therefore not be privy to others as public information or the cause of disciplinary action against the teacher.¹⁶⁴ The appropriate communications that a teacher has with his students, which do not negatively impact the teacher’s occupational effectiveness, are actually beneficial to his job

157. See Heidi M. Agustin, *Massachusetts Schools Prohibit Teachers and Students From Being Friends on Facebook*, CITYTOWNINFO.COM (Oct. 26, 2010) <http://www.citytowninfo.com/career-and-education-news/articles/massachusetts-schools-prohibit-teachers-and-students-from-being-friends-on-facebook-10102601>.

158. 285 S.E.2d 665 (W. Va. 1981).

159. *Id.* at 666. The guidance counselor was arrested for felony shoplifting and pled *nolo contendere*. *Id.* News of this act was published in a local newspaper, from which the school board learned about the incident and fired the counselor for this “serious act of immorality.” *Id.*

160. *Id.* at 669.

161. *Id.*

162. *Id.*

163. See *id.*

164. See Michael D. Simpson, *The Whole World (Wide Web) Is Watching*, NAT’L EDUC. ASS’N. <http://www.nea.org/home/12784.htm>. (last visited Nov. 12, 2012).

performance and should be promoted, not punished.¹⁶⁵

In several cases, courts have refused to protect the privacy of teachers, holding that the public's entitlement to knowledge was greater than a teacher's right to maintaining a certain level of personal privacy. For example, in *Zellner v. Cedarburg School District*,¹⁶⁶ the court held that the public interest in protecting a teacher's privacy and reputation did not outweigh the presumption of complete public access.¹⁶⁷ The information at issue was a memorandum, a compact disc containing pornographic images, and Internet searches that a teacher was alleged to have conducted and viewed on his computer at school.¹⁶⁸ However, this decision was greatly influenced by the facts of the case. The teacher's violations in this instance included searching for and viewing pornographic materials on his school computer.¹⁶⁹ These were serious offenses, bordering on criminal, for which the public's right to be informed outweighed the teacher's right to privacy protections. *Linzmeier v. Forcey* articulates a common law balancing test which further emphasizes this point.¹⁷⁰ The court will weigh the harm to the public interest from releasing the information against the public interest in the information and the general policy of openness.¹⁷¹ One of the factors that could tip the scale in favor of the public interest in maintaining privacy is protecting the reputation and honoring the privacy interests of a citizen.¹⁷² When the information is not as serious as something reaching the level of criminal, as it was in *Zellner*, the public interest in valuing privacy and reputations could be enough to overcome the presumption of the public's right to information.

The facts in *Zellner* are easily distinguishable from a case in which a teacher is using social media. The teacher in *Zellner* was using a school computer and time at work to engage in an activity that is highly inappropriate for an environment filled with children.¹⁷³ Teachers who are using social media, even if it is to communicate with students, are not acting in a way that is inherently improper. The teacher in *Zellner*

165. John Andrius, *Roles of the Teacher-Communicating*, ADVANCING KNOWLEDGE FOR TEACHERS, <http://www.teachermatters.com/classroom-management/roles-of-the-teacher/communicating.html> (last visited Apr. 21, 2012).

166. 731 N.W.2d 240 (Wis. 2007).

167. *Id.* at 254.

168. *Id.* at 242.

169. *Id.*

170. *Linzmeier v. Forcey*, 646 N.W.2d 811, 814-15 (Wis. 2002).

171. *Id.* at 818.

172. *See id.* at 820.

173. *See Zellner*, 731 N.W.2d at 243.

was acting selfishly and for his own gratification, while he was supposed to be working and educating.¹⁷⁴ When a teacher is using social media, on his or her own time for personal relationships, it is not interfering with his or her job as an educator and he or she is not acting inappropriately in the work environment. Their activities on the social media network, the majority of which do not even involve communications with students, are personal and private.¹⁷⁵ As long as the activity is not interfering with the teacher's work, or part of an inappropriate interaction with a student, the teacher's right to privacy should outweigh the public's right to knowledge and information.¹⁷⁶

The court in *Minneapolis Federation of Teachers, Local 59 v. Minneapolis Public Schools, Special School District No. 1*¹⁷⁷ determined that generally, an individual does not have a privacy right to public information.¹⁷⁸ This means that a person cannot claim that their right to privacy extends to information that is open to the public.¹⁷⁹ The decision discusses the reasoning from other jurisdictions, which have previously determined that "public school teachers do not have a right to privacy"¹⁸⁰ The facts of those cases all involved disciplinary reports on teachers or information in their personnel files, to which they are not afforded the protections of privacy rights.¹⁸¹ This information was classified as public records after the balancing test was applied and the scales tipped in the favor of benefitting the public rather than protecting the teacher as an employee.¹⁸² The reasoning is understandable. Just as with any other profession, if a person performs poorly or acts inappropriately, future employers would want to know. A teacher is employed by the school district, but in a sense also works for the public by educating society's youth.¹⁸³ Therefore any violations of

174. See *id.* at 242.

175. See Simpson, *supra* note 164.

176. See *Golden v. Board of Educ.*, 285 S.E.2d 665, 669 (W. Va. 1981).

177. 512 N.W.2d 107 (Minn. App. 1994).

178. *Id.* at 110; see also, *Minn. Med. Ass'n v. State.*, 274 N.W.2d 84, 93-94 (Minn. 1978) (the guarantee of personal privacy is limited to rights that are "fundamental" or "implicit in the concept of ordered liberty").

179. *Minneapolis Federation of Teachers*, 512 N.W.2d at 110.

180. *Id.* at 111; see also, *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 581 (5th Cir.1987); *Brouillet v. Cowles Publishing Co.*, 791 P.2d 526, 531-32 (Wash.1990); *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 190-91 (N.D.1988).

181. *Klein Indep. Sch. Dist.*, 830 F.2d at 581; *Brouillet*, 791 P.2d at 531-32; *Hovet*, 419 N.W.2d at 190-91.

182. *Klein Indep. Sch. Dist.*, 830 F.2d at 581; *Brouillet*, 791 P.2d at 531-32; *Hovet*, 419 N.W.2d at 190-91.

183. See *Who Is Accountable for Children's Education?*, BY THE PEOPLE: AMERICA IN THE WORLD 5, http://www.pbs.org/newshour/btp/pdfs/stlouis_accountability_2005.pdf (last visited Apr.

their duties are rightfully subjected to public scrutiny.¹⁸⁴ An instance where a teacher is using social media or the Internet is distinguishable. The teacher's activities outside of the classroom do not require public evaluation when they are unrelated to the effectiveness of the teacher as an educator.¹⁸⁵ If the teacher's actions amount to something harmful or illegal, such as the sexual harassment that the Missouri legislature was so apprehensive of, then the teacher places himself in the public eye willingly by committing a crime that will be prosecuted in open court, and the issue of breaching privacy protections does not even need to be raised. Apart from unfortunate circumstances such as those, or activities that impact the teacher's job performance, intruding on a teacher's personal life is unnecessary.

While a teacher's expected right to privacy in their actions outside the classroom is one of possible protections that may be invoked against this law, it is not the exclusive argument. Teachers facing the looming threat of the Amy Hestir Act clamping down on their social media activities have another valuable protection through utilizing the Fourteenth Amendment.

IV. AMY HESTIR AND THE STRICT SCRUTINY TEST OF THE FOURTEENTH AMENDMENT

The Amy Hestir Student Protection Act and other similar regulations clearly intend to protect students from unfit teachers.¹⁸⁶ Courts have long held that the state as an employer has the power to investigate whether a teacher who has been hired is fit to teach.¹⁸⁷ This is due to the teacher's role in educating the minds of their students and helping them prepare to function in our society.¹⁸⁸ The Court has also held that "[t]here is 'no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors.'"¹⁸⁹ However,

22, 2012).

184. Kim McGuire, *Like Never Before, Teachers Under Scrutiny*, STARTRIBUNE (Mar. 25, 2012, 10:40 AM), <http://www.startribune.com/local/stpaul/144099296.html>.

185. See Eric Ringham, *Should Employers Be Able to Regulate Your Personal Life?* MPRNEWS (July 14, 2009, 6:00 AM), <http://minnesota.publicradio.org/collections/special/columns/todays-question/archive/2009/07/should-employers-be-able-to-regulate-your-personal-life.shtml>.

186. See *Student Abused By Jr. High School Teacher*, *supra* note 25.

187. *Shelton v. Tucker*, 364 U.S. 479, 485 (1960).

188. *Id.*

189. *Id.* (citing *Beilan v. Bd. of Educ.*, 357 U.S. 399, 406 (1958)).

while the Court has accepted the authority of the government to check the fitness of a teacher, this ability has not been made absolute.¹⁹⁰ “[E]ven though the governmental purpose [may] be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”¹⁹¹

A. The Fourteenth Amendment’s Due Process Clause and the Incorporation of the Freedom of Association

The Fourteenth Amendment of the Constitution contains within it the guarantee that no state shall deprive a citizen of life, liberty, or property without the due process of law.¹⁹² Through this provision, the Supreme Court determined that certain rights contained within the Bill of Rights could be applied to the states.¹⁹³ Through the doctrine of incorporation, the Supreme Court has applied a majority of the rights guaranteed through the Bill of Rights to the states.¹⁹⁴ It is the right of the freedom of association in particular that is integral to the discussion of the Amy Hestir Student Protection Act. Interestingly, this right is not explicitly stated anywhere in the First Amendment,¹⁹⁵ the amendment courts would later use as the building block to create this right.

It was not until the Supreme Court case of *NAACP v. Alabama ex*

190. See *id.* at 488.

191. *Id.*

192. U.S. CONST. amend. XIV, § 1.

193. See generally *Adamson v. Cal.*, 332 U.S. 46 (1947) (setting forth a description on the doctrine of selective incorporation which may be used to apply rights within the first eight amendments to the states), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (rejecting the suggestion in *Adamson* that only very limited provision of Bill of Rights could be applied to states through the Fourteenth Amendment).

194. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of press); *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947) (establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (right to bear arms); *Mapp v. Ohio*, 367 U.S. 643 (1961) (unreasonable search and seizure); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirement for searches); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Malloy*, 378 U.S. 1 (1964) (self-incrimination); *Chi. Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (takings clause); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (right to public trial and notice of accusations); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process to obtain witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Robinson v. California*, 370 U.S. 660 (1962) (right against cruel and unusual punishment).

195. See U.S. CONST. amend. I.

*rel. Patterson*¹⁹⁶ that the right to free association was recognized and applied to the states.¹⁹⁷ An Alabama statute required that, before doing business within the state, foreign corporations file their charters with the secretary of state, designate a place of business, and appoint an agent to receive service of process.¹⁹⁸ The National Association for Advancement of Colored People (NAACP), which had been active in Alabama since 1918, opened up a regional office within the state in 1951 without fulfilling the state statute's requirements.¹⁹⁹ The state Attorney General filed suit against the NAACP for this violation and sought an injunction as prescribed by the statute.²⁰⁰ During the preliminary stages of the action, the State requested and was given the right by the court to obtain a list of all members and agents in Alabama who were affiliated with the NAACP.²⁰¹ After refusing to turn over the list of members, the NAACP was found in contempt of court and fined.²⁰²

After granting certiorari, the Supreme Court reversed the imposition of the fine by the lower court against the NAACP.²⁰³ In handing down this decision, the Court took up the argument advanced by the NAACP that the lower court's order of disclosing its membership list would have been an unconstitutional infringement upon the right to freedom of association.²⁰⁴ Beginning its discussion on the issue, the Court declared "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association"²⁰⁵ The ability of a person to freely associate for the advancement of their ideas was one that the Court held was without question a protected liberty under the Fourteenth Amendment's Due Process Clause.²⁰⁶ The Court asserted further that the right to association was vitally tied to one's privacy in associations.²⁰⁷ Any action taken by the State that had a curtailing effect upon this right would be held to a level of "the closest

196. 357 U.S. 449 (1958).

197. *Id.* at 460-61.

198. *Id.* at 451.

199. *Id.* at 452.

200. *Id.*

201. *Id.* at 453.

202. *Id.* at 453-54.

203. *Id.* at 454, 466.

204. *Id.* at 460, 462.

205. *Id.* at 460.

206. *See id.*

207. *Id.* at 462. "Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.*

scrutiny.”²⁰⁸ The Court even cautioned that actions which were not intended to infringe upon such a right could be held as an unconstitutional infringement, whether perpetrated by the legislature or the judiciary.²⁰⁹ Regardless of who the actor for the State is, the interest served by the infringement upon the right must be compelling in the eyes of the Court.²¹⁰ Applying this compelling interest test, the Court found that the State’s need for the membership list in order to prove the NAACP was carrying on intrastate business did not meet this threshold.²¹¹ While *NAACP* cemented the existence of freedom of association and its application to the states, it would require another decision of the Supreme Court to crystalize how this right would apply to the teaching profession.

B. A Teacher’s Right to Free Association

The Supreme Court would not have to wait long to apply this newly recognized right to state teachers. Merely two years later, the case of *Shelton v. Tucker*²¹² came before the Court, requiring it to weigh in on the free association rights of public schoolteachers.²¹³ As discussed previously,²¹⁴ this case concerned an Arkansas statute that required an individual looking to become a superintendent, principal or teacher had to file an affidavit with the appropriate authority, before they were hired or requested continuing employment.²¹⁵ In this affidavit, the individual had to list all organizations they were currently in or had been in for the last five years and all organizations they were making contributions to or had made contributions to for the past five years.²¹⁶ Along with the restriction on hiring imposed by this statute, if an individual lied on the affidavit they would be subject to fines and the loss of their teaching license.²¹⁷ In spite of this requirement, B. T. Shelton, a teacher in Little Rock, refused to file the affidavit leading to a failure to renew his contract.²¹⁸

208. *Id.* at 460-61.

209. *See id.* at 461, 463.

210. *See id.* at 463 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)).

211. *See id.* at 464-66.

212. 364 U.S. 479 (1960).

213. *See id.* at 479.

214. *See supra* Part III.

215. *Shelton*, 364 U.S. at 480.

216. *Id.* at 480-81.

217. *Id.* at 481.

218. *Id.* at 482-83. The companion case to *Shelton* was that of Max Carr, a professor at the

After this adverse action, Shelton brought suit in district court, arguing the Arkansas statute was a violation of state teachers' right to freedom of association that was protected by the Due Process Clause of the Fourteenth Amendment.²¹⁹ In beginning of its discussion, the Court stressed the importance of a state's interest in assuring the competence of the teachers it employs.²²⁰ Categorizing this interest as a "vital concern,"²²¹ the Court held there is no requirement that "a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors."²²² Holding this concern of the state in such high regard, the Court felt the situation was noticeably different than that of *NAACP*, for here there existed a substantial relevancy between the State's need for organization lists and determining a teacher's competency.²²³ However, the Court then went on to weigh the importance of protecting constitutional rights within the U.S. school system, indicating that there may even be a "vigilant protection" requirement for those rights.²²⁴ The Court even went so far as to state that:

By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their

University of Arkansas and Ernest T. Gephardt, a teacher at a Little Rock High school. *Id.* at 484. Both refused to file the affidavit required by the statute opting instead to allow the institutions to question them on matters that would concern their qualifications as teachers. *Id.* Both were warned of the consequences of the refusal and elected to bring a suit in state court which they ultimately lost. *Id.*

219. *Id.* at 482, 484-85.

220. *Id.* at 485 ("There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize.").

221. *Id.* (quoting *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952), *overruled in part by Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)).

222. *Id.* (quoting *Beilan v. Bd. of Educ.*, 357 U.S. 399, 406 (1958)).

223. *See id.*

224. *Id.* at 487.

associations by potential teachers.²²⁵

The Court further explained that in order for both teachers and students to excel and grow in an educational environment, that environment must be free of state suspicion.²²⁶ This does not mean, however, that states cannot ask teachers about their associational ties.²²⁷ Instead, the Court was troubled by the extraordinary breadth of the statute in what it would require teachers to disclose.²²⁸ The Court surmised that the statute would require teachers to disclose what church they attended, political party they belonged to, and every other conceivable association they may have a tie with.²²⁹ The Court reasoned that such a broad imposition could not possibly be narrowly tailored to the state's goal of ensuring teacher competency, and thus failed the requirements of strict scrutiny.²³⁰

While *Shelton* only held that ensuring teacher competency was a compelling state interest, the Court has also consistently found that protecting children from sexual abuse is similarly compelling.²³¹ However, while this interest is compelling, the statute used to fulfill this interest must still be narrowly tailored in order to be upheld by the Court.²³² With the holdings of the Court thoroughly discussed, they may now be applied to the situation created by the Amy Hestir Student Protection Act.

C. Applying Strict Scrutiny to the Amy Hestir Act

The first step in applying the judicial analysis of strict scrutiny to the Amy Hestir Act is to look at the reasoning behind the Act to determine whether or not it is a compelling state interest. The stated purpose of the bill was to protect the minor students of Missouri from sexual abuse perpetrated by school employees.²³³ Looking at the

225. *Id.* (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J. concurring)).

226. *See id.*

227. *Id.*

228. *See id.* at 487-88.

229. *Id.* at 488.

230. *See id.*

231. *See* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006).

232. *See* *Globe Newspaper*, 457 U.S. at 607-08 (“[A]s compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest.”).

233. *Cunningham Press Release*, *supra* note 13.

language and the history of the statute, it is likely that a court would find the stated purpose of this bill was genuinely to protect children from sexual abuse and it is not being argued that this is not the case. Even those who argue that the Amy Hestir Act is unconstitutional support the ultimate goal of the Missouri legislature.²³⁴ This then means that under the holdings of cases such as *Global Newspaper*, which recognized the protection of children from sexual abuse as compelling,²³⁵ the Amy Hestir Act would be found to have a compelling state interest.

With the first requirement of strict scrutiny met, the final step in the analysis is to determine whether the Amy Hestir Act was narrowly tailored to fulfill this interest. In looking at section 162.069 of the Amy Hestir Student Protection Act, it becomes clear why this act is not narrowly tailored. It is explicitly stated in the statute that “[n]o teacher shall establish, maintain, or use a nonwork-related website that allows exclusive access with a current or former student.”²³⁶ The term that plays the biggest part in the analysis of whether or not the statute is narrowly tailored is “exclusive access.” The statute indicates that this happens when information on the site is “available only to the owner (teacher) and user (student) by mutual explicit consent and where third parties have no access to the information on the website absent an explicit consent agreement with the owner (teacher)”²³⁷

Using this definition of “exclusive access” there is a seemingly infinite array of sites that may be subject to this rule. Going with the prime example first, a social media site such as Facebook, which requires permission to see other users profiles unless a person has made their page “public.”²³⁸ This fits the statute’s mold perfectly as students and teachers could mutually consent to having access to each other’s profile while administrators or parents would only have access if the teacher consented to such an action. However, could a teacher use an instant messaging²³⁹ service run on a website to communicate with

234. See Tim Barker, *Backlash Over Missouri’s ‘Facebook Law’*, ST. LOUIS POST-DISPATCH (Aug. 10, 2011, 12:12 AM), http://www.stltoday.com/news/local/education/article_048b2b2f-04b4-576f-b878-b8080800e94e.html.

235. See *Global Newspaper*, 457 U.S. at 607.

236. S. 54, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

237. *Id.*

238. A function of the security settings on Facebook is to allow the user to choose whether they will allow their Facebook profile to be viewable by the general public without specific consent by the user, or keep their profile private which requires the user to give other users permission to access the content of their page.

239. A program or service that allows two or more users to communicate with each other through text windows which contain typed messages by the users sent directly to the other users. See *What is Instant Messaging?* WISEGEEK, <http://www.wisegeek.com/what-is-instant->

students? These sorts of programs allow for “exclusive access” between teachers and students, and also deny access to other third parties unless the teacher allows them to see or be a part of the conversation.²⁴⁰ Would this sort of service be considered a “website” under the statute? Would it depend on if it was a program or an online service?

The problems do not end with the question of whether something is considered a website that allows for “exclusive access.” Would this statute apply to teachers communicating with students who are their children? The statute merely provides that teachers may not have a website that allows them to have exclusive access to a current or former student.²⁴¹ This would most certainly mean that a parent who is a teacher communicating with his or her child who is, or was, a student over a website such as Facebook has violated the Amy Hestir Act.²⁴² This sort of outcome could not be a better indication that this law has an effect far too extreme to realistically claim it narrowly serves the goals of the state. In this instance parents would be prevented from communicating with their family merely because they are a teacher and a website allows them, in the abstract, to communicate exclusively with students.²⁴³

This problem is aggregated by the fact that in modern American society a person’s ability to use social networking sites like Facebook to create and maintain relationships has become pivotal.²⁴⁴ It is no longer the case that individuals only meet face-to-face or over the phone, but instead do so through utilizing social media to communicate with others.²⁴⁵ Millions of people will use social media sites for activities such as chatting with their friends or viewing pictures their friends have posted on their webpage.²⁴⁶ With such websites becoming so integral to the maintenance of a social life, the state, through this statute, has effectively socially isolated teachers.²⁴⁷ This forces teachers into a tough situation of choosing between their jobs or their social media

messaging.htm (last visited Oct. 15, 2012).

240. *See id.*

241. S. 54, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

242. *See* Petition for Injunctive Relief and Declaratory Judgment, *supra* note 55 at 3.

243. *See id.*

244. *See* Somini Sengupta, *Half of America is Using Social Networks*, N.Y. TIMES (Aug. 26, 2011 7:30 PM), <http://bits.blogs.nytimes.com/2011/08/26/half-of-america-is-using-social-networks/>.

245. *See id.*

246. *See* FACEBOOK, *supra* note 9.

247. *See* Barker, *supra* note 234 (stating that Missouri’s law will prevent teachers from communicating with students and may scare teachers away from using social media entirely).

connections.²⁴⁸

Yet, the government is seeking to protect children from sexual abuse.²⁴⁹ However, creating an all-out ban on teachers having such social media websites goes beyond this purpose.²⁵⁰ Similar to the mandatory list of associations in *Shelton*, the Missouri legislature has cast a net so wide that it is going to infringe rights and effect teachers in such a way that is not related to protecting children from sexual abuse.²⁵¹ This law requires all Missouri teachers to abstain from all social media sites in order to protect children.²⁵² This is strikingly similar to *Shelton*'s requirement of all teachers to communicate all associations to which they belong. Just as the court marveled at the breadth of the requirement in *Shelton*, it would likely be just as amazed at the amount of ground covered by the Amy Hestir Act.²⁵³

Further, the danger of stifling the educational environment with State suspicion as warned in *Shelton* is evident in this instance. The State is so suspicious of the teachers in its school system that it is going to deny them all access to amenities required to have an active social life.²⁵⁴ This level of restraint on teachers goes far beyond that needed to protect children,²⁵⁵ thus this Act is not narrowly tailored and would fail the second requirement of strict scrutiny.

Along with the complications posed by the right of freedom of association, the Amy Hestir Student Protection Act bares striking similarities to other state limitations on teacher's actions. In looking at case law that deals with comparable problems that may be faced in enforcing the Amy Hestir Act, further flaws in the statute can be spotted and used to weaken Missouri's already failing law.

248. See Mark Guarino, *Can Facebook Get Teachers Fired?*, CHRISTIAN SCI. MONITOR (Aug. 23, 2011, 7:35 PM), <http://www.csmonitor.com/USA/2011/0823/Can-Facebook-get-teachers-fired>.

249. See *id.*

250. See Kashmir Hill, *Why Missouri's Ban on Teacher-Student Facebook Friendships is Doomed*, FORBES (Aug. 8, 2011, 1:56 PM), <http://www.forbes.com/sites/kashmirhill/2011/08/08/why-missouris-ban-on-teacher-student-facebook-friendships-is-doomed/>.

251. See Guarino, *supra* note 248 (stating that banning teachers from Facebook may not stop sexual abuse and may only serve to drive child abusers to use more direct methods such as private and phone communication).

252. See *id.*

253. See Order Entering Preliminary Injunction, *supra* note 62, at 2 (holding that the "breadth of the prohibition is staggering.").

254. See Barker, *supra* note 234.

255. See Hill, *supra* note 250.

V. OTHER SITUATIONS IN WHICH TEACHERS COMMUNICATE WITH STUDENTS, AND HOW THE MISSOURI LAW APPLIES TO THEM

Missouri is not the only state attempting to deal with the complex issue of communications between teachers and their students.²⁵⁶ Other jurisdictions in various regions have enacted regulations seeking to affect similar activities targeted by the Amy Hestir Student Protection Act, and their effects can be used to measure the consequences of the Missouri statute. By comparing the facts of these similar cases to the statute at hand, a clear assessment of the broadness of the Amy Hestir Student Protection Act, and its constitutionality, or lack thereof, can be made. Comparable statutes can also serve as a template for the Missouri legislature to use when redrafting the statute to ensure that they do not make the same mistakes twice. Through observance of the mistakes or successes in other jurisdictions, the drafters can compile a regulation that encompasses all of the necessary protections for students without the restrictions on teachers' freedoms.

*Chivers v. Central Noble Community Schools*²⁵⁷ is a case from Indiana where a teacher was communicating with his students outside of class.²⁵⁸ The teacher had been previously warned against contacting students over the Internet, because such action was frowned upon by the school officials.²⁵⁹ Rumors about the teacher's Internet conversations with a student prompted an investigation by school officials, but the school principal concluded that there was no inappropriate behavior on the part of the teacher.²⁶⁰ This case is distinguishable from any that would be brought under the Missouri statute, because there was no codified restriction preventing teachers from communicating with students over the Internet. However, it stands for the proposition that conversations between students and teachers outside of the classroom should not automatically receive the stigma of being inappropriate. The reasoning behind the creation of the Amy Hestir Student Protection Act is supported by an assumption that communications between students and teachers are likely to be inappropriate if they take place outside of

256. See Patrik Jonsson, *Will Missouri 'Facebook Law' Spook Teachers Away From Social Media?*, CHRISTIAN SCI. MONITOR (Aug. 3, 2011), <http://www.csmonitor.com/USA/2011/0803/Will-Missouri-Facebook-Law-spook-teachers-away-from-social-media>.

257. 423 F.Supp.2d 835 (N.D. Ind. 2006).

258. *Id.* at 841-42.

259. See *id.* at 846.

260. See *id.*

the classroom.²⁶¹ The *Chivers* case makes it clear that that assumption is not true.

In *State v. Ebersold*,²⁶² a teacher was brought up on charges of verbally communicating a “harmful description or narrative account to a child.”²⁶³ The teacher was sending sexually explicit messages to one of his students in an Internet chat room.²⁶⁴ The Court of Appeals in Wisconsin held that the statute prohibiting the communication of harmful descriptions or narrative accounts could be applied to an Internet chat message, despite it not actually being verbal expression.²⁶⁵ The court took the liberty to construe the statute in a way that they saw fit, in order to punish the teacher for his inappropriate actions. This case demonstrates that there are other ways of constructing laws to protect students from predatory teachers, without restricting teachers’ use of social media and the Internet. This Wisconsin statute is a perfect example of statutory language that protects students, without infringing on teachers’ constitutional rights. It proves that with some effort, the Missouri legislature could redraft the law to fulfill its purpose, without constricting the freedoms of the teachers.

Teachers in Missouri have maintained that the Amy Hestir Student Protection Act is a clear infliction on their First Amendment right to free speech. However, the link between communications over the Internet and a constitutional protection may not be entirely clear. In *Snyder v. Millersville University*,²⁶⁶ a student teacher was denied her certification, allegedly because of certain web pages that were discovered about her on the Internet.²⁶⁷ The evaluator in charge of her during her student teaching claimed that she lacked professionalism, and needed to better grasp the boundaries between students and teachers.²⁶⁸ It was clear in this case that the concern was not about an inappropriate sexual relationship, but the lack of an authoritative relationship.²⁶⁹ Regardless, the Internet posting and efforts to communicate with students through MySpace were used as support for the denial of her certification.²⁷⁰ The plaintiff claimed that the First Amendment entitled her to freely express

261. See Jonsson, *supra* note 256.

262. 742 N.W.2d 876 (Wis. Ct. App. 2007).

263. *Id.* at 877.

264. *Id.*

265. See *id.* at 879-81.

266. No. 07-1660, 2008 WL 5093140, at *1 (E.D. Pa. Dec. 3, 2008).

267. *Id.*

268. See *id.* at *4, *8.

269. See *id.* at *4.

270. See *id.* at *5-*8.

herself over the Internet, and that failing to recommend her based on information about her on the Internet was essentially a restriction of her freedom of expression.²⁷¹ The court disagreed, stating that this was not considered a First Amendment violation, because the plaintiff's status as a teacher made her subject only to freedom of speech that touched on public concern.²⁷² The student teacher's website posting was not a "speech" that touched on matters of public concern.²⁷³ Instead, the information on the Internet was regarding personal matters on her MySpace page, which does not fall under the protections of the First Amendment when teachers are concerned.²⁷⁴ This case establishes the rule that a First Amendment freedom of speech claim is only applicable in instances where a teacher's expressions are in regards to a matter of public concern.²⁷⁵ Had the student teacher posted something that could have been deemed related to a matter of public concern, her speech could have been protected under the First Amendment.²⁷⁶

The teachers in Missouri, whose lives have been drastically impacted by the Amy Hestir Student Protection Act, can take some comfort in the outcomes of these cases. The court in *Chivers* established the principle that not all communications between students and teachers are improper.²⁷⁷ The drafters of the Missouri statute clearly intended to protect school children from being taken advantage of by their teachers.²⁷⁸ The legislature was under the impression that allowing communications between students and teachers, outside of the classroom, would make students vulnerable to sexual predators masquerading as molders of minds.²⁷⁹ However, the *Chivers* case proves that this assumption is overreaching. Teachers and students should be able to interact with each other without the negative stigma of molestation hanging over their heads. The teacher in *Chivers* was not punished for his interactions with students outside of the classroom, because it was clear that they were not inappropriately sexual in nature.²⁸⁰ This same leeway should be allowed with all student-teacher communications.

271. See *id.* at *10.

272. *Id.* at *14.

273. See *id.* at *16.

274. *Id.*

275. See *id.* at *14.

276. See *id.* at *14-*16.

277. See *Chivers v. Cent. Noble Cmty. Sch.*, 423 F. Supp. 2d 835, 856-57 (N.D. Ind. 2006).

278. Cunningham Press Release, *supra* note 13.

279. See *id.*

280. *Chivers*, 423 F. Supp. 2d at 856.

Furthermore, *Ebersold* provides a clear example of how the Missouri legislature can redraft the law to protect both their interests and the interests of the teachers.²⁸¹ In that case, a teacher sent sexually explicit messages to one of his students, and was charged under a state statute that prohibited harmful communications between teachers and students.²⁸² The statute was specifically worded to prevent communications of harmful descriptions or narrative accounts.²⁸³ The court indicated that the purpose behind statutory interpretation is to allow for the policy choices of the legislature to shine through.²⁸⁴ The Missouri legislature, in their zealotry to come to the aid and protection of abused students, may have overstepped their bounds. Instead of creating a narrow regulation like that in *Ebersold*,²⁸⁵ which could be used to punish teachers who use the internet as a pathway to sexual abuse, the legislature wrote an overly broad law that prevents teachers from using the Internet to efficiently promote the learning process.

The Amy Hestir Student Protection Act is not unique in its purpose. Other similar regulations have been created before, and others will be enacted in the future. There is great value in this history, because the Missouri legislature can learn from it. It has been clearly established that as it stands now, the Amy Hestir Student Protection Act is ineffective and unconstitutional. However, this is not to say that the reasoning and principles behind it are not important. The Missouri legislature needs to re-write this statute, but only after careful evaluation of previous regulations and consideration for the rights of the teachers.

VI. PROPOSED CHANGES TO THE AMY HESTIR STUDENT PROTECTION ACT

While the motivation behind the Amy Hestir Student Protection Act was admirable, the language of the statute and the overzealousness of the legislatures led to illogical restrictions on teachers. In their enthusiasm to protect students from sexual abuse by their teachers, the legislatures drafted an incredibly broad statute, which imposed upon the rights of teachers far more than it protected the safety of their students. The purpose behind the statute was clear; however the execution was faulty

281. See generally *State v. Ebersold*, 742 N.W.2d 876 (Wis. Ct. App. 2007).

282. *Id.* at 877.

283. *Id.* at 878.

284. *Id.* at 877-78.

285. See *id.* at 878.

and thus can be improved upon. The following proposed statute continues to focus on the safety of students and the prevention of sexual abuses, but includes altered portions of the original statute, and several new sections, in order to lessen the burden the law will impose on teachers.

A. Proposed Draft of the New Statute

Below is a draft of the proposed changes to the relevant portion of the Amy Hestir Student Protection Act. A definitions section has been added to better clarify the breadth and depth of the restrictions placed on teachers, and to help eliminate gray areas that might cause confusion as to what exactly teachers are allowed to do. There are also adjustments made to the language of certain sections, to maintain the same level of protection for students against sexual abuse, but to prevent undue burdens on the rights and abilities of teachers.

Section 1

Definitions

A) Enhanced Authority. *Enhanced authority is any authority above what a teacher is normally granted in the normal course of their employment.*²⁸⁶

B) Non-Work Related Site. *A non-work related internet site is any internet website or web page which is not owned, operated or maintained by the school, school district or school administration.*

C) Private Communication. *Private communication is any communication between a teacher and student that is not subject to supervision by a school administrator and the parent/legal guardian of the student.*

D) Relative. *A relative is a person who is connected to the student through blood, marriage or domestic partnership.*

E) School Administrator. *A school administrator is a state employee who has received certification and was hired for the purpose of supervising and maintaining the daily operations of one or more schools. Such positions may include but are not limited to: principals, school superintendents, and school comptrollers.*

F) Work Related Internet Site. *A work related Internet site is any Internet website or web page which is owned, operated or maintained by*

286. Italicized portions of this proposed statute indicate language that was changed from the original version, or new sections that were added. All other language is consistent with the original version of the Amy Hestir Student Protection Act.

the school, school district or school administration, to which the school, school district or school administration has primary access.

Section 2

Each school district must formulate their own written policy, concerning teacher-student and employee-student communications. The new policies must contain, at the very least, the following elements:

A) Appropriate oral and non-verbal communication (can be combined with policies on sexual harassment); and

B) Appropriate use of electronic media such as text messaging and Internet sites for both instructional and personal purposes, with an element concerning use of social networking sites *that specifically adheres to* the provisions provided in subsections of this section.

C) No teacher shall establish, maintain or use a work-related Internet site unless such site is available to school administrators and the student's guardian(s).

1) *Any non-work related Internet site which is used by a teacher primarily to support the curriculum and further the education of their students may be treated as a work-related Internet site, as long as the school administration gives their express permission in writing.*

D) No teacher shall use a non-work related Internet site to communicate privately with a current or former student, *except when:*

1) *The teacher is a relative of the student.*

2) *The teacher has enhanced authority over an aspect of the student's education, which has been granted by the school administration and the parent/legal guardian of the student.*

a) *Any private communications that occur pursuant to this exception must be available to the school administration and the parent/legal guardian of the student.*

b) *Any teacher with enhanced authority who fails to make private communications available to the school administration and the parent/legal guardian of the student shall not be covered under this exception.*

3) *A teacher without enhanced authority has been given permission, by the parent/legal guardian of a student, to privately communicate with that student.*

a) *The permission must be granted in writing, filed with the school administration, and kept on record by the school administration.*

b) *The student's parent/legal guardian has the exclusive right to revoke the permission for private communication any time after it has been granted. This must be done through an additional writing, which is submitted to the school administration, and kept on record by the*

school administration.

E) Any teacher who has violated Section 2(D) shall be subject to investigation by the school administration and may face disciplinary actions which may include but is not limited to reprimand, suspension or termination by the school administration.

1) This provision is not to be construed as the exclusive remedy for a teacher's violation of this statute. A teacher who has violated Section 2(D) of this statute is also subject to all other criminal and civil penalties as mandated by other state and federal laws and regulations.

Section 3

If a school or school district is found to not be in compliance with the standards set forth in Section 2, the school administrator for that school or school district will be subject to disciplinary action, which may include but is not limited to investigation, reprimand, suspension or termination by their supervisor.

A) A school administrator who has violated Section 3 of this statute is also subject to all other criminal and civil penalties as mandated by other state and federal laws and regulations.

B. Analysis of the Revised Statute

In order to reform the Amy Hestir Student Protection Act, it is important to break down the statute by section and carefully analyze the language. The definitions section provides a list of clear and concise terms, which were not available to readers in the first version of the statute.²⁸⁷ By outlining exactly what meaning was intended to apply to the diction used in the statute, the various sections themselves are clarified. The school administrators and teachers who are required to follow the statutory restrictions will be able to clearly and easily identify what is expected of them, and what actions they must be careful to avoid.

One of the most important distinctions the definitions section adds is the difference between a work related Internet site and a non-work related Internet site.²⁸⁸ The ability to easily determine which Internet sites are considered "work related," and which ones are not, is important for teachers and school administrators because it clarifies which sites can be used to communicate with students. This lucidity will help to prevent misunderstandings by teachers on the methods they can use to

287. See *supra* Section 1 of the Proposed Statute.

288. See *supra* Sections 1(B), (F) of the Proposed Statute.

communicate with students, and which avenues are considered inappropriate. It also makes clear to school administrators which Internet sites they should monitor closely, and which sites are private and should not be investigated.

Work related sites are limited by this definition to specifically exclude social networking sites,²⁸⁹ in order to prevent these websites from being monitored by school administrators and to provide teachers with some assurance of privacy in their personal lives. It was also important to define exactly what a private communication was for the same reasons.²⁹⁰ Schoolteachers need clear guidelines of what is allowed versus what is prohibited when communicating with students, so that no accidental violations are made. Furthermore, a concise definition will help to discourage unnecessary confrontations between teachers and school administrators over controversial communications.

The definitions section also contains descriptions of what “enhanced authority” and “relative” mean.²⁹¹ These terms are important in understanding certain exceptions that have been added into the statute. Teachers and school administrators alike need a concrete understanding of who has “enhanced authority” or who is a “relative” of a student, in order to establish permission for certain communications under those exceptions. Without exact descriptions of these terms, the exceptions would be far too flexible. This would defeat the purpose of the reconstructed statute, which intends to protect both the rights of teachers, and students from harm.

The second section of the revised statute contains some of the old language, complemented by many additional provisions.²⁹² Part A remains the same, because it establishes the most important premise within the statute.²⁹³ Teachers and other school officials are prohibited from having any inappropriate communications with students. This section calls for the creation of school policies outlining which verbal and non-verbal communications are appropriate, and which must be restricted.²⁹⁴ It also suggests that these policies be combined with those on sexual harassment.²⁹⁵ This proposal is logical, because the elements that define communications as appropriate or not will likely be

289. See *supra* Section 1(F) of the Proposed Statute.

290. See *supra* Section 1(C) of the Proposed Statute..

291. See *supra* Sections 1(A), (D) of the Proposed Statute

292. See *supra* Section 2 of the Proposed Statute.

293. See *supra* Section 2(A) of the Proposed Statute

294. See *id.*

295. See *id.*

inextricably linked to instances of sexual harassment.

Part B remains mostly the same, other than a small change to the syntax that standardizes the level of stringency of the schools' policies.²⁹⁶ Rather than saying that each school's policy must be at least as strict as the statute lays out, the revised provisions in the statute are redrafted to depict the desired level of strictness. This encourages clarity, and prevents schools from passing overly restrictive policies.

Part C was left the same, with the exception of clarifying what is a work related site in the definitions portion.²⁹⁷ An exception was also added under this section, allowing teachers to use non-work related sites to communicate with students, if the primary purpose of the site was to further student education in compliance with the curriculum.²⁹⁸ This exception was necessary because of the way in which work related sites were defined. Work related sites are only those that are essentially controlled by the school administration. Therefore, if a teacher wanted to use another Internet page, such as a class blog, a webpage that played videos, or even a website that was meant to be used in tandem with one of the text books, they technically would not be able to under the allowance for usage of work related sites. This exception gives teachers the freedom to explore the best methods for furthering their students' educations, while still offering the protections of administrative approval and supervision.

Part D contains the most edits, because it concerns private communications between students and teachers, which is arguably the largest area of concern when aiming to prevent sexual harassment.²⁹⁹ The revision includes certain scenarios where private communications using non-work related Internet sites would normally be considered appropriate, and therefore exceptions should be granted. For example, if a teacher is also the parent or relative of the student,³⁰⁰ the threat of sexual harassment is greatly diminished. Even if there was still a threat, it is doubtful that the sexual relationship would culminate through Internet communication, because the student and teacher are already acquainted in a more intimate nature: their familial relationship.

There is also an exception for teachers who are given enhanced authority regarding certain students.³⁰¹ This exception was important,

296. See *supra* Section 2(B) of the Proposed Statute.

297. See *supra* Section 2(C) of the Proposed Statute.

298. See *supra* Section 2(C)(1) of the Proposed Statute.

299. See *supra* Section 2(D) of the Proposed Statute.

300. See *supra* Section 2(D)(1) of the Proposed Statute.

301. See *supra* Section 2(D)(2) of the Proposed Statute.

because the purpose behind that enhanced authority is normally to promote learning, and restricting the teacher's ability to communicate with the student could be counterproductive. However, it is also possible that relationships such as these make students more susceptible to sexual abuse. Therefore, along with the exception is the requirement that private communications be made available to the school administration and parents/guardian of the student.³⁰² This way, the school is not limiting communication, but has the ability to monitor, which is a necessary precaution. Finally, there is a basic catch-all exception, which grants the ability for private communication to any teacher who receives permission from the student's parent/legal guardian.³⁰³ This exception is meant to cover any unforeseen situations that escaped our foresight during revisions, while still maintaining a level of protection to prevent harm to the students.

Part E of the statute provides the roadmap as to what the ramifications are to be for a teacher who has violated this statute.³⁰⁴ This section was lacking in the Amy Hestir Act and serves as a guide for school administrators in determining how to proceed when a teacher violates the policies set forth. When it is discovered that a teacher has made a private communication with a student, the school administration is to first investigate the communication. This is to underscore the importance to be placed upon what the teacher actually said to the student in the private communication. Innocent conversation or a simple errant message would violate the statute, but after the investigation could be disregarded as harmless and unworthy of further action. However, if an investigation turned up something more sinister or sexual, the school administrator has all the options of the statute and more at his or her disposal. This set-up places the emphasis on what was actually said or the number of private communications a teacher has had with students before doling out punishment. This scheme fits nicely with the objective of protecting students from sexual abuse and not merely banning all conversation between teacher and student.

Part E also contains a disclaimer as to the full ramifications of a teacher's unauthorized private communication with a student.³⁰⁵ Part E of section 2 is not the sole remedy of any student, parent/legal guardian or school administrator for violations of this statute. Along with the possible disciplinary actions that can be taken against a teacher pursuant

302. See *supra* Section 2(D)(2)(a) of the Proposed Statute.

303. See *supra* Section 2(D)(3) of the Proposed Statute.

304. See *supra* Section 2(E) of the Proposed Statute.

305. See *supra* Section 2(E)(1) of the Proposed Statute.

to part E, the teacher is also subject to criminal and civil liabilities for his or her actions. This warning is necessary to show that the conduct of a teacher merely contacting a student is not the only target of sexual abuse statutes. Section D of the statute is just the first inquiry into the suspected action. If a teacher for example communicates material prohibited by state or federal law, he or she is subject to punishment under part E as well as that state or federal law. Part E(1) is a necessary precaution to ensure no teacher can be shielded from other liability by being punished under this provision and reinforces the need to focus on the actual conduct when investigating a violation of part D.

The final section of the revised statute provides punishments for the school administrators if any of the provisions are not enacted in the school district.³⁰⁶ This section was missing in the original version of the statute, which left school administrators without a clear example of the consequences for not ensuring that the newly enacted proposed statute and the policies it mandated would be enacted by the school districts. Furthermore, it increased the vulnerability of school administrators, because there was no proposed limit to what the repercussions for violating the statute could be.

Under section 3 of the proposed statute, school administrators now know that they are subject to discipline for non-compliance. Further, under part A of section 3, school administrators are also warned of the civil and criminal liabilities they may face for their non-compliance.³⁰⁷ This part is almost a word for word copy of the warning given to teachers for violating section 2(D). As previously stated, this disclaimer acts as a warning to school administrators that the proposed statute will not act as a shield for additional liability stemming from other state and federal violations. As with a teacher, a school administrator may be punished subject to section 3 and any relevant state or federal law or regulation.

C. How the Proposed Statute Holds up Under the Criticisms of Amy Hestir

Throughout this paper, there have been multiple fronts upon which the Amy Hestir Student Protection Act has been attacked and reasoning given as to why it should be deemed invalid. The proposed statute must be put through the same evaluation, to determine how well it addresses

306. See *supra* Section 3 of the Proposed Statute.

307. See *supra* Section 3(A) of the Proposed Statute.

the problems with the statute it seeks to replace.

1. Restrictions on the Private Lives of Employees

As stated earlier in Part III, the Amy Hestir Act would be susceptible to challenge on the ground that its broad infringement on the private actions of schoolteachers was a violation of their right to privacy and public policy.³⁰⁸ However, unlike the Amy Hestir Act, the proposed statute does not have the same far sweeping reach as seen in the Missouri statute. Under section 2 of the proposed statute, a teacher would only be in violation of the statute if they used a non-worked related site to communicate with students, not merely having a non-work related site as under Amy Hestir. Such a reduction in scope of coverage would certainly meet the requirements of *Shelton* and *American Federation*, in which the court struck down state restrictions it felt were overbroad and gave the states excessive control over its employees. The proposed statute would also meet the fair dealing and connection to job performance requirement of *Rulon*. By limiting the scope of the focus to actual unauthorized private conversations between teachers and students, the state is in a better position to argue that this action had a negative impact upon their ability to teach. Thus, it would be easier to argue to a court that a disciplinary action was justified.

The proposed statute would also be able to meet the standards set under the public policy argument put forward in Part III. First, under the two part test set forth in *Missoulain*, a teacher once put on notice that their unauthorized private conversations with students are no longer private; they would no longer have a subjective expectation of privacy.³⁰⁹ The stronger distinction between the proposed statute and Amy Hestir however, flows from the second prong of the test. While the Amy Hestir Act fails under this prong because society would recognize a teacher's right to privacy in being able to have a social media account, the proposed statute has no similar shortcoming. Society is not likely to recognize as reasonable a teacher's right of privacy in actually privately talking with an underage student without any supervision, consent, or family relationship. Thus, in limiting what society has to consider reasonable, the proposed statute can meet the standards of privacy.

308. See *supra* Part III.

309. *Missoulain v. Bd. of Regents Higher Educ.*, 675 P.2d 962, 967 (Mont. 1984).

2. The Strict Scrutiny Test of the 14th Amendment

As argued in Part IV, the Amy Hestir Student Protection Act would not hold up under the weight of strict scrutiny.³¹⁰ While the proposed statute is an improvement over the Amy Hestir Act, it would still be a restriction on the right of free association found under the First Amendment. As such, it would still be subject to strict scrutiny which would require a compelling governmental interest achieved through narrowly tailored means.³¹¹

As with the Amy Hestir Act, the proposed statute seeks to protect children from the sexual abuse of teachers. Therefore, the court would see the statute as serving a compelling governmental interest similar to the holding in *Globe Newspaper*.³¹² With the compelling interest requirement taken care of, the next step would be to see if the proposed statute was narrowly tailored to achieve this goal. The Amy Hestir Act failed this requirement due to the incredible breadth of its reach in denying teachers the ability to even use a social media site if it could allow them to talk to their students privately.³¹³ The proposed statute, on the other hand, only denies a teacher the right to actually communicate with a student using one of these non-work related sites. This would not ban a teacher from having a Facebook or Twitter account; it would only prevent them from using such accounts to privately talk to students. Moreover, this provision is further curtailed, as there are exceptions under section 2 of the proposed statute which would allow teachers to privately communicate with students. The proposed statute is a calculated retreat from the all or nothing approach put forward under the Amy Hestir Act. By curtailing the number of teachers affected by the statute, what actions are prohibited, and creating necessary exceptions, the overbroad issue crippling the Amy Hestir Act fades away. Under this set up, the court would likely find that the proposed statute is narrowly tailored thus allowing it to stand up to even the toughest level of scrutiny applied by the courts.

310. See *supra* Part IV.C.

311. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

312. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

313. See Joshua Rhett Miller, *New Missouri Law Bans 'Exclusive' Online Contact Between Teachers, Students*, FOX NEWS (Aug. 2, 2011), <http://www.foxnews.com/us/2011/08/02/new-missouri-law-bans-exclusive-online-contact-between-teachers-students/>.

3. Other Situations in Which Teachers Communicate with Students

As discussed in Part V, there are other laws throughout the country that deal with teacher communications.³¹⁴ Through a review of those cases and laws, it was shown that there were less restrictive ways to write the Amy Hestir Student Protection Act without overly infringing upon a teacher's right to communicate with others. The proposed statute does not suffer from these sorts of deficiencies and thus would not be susceptible to similar arguments.

Under the proposed statute, not all communications between teachers and students are considered inappropriate. Under Section 2 of the proposed statute there are multiple exceptions carved out enabling teachers and students to communicate outside of the classroom.³¹⁵ This restriction would pass the test of *Chivers* for the proposed statute is not putting a stigma on all communications between teachers and students. Unlike the Amy Hestir Act, the proposed statute only targets a limited number of communications and there is nothing in the statute that mandates punishment for teachers who even fall within this targeted demographic. Thus, no stigma is automatically placed upon the communications as was shown by the blanket ban in the Amy Hestir Act.

In looking at the proposed statute in this light, it acts as a first step in a process. A teacher's violation of the proposed statute would only prompt an investigation into the alleged communication through a non-work related website. What was actually communicated to the student could then be evaluated in a similar fashion to the *Ebersold* case. If a teacher violated the proposed statute, and after investigation it was determined what they communicated to the child was inappropriate, the teacher is subject to punishment under another state statute. This type of set-up works well for teachers as they are allowed to keep their social media websites, and works for the state as actually using these sites to communicate with students without authorization opens the teacher up to investigation and possible punishment under another statute.

Placed under the same light as the Amy Hestir Student Protection Act, the proposed statute does not succumb to any of the pitfalls that doomed the Missouri statute. Further, since the attacks on the proposed statute came from an array of federal and multiple state concerns, it is clear that the statute could likely survive challenges from any

314. See *supra* Part V.

315. See *supra* Section 2 of the Proposed Statute.

jurisdiction that would adopt the proposed statute. With the strength of a limited range of coverage and significant clarity, the proposed statute should not only be adopted in Missouri, but all other states in order to ensure uniformity in teacher/student communication.

VII. CONCLUSION

The schoolteacher's position is a complex one, especially considering the recent advancements in technology and social networking.³¹⁶ On the one hand, a teacher strives to build close relationships with students in order to form bonds of trust and understanding, and to further the educational environment of the classroom.³¹⁷ Social media websites have the potential to be used as tools in this mission, by creating forums for class discussions and encouraging learning outside of the classroom.³¹⁸ On the other hand, teachers have lives that they keep separate from school, just as all professionals have private personal lives that they isolate from their colleagues at work. Limiting teachers in their personal lives by banning their use of social media sites is an overextension of employer authority, and a legislative imposition on personal freedoms. The intent behind the legislative action was honorable, but in their zest to protect the Missouri youth from harm and corruption, the legislature overstepped its bounds, and created more problems than it solved. However, with the adoption of the proposed statute put forth in this Note states will be able to walk the fine line between keeping students safe from sexual abuse while allowing teachers to express their protected freedoms over the World Wide Web.

*James R. Baez & Kerri E. Caulfield**

316. See generally Ron Schachter, *The Social Media Dilemma*, DISTRICT ADMINISTRATION, July/Aug. 2011, at 27 (discussing the problem school districts and teachers are facing in whether to integrate social media sites into the classroom to facilitate the learning environment for students).

317. See *The Teacher Student Relationship*, *supra* note 134.

318. See *Miller*, *supra* note 313.

* The authors of this note want to give special recognition to Professor Susan H. Joffe for all the guidance given during the creation of this note. The authors would also like to thank James and Diane Baez, Jim and Angel Caulfield, Ariel Sanders, and Tim Moore for all their love and support throughout our endeavors.

HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL

**Volume 30, No. 2
Spring 2013**

HEMPSTEAD, NEW YORK 11549

cite as 30 HOFSTRA LAB. & EMP. L.J.

THE *Hofstra Labor & Employment Law Journal* is pleased to consider unsolicited manuscripts for publication year round. Manuscripts should be addressed to: Managing Editor of Articles, Hofstra Labor & Employment Law Journal, Hofstra University School of Law, 121 Hofstra University, Hempstead, New York 11549 or sent via e-mail to laboremploymentlaw@hofstra.edu. The *Journal* does not accept Student Notes, with the exception of those written by Staff Members of the *Hofstra Labor & Employment Law Journal*. All manuscripts should be double-spaced in Microsoft Word format. Citations should follow the form prescribed in *The Bluebook: A Uniform System of Citation* (19th ed. 2010).

Published two times per year by the *Hofstra Labor & Employment Law Journal*. The current subscription rate is twenty-five dollars per volume. Subscription renewals will be automatic unless notice to the contrary is received. All communications concerning subscriptions should be addressed to: Business Administrator, Hofstra Labor & Employment Law Journal, Hofstra University School of Law, 121 Hofstra University, Hempstead, New York 11549. Back issues can be obtained by contacting William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209, 800-828-7571, or in PDF format through HeinOnline (<http://heinonline.org>).

© Copyright 2013 by the *Hofstra Labor & Employment Law Journal*. All rights reserved.

HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL

2012-2013

VOLUME 30

Editor-in-Chief

JUDITH MASSIS-SANCHEZ

Managing Editor of Articles

STEPHEN R. WARSHAVSKY

Managing Editor of Staff

JULIET MARY GOBLER

Business Administrator

DAVID YARON

Symposium Editor

JOSHUA D. SEIDMAN

Alumni Affairs Coordinator

INDERJIT SINGH DHAMI

Technology Editor

LANA YANG

Articles Editors

JAMES R. BAEZ

JOHN BROSNAN

DIANA M. CANNINO

MATTHEW J. CRAWFORD

ANTHONY MORREALE

ZACHARY ROTHKEN

Research Editors

PAUL G. ATKINSON IV

JOSHUA A. GOODMAN

JONATHAN STURM

Notes and Comments Editors

NICK ANDERSON

KERRI CAULFIELD

RYAN MAINHARDT

LAUREN MATTI

Associate Editors

BRIAN ROSEN

MICHAEL J. TSIMARAS

MICHAEL P. SCHEINER

WILLIAM A. VOLET

KEITH LANGLAIS

BINYAMIN T. SILVER

Staff

LAURA C. AHERN

STEPHEN D. ATWELL

IVY CHERIAN

CAMERON B. DANIELS

MITCHELL DANK

JACOB P. DAVIDSON

MATTHEW D. FOX

THOMAS FRIEDKIN

JOSEPH GAON

JENNAI E. GASKIN

JOHN-ETHAN GIONIS

SIMCHA GITELIS

JAMIE HAAR

MAITRY HALDER

KEN KAST

MEREDITH-ANNE KURZ

JOSEPH DEAN LOSOS

KUI MA

AMANDA E. MAGUIRE

ROBERT MARTIN

CHRISTOPHER MUNIZ

CHIDO D.T. MUNYATI

LAUREN MURPHY

PATRICK MURRAY

KATRINA OZOLS

JASON PARK

SARA K. SCHWARTZ

STEPHEN SEALEY

KARINA VAZIROVA

TIANLONG "VICTOR" YOU

National Advisory Board

ALLAN BLOOM

MATTHEW T. BODIE

ALLAN DINKOFF

DANIEL DRISCOLL

SAMUEL ESTREICHER

ALAN M. KORAL

PAUL SECUNDA

PEARL ZUCHEWSKI

Faculty Advisory Board

GRANT M. HAYDEN

SUSAN JOFFE

Alumni Advisory Board

DAVID B. FELDMAN, *Chair*

MERYL R. KAYNARD*

HOLLY E. RICH

ROBERT T. SZYBA

HON. STEPHEN L. UKEILEY

MATTHEW WOODARD

* Honorary Member

MAURICE A. DEANE SCHOOL OF LAW AT HOFSTRA UNIVERSITY

ADMINISTRATIVE OFFICERS

Eric Lane, B.A., M.A., J.D., LL.M., *Dean and Eric J. Schmertz Distinguished Professor of Public Law and Public Service*
Jennifer A. Gundlach, B.A., J.D., *Senior Associate Dean for Academic Affairs and Experiential Education and Clinical Professor of Law*
Yishai Boyarin, B.A., J.D., LL.M., *Assistant Clinical Professor of Law and Associate Dean for Intellectual Life*
Tobie-Lynn Accardi, B.F.A., *Creative Director*
Toni L. Aiello, B.A., J.D., M.S.L.S., *Reference Librarian*
Adonza S. Anderson, *Director of Enrollment Management*
Gerard Anderson, B.A., M.A., *Director of Financial Aid*
Yvonne V. Atkinson, B.S., M.S., *Office Manager/Paralegal, Law School Clinical Program*
Jessica Backman, *Help Desk Analyst*
Andrew E. Berman, B.A., *Senior Associate Director of Communications*
Lisa Berman, B.A., *Assistant Dean for External Relations*
Judith N. Black, *Director of Special Events and Director of CLE*
Peter S. Casalino, B.S., J.D., *Prospect Research and Database Manager*
John Chalmers, B.A., *Associate Dean for Enrollment Management*
Chaio Peter Chao, B.A., M.L.S., M.A., *Catalog Librarian*
Marin Dell, B.S., J.D., M.L.I.S., M.S./M.I.S., *Reference/Electronic Services Librarian*
Shane Dizon, B.A., J.D., *Assistant Director of Academic Support & Visiting Assistant Professor of Law*
Dimitrios M. Doussi, B.A., *Assistant Registrar*
Ryan Duck, *Operations Coordinator – Facilities*
Michael J. Ende, B.A., J.D., *Assistant Dean for Career Services*
Scott C. Filipkowski, B.B.A., *Assistant Director of Information Systems*
Scott J. Glick, B.A., J.D., *Director of the Hofstra Law in D.C. Externship Program and Special Professor of Law*
Mary Godfrey-Rickards, B.A., J.D., M.L.S., *Reference/Access Services Librarian*
Dominick J. Grillo, B.A., M.S.L.S., J.D., *Assistant Director for Technology and Collection Services*
Samantha Hankins, *Associate Director of Student Affairs*
Teresa Harrington, *Operations Coordinator — Personnel*
Vernadette Horne, B.A., J.D., *Director of Career and Professional Development*
Shikha Gupta Joseph, B.A., J.D., M.S.L.S., *Reference Librarian*
Aisha L. Joseph, B.A., J.D., *Director of Career and Professional Development*
Brian T. Kaspar, B.S., M.B.A., *Registrar*
Patricia A. Kasting, B.A., J.D., M.L.S., *Reference Librarian*
Laura Lanzillotta, *Executive Assistant to the Dean*
Rou-Chia P. Lin, B.A., M.L.S., *Acquisitions Librarian*
Michele LoFaso, *Director of Student Affairs*
Christine Lunsford, B.A., *Director of Development*
Katelyn McAllister, *Student Affairs Coordinator*
Maricia McCoy, *Recruiter/Counselor for Enrollment Management*
Megan Meighan, *Assistant Director of Enrollment Management*
Lisa Monticciolo, B.A., J.D., *Associate Dean for Students and Administration*
Mark Padin, B.A., M.S., J.D., *Associate Professor of Academic Support*
Eric Post, *Annual Fund Manager*
Steven Richman, *Associate Director of Global Initiatives*
Mary T. Ruggilo, B.A., J.D., *Assistant Dean for Finance*
Laura T. Rup, B.A., *Assistant Director of Enrollment Management*
Linda P. Russo, M.L.S., B.A., *Assistant Director for Technical Services*
Franca Sachs, B.A., J.D., *Executive Director of Pro Bono, Externship and Fellowship Programs*
Courtney Selby, B.A., J.D., M.L.I.S., *Associate Dean for Information Services, Director of the Law Library & Associate Professor of Law*
Kenneth J. Selvester, B.A., M.A., *Associate Director for Publications*
Kevin Shelton, B.A., M.A., J.D., M.S.L.I.S., *Reference and Government Documents Librarian*
Lisa A. Spar, B.A., J.D., M.S., *Assistant Director for Reference and Instructional Services*
Jodie D. Sperico, *Director of Alumni Relations*
Barbara Stark, B.A., J.D., LL.M., *Associate Dean for Intellectual Life and Professor of Law*
Daphne Telfeyan, *Employee Outreach Specialist*
Akshay D. Tripathi, B.E., M.B.A., P.M.P., *Senior Director of Information Systems*
Khara Tusa, B.S., J.D., *Director of Career and Professional Development*
Michael G. Wagner, B.S., *Webmaster*

FACULTY

Robert Abrams, B.A., J.D., *Special Professor of Law*
Burton C. Agata, A.B., J.D., LL.M., *Professor Emeritus of Law*
Erica Aisner, *Special Professor of Law*

Miriam Albert, B.A., J.D., M.B.A., LL.M., *Professor of Skills and Faculty Advisor for the J.D./M.B.A. Program*
 Robert Archer, *Special Professor of Law*
 Kennisha Austin, *Visiting Assistant Professor of Law*
 The Honorable Leonard B. Austin, B.A., J.D., *Special Professor of Law*
 Kenneth Balkan, J.D., *Special Professor of Law*
 Barbara S. Barron, B.A., M.A., J.D., *Professor of Skills, Director of the Trial Techniques Program, Director of Student Advocacy Programs and Faculty Advisor to Moot Court Board*
 Leslie R. Bennett, B.A., J.D., *Special Professor of Law*
 Steven C. Bennett, B.A., J.D., *Special Professor of Law*
 Deborah Berger, B.S., J.D., *Special Professor of Law*
 Lee Bergstein, *Special Professor of Law*
 Robert Biancavilla, B.A., J.D., M.P.S., A.S., *Special Professor of Law*
 The Honorable Joseph Bianco, *Special Professor of Law*
 Richard Bock, B.A., J.D., *Special Professor of Law*
 Robert A. Baruch Bush, B.A., J.D., *Harry H. Rains Distinguished Professor of Arbitration and Alternative Dispute Settlement Law*
 Yishai Boyarin, B.A., J.D., LL.M., *Associate Clinical Professor of Law and Associate Dean for Intellectual Life*
 Lawrence Jay Braunstein, B.A., J.D., *Special Professor of Law*
 William Burdo, *Special Professor of Law*
 Alafair S. Burke, B.A., J.D., *Professor of Law*
 Nancy Burner, *Special Professor of Law*
 Allison Caffarone, *Visiting Assistant Professor of Legal Writing*
 Juli Campagna, B.A., M.A., J.D., LL.M., *Associate Professor of Legal Writing and Assistant Faculty Director of International Programs*
 Andrez Carberry, B.A., M.A., J.D., *Special Professor of Law*
 Ralph H. Cathcart, *Special Professor of Law*
 Robin Charlow, A.B., J.D., *Professor of Law*
 J. Scott Colesanti, B.A., J.D., LL.M., *Associate Professor of Legal Writing*
 Ronald J. Colombo, B.S., J.D., *Professor of Law*
 Peter Contino, *Special Professor of Law*
 The Honorable R. Bruce Cozzens, *Special Professor of Law*
 The Honorable Edmund Dane, *Special Professor of Law*
 J. Herbie DiFonzo, B.S., J.D., M.A., Ph.D., *Professor of Law*
 Janet L. Dolgin, B.A., M.A., Ph.D., J.D., *Jack and Freda Dicker Distinguished Professor of Health Care Law and Director of Health Law Studies*
 Tracy Dunbrook, B.A., J.D., LL.M., *Visiting Assistant Professor of Law*
 Jack Evans, *Special Professor of Law*
 Akilah N. Folami, B.A., J.D., *Associate Professor of Law*
 Susan Fortney, B.A., J.D., LL.M., J.S.D., *Howard Lichtenstein Distinguished Professor of Legal Ethics and Director of the Institute for the Study of Legal Ethics*
 Eric M. Freedman, B.A., J.D., M.A., *Maurice A. Deane Distinguished Professor of Constitutional Law*
 Monroe H. Freedman, A.B., LL.B., LL.M., *Professor of Law*
 Leon Friedman, A.B., LL.B., *Joseph Kushner Distinguished Professor of Civil Liberties Law*
 Linda Galler, B.A., J.D., LL.M., *Professor of Law*
 Mitchell Gans, B.B.A., J.D., *Rivkin Radler Distinguished Professor of Law*
 The Honorable Kenneth L. Gartner, B.A., J.D., *Special Professor of Law*
 Ashleigh Garvey, *Special Professor of Law*
 Dolores Gebhardt, B.S., J.D., *Special Professor of Law*
 James F. Gesualdi, Esq., B.A., M.A., J.D., *Special Professor of Law*
 George Giuliani, B.A., M.S., M.A., J.D., Psy.D., *Special Professor of Law*
 Elizabeth M. Glazer, B.A., M.A., J.D., *Associate Professor of Law*
 Scott J. Glick, B.A., J.D., *Director of the Hofstra Law in D.C. Externship Program and Special Professor of Law*
 Barry Goldberg, *Special Professor of Law*
 Daniel J. H. Greenwood, A.B., J.D., *Professor of Law*
 John DeWitt Gregory, B.A., J.D., *Sidney and Walter Siben Distinguished Professor of Family Law*
 Joanna L. Grossman, B.A., J.D., *Professor of Law*
 Frank Gulino, B.A., J.D., *Associate Professor of Legal Writing*
 Jennifer A. Gundlach, B.A., J.D., *Senior Associate Dean for Academic Affairs and Experiential Education and Clinical Professor of Law*
 Michael Haber, B.A., M.A., J.D., *Visiting Assistant Clinical Professor of Law*
 Marc L. Hamroff, *Special Professor of Law*
 Robert Harper, *Special Professor of Law*
 Grant M. Hayden, B.A., J.D., M.A., *Professor of Law and John DeWitt Gregory Research Scholar*
 Carol Casazza Herman, B.A. J.D., *Visiting Practitioner-in-Residence in Environmental Law and Special Professor of Law*
 James Edward Hickey, Jr., B.S., J.D., Ph.D., *Professor of Law*
 The Honorable Richard Horowitz, *Special Professor of Law*
 John Hogan, *Special Professor of Law*
 Bernard E. Jacob, B.A., J.D., Ph.D., *Distinguished Professor Emeritus of Law*
 Michael D. Jaffe, B.A., J.D., *Special Professor of Law*
 Alan Jakimo, B.A., M.B.A., J.D., *Special Professor of Law*
 Susan H. Joffe, B.A., M.A., J.D., *Associate Professor of Legal Writing*

Gary Kalbaugh, BCL, LL.M., *Special Professor of Law*
 Kara Kaplan, *Special Professor of Law*
 Elena Karabatos, *Special Professor of Law*
 David A. Kaufman, B.A., J.D., *Special Professor of Law*
 Lawrence Kessler, B.A., J.D., *Richard J. Cardali Distinguished Professor of Trial Advocacy*
 Avi Z. Kestenbaum, B.S., J.D., LL.M., *Special Professor of Law*
 Brian Klein, *Special Professor of Law*
 Fred Klein, B.A., J.D., *Visiting Assistant Professor of Law*
 Spencer Klein, *Special Professor of Law*
 The Honorable Gary F. Knobel, B.A., J.D., LL.M., *Special Professor of Law*
 Abe Krieger, *Special Professor of Law*
 Stefan Krieger, B.A., J.D., *Professor of Law, Director of Center for Applied Legal Reasoning and Director Emeritus of Hofstra Clinical Programs*
 Julian Ku, B.A., J.D., *Professor of Law and Faculty Director of International Programs*
 Katrina Fischer Kuh, B.A., J.D., *Associate Professor of Law*
 Lawrence Kurland, *Special Professor of Law*
 Eric Lane, B.A., M.A., J.D., LL.M., *Dean and Eric J. Schmetz Distinguished Professor of Public Law and Public Service*
 Anibal Rosario Lebron, J.D., LL.M., *Visiting Assistant Professor of Legal Writing*
 Richard G. Leland, B.S., J.D., *Special Professor of Law*
 Theo Liebmann, B.A., J.D., *Clinical Professor of Law and Director of Clinical Programs*
 Barry Lites, *Special Professor of Law*
 Kim Luckey, *Special Professor of Law*
 Barbara A. Lukeman, B.A., J.D., *Special Professor of Law*
 Andrew H. Lupu, B.A., J.D., *Special Professor of Law*
 Malachy T. Mahon, B.A., J.D., *Founding Dean Emeritus*
 Lewis R. Mandel, A.B., J.D., LL.M., *Special Professor of Law*
 Irina D. Manta, B.A., J.D., *Associate Professor of Law*
 Serge Martinez, B.A., J.D., *Clinical Professor of Law*
 The Honorable Edward W. McCarty III, B.S., J.D., *Special Professor of Law*
 Gerald McCloskey, *Special Professor of Law*
 Kevin McElroy, B.A., J.D., *Assistant Professor of Legal Writing*
 Christopher T. McGrath, *Special Professor of Law*
 Gerard Messina, *Special Professor of Law*
 Janis Meyer, *Special Professor of Law*
 Richard K. Neumann, Jr., B.A., Dipl., J.D., LL.M., *Professor of Law*
 Christopher Nicolino, *Special Professor of Law*
 Andrew Oringer, J.D., M.B.A., A.B., *Special Professor of Law*
 Ashira Ostrow, B.A., J.D., *Associate Professor of Law*
 Mark Padin, B.A., M.S., J.D., *Associate Professor of Academic Support*
 Peter Parcher, *Special Professor of Law*
 Curtis Pew, B.A., M.P.P.A., J.D., *Visiting Clinical Professor of Law*
 Damian Pieper, *Special Professor of Law*
 John Pieper, B.A., J.D., LL.M., *Special Professor of Law*
 Troy Pieper, *Special Professor of Law*
 Jack M. Platt, Esq., B.A., J.D., *Special Professor of Law*
 Neal R. Platt, B.S., J.D., LL.M., *Special Professor of Law*
 Rona L. Platt, B.S., J.D., *Special Professor of Law*
 Seth A. Presser, J.D., *Special Professor of Law*
 Andrew Reiss, *Special Professor of Law*
 Alan N. Resnick, B.S., J.D., LL.M., *Benjamin Weintraub Distinguished Professor of Bankruptcy Law*
 Arianne Reyser, *Special Professor of Law*
 Joseph Richetti, *Special Professor of Law*
 John L. Rivkin, B.A., J.D., *Special Professor of Law*
 Anibal Rosario Lebron, J.D., LL.M., *Visiting Assistant Professor of Legal Writing*
 Jared Rosenblatt, *Special Professor of Law*
 Paul Rubell, B.A., J.D., *Special Professor of Law*
 Ben B. Rubinowitz, B.A., J.D., *Special Professor of Law*
 James Sample, B.A., J.D., *Associate Professor of Law*
 Andrew Schepard, B.A., M.A., J.D., *Professor of Law and Director of the Center for Children, Families and the Law*
 Robert Schwenkel, *Special Professor of Law*
 Courtney Selby, B.A., J.D., M.L.I.S., *Associate Dean for Information Services, Director of the Law Library & Associate Professor of Law*
 Rita Sethi, *Special Professor of Law*
 Grant Shehigian, *Special Professor of Law*
 Gregory H. Shill, B.A., M.A., J.D., *Visiting Assistant Professor of Law*
 Norman I. Silber, B.A., M.A., Ph.D., J.D., *Professor of Law*
 Jeffrey Silberfeld, B.A., J.D., *Visiting Assistant Professor of Law*
 Ronald H. Silverman, B.A., J.D., *Distinguished Professor Emeritus of Law*
 Roy D. Simon, B.A., J.D., *Distinguished Professor of Emeritus of Law*
 William M. Skehan, B.A., M.B.A., J.D., *Special Professor of Law*
 David Smith, *Special Professor of Law*
 Judd Sneider, B.A., J.D., *Visiting Associate Professor of Law*
 Lisa Spar, B.A., J.D., M.S., *Special Professor of Law*

Barbara Stark, B.A., J.D., LL.M., *Professor of Law and Hofstra Research Fellow, Associate Dean for Intellectual Life*
Amy R. Stein, B.A., J.D., *Professor of Legal Writing, Assistant Dean for Adjunct Instruction, and Coordinator of the Legal Writing Program*
Michael Steinberg, *Special Professor of Law*
Jacob L. Stevens, B.A., J.D., *Visiting Associate Clinical Professor of Law*
Daniel M. Sullivan, B.A., J.D., *Special Professor of Law*
Michael Vecchione, *Special Professor of Law*
Robert Wagner, *Visiting Assistant Professor of Law*
Vern R. Walker, B.A., M.A., Ph.D., J.D., *Professor of Law and Director of the Research Laboratory for Law, Logic and Technology*
Bennett J. Wasserman, B.A., M.A., J.D., *Special Professor of Law*
Stephen Weiner, B.A., J.D., *Special Professor of Law*
Joel Weintraub, A.B., M.D., J.D., *Special Professor of Law*
Karen Weiss, *Visiting Assistant Professor of Legal Writing*
Carolyn Reinach Wolf, B.A., M.B.A., M.S., J.D., *Special Professor of Law*
Lauris Wren, B.A., J.D., *Clinical Professor of Law and Director for the LGBT Fellowship*
Patrick Young, *Special Professor of Law*

