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Smile, You're on Camera: a Discussion of the Privacy Rights of Teachers in the Modern Day Classroom

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SMILE, YOU'RE ON CAMERA: A DISCUSSION OF THE PRIVACY RIGHTS OF TEACHERS IN THE MODERN DAY CLASSROOM

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I. INTRODUCTION

Recording teachers in the classroom appears to be a growing trend among students. One now has to look no further than Facebook or YouTube for a good laugh at the expense of teachers. In a Connecticut high-school, dedicated teacher Ernie Smoker hopped around his classroom, arms flailing, attempting to demonstrate to his class how molecules move.[1] Unbeknownst to Smoker, a student recorded the demonstration with a smart-phone.[2] The student removed the audio of Smoker's lecture, replaced it with instrumental music, and—just like that—Smoker became an internet sensation.[3] It was not until a news outlet contacted him that he realized he was the newest laughing stock of the internet.[4] In Kentucky, two students used their iPhones to video up their teacher's skirt.[5] The two then posted the video onto YouTube and quickly spread the word to classmates and others about where to find it.[6] These incidents are not isolated. In fact, a web search of "crazy teacher" on YouTube will quickly generate thousands of videos of teachers,

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1. Eddy Ramírez, *Why Teachers Want to Ban Cellphone Cameras From Classrooms*, U.S. NEWS (Mar. 23, 2009), https://www.usnews.com/education/blogs/on-education/2009/03/23/why-teachers-want-to-ban-cellphone-cameras-from-classrooms; Vanessa de la Torre, *Teachers Fighting the Video Invasion*, HARTFORD COURANT (Mar. 20, 2009, 3:30 AM), http://www.courant.com/hc-video-cameras-0320-story.html .

2. Ramírez, *supra* note 1.

3. Ramírez, *supra* note 1.

4. Ramírez, *supra* note 1.

5. Edecio Martinez, *Ky. Students Used IPhone to Video Record Under a Teacher's Skirt, Police Say*, CBS (May 11, 2012, 10:39 AM), https://www.cbsnews.com/news/ky-students-used-iphone-to-video-record-under-a-teachers-skirt-police-say/.

6. Martinez, *supra* note 5.

which have been recorded and uploaded by students.[7]

Even more troubling is the fact that such videos are now being used as a way to have teachers reprimanded, terminated, and publicly humiliated. For example, in California, Professor Olga Cox led her class in a discussion about the presidential election following President Donald Trump's victory.[8] She stated that President Trump's win was "an act of terrorism" on minority groups in the United States.[9] A student with opposing views recorded Cox's comments without her consent and posted the video on Facebook, which then went viral.[10] The school suspended the student, but, for Cox, the consequences were more severe.[11] Throughout the following days, Cox's email and voicemail filled with threatening messages.[12] She was forced to leave her home and temporarily stop teaching.[13] The threats became so bad that Cox was afraid to even walk outside.[14] She was told to "shoot herself" and to "set [herself] on fire," among many other threats.[15] According to Cox, she often opened her classroom up for students to discuss "sensitive issues" in a safe environment.[16] On this occasion, she stated that her purpose was to comfort students in minority groups that were fearing persecution following the election.[17] For many, however, Cox's intentions were of little consolation.[18] The student's recording

7. De la Torre, *supra* note 1; *see Crazy Teacher*, YOUTUBE, https://www.youtube.com/results?search_query=%22crazy+teacher%22 (last visited Mar. 4, 2018).

8. Peter Holley & Avi Selk, *A Professor Called Trump's Win 'an Act of Terrorism.' The Student who Filmed Her got Suspended*, WSH. POST (Feb. 16, 2017), https://www.washingtonpost.com/ news/grade-point/wp/2017/02/15/a-professor-called-trumps-victory-terrorism-a-student-who-recorded-the-rant-got-suspended/?utm_term=.1f0154dc2e1b.

9. Holley & Selk, *supra* note 8; Daily Pilot Staff, *OCC Professor says Threats Over Her Anti-Trump Comments have Her Living in Fear, but 'I Didn't do Anything Wrong,'* L.A. TIMES (Dec. 29, 2016, 2:16 PM), http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-1230-occ-professor-20161229-story.html.

10. Holley & Selk, *supra* note 8.

11. Daily Pilot Staff, *supra* note 9.

12. *Id.*

13. Id.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See Id.*

caused a public backlash that upended Cox's career.[19] Following this incident, colleges across California welcomed students back from winter break with signs stating that classroom recordings were prohibited.[20] University of Southern California law professor Rebecca Lonergan voiced her support for the prohibition, stating that students can take a "snippet" of what is said in class and use it out of context to cyberbully teachers.[21] Based on similar concerns, other states also began questioning the appropriateness of smartphones in the classroom.[22] After the above-mentioned video of Ernie Smoker went viral, the Connecticut State General Assembly created a task force to investigate "the impact of cellphone cameras and video-recording devices in the classroom."[23]

Even with so many now questioning the place of smartphones in schools, very little is still known about the effects that surreptitious recordings have on classrooms and teachers.[24] While there are no studies directly showing that surreptitious recordings affect teacher satisfaction, supply, and attrition, there are studies directly linking *student behavior* to teacher attrition.[25] And teachers are now reporting more issues with student behavior due to student smartphone usage.[26] In addition to student behavior, studies are also showing that student satisfaction and comprehension decrease when smartphones are present in the classroom.[27] Even more alarm-

19. *See Id.*

20. Roxana Kopetman, *Can Students Record a Teacher, as a Study Tool or to Ward off Politics*, SUN (Feb. 12, 2017, 4:47 PM), https://www.sbsun.com/2017/02/12/can-students-record-a-teacher-as-a-study-tool-or-to-ward-off-politics/.

21. *Id.*

22. De la Torre, *supra* note 1.

23. *Id.*

24. *See* Paula Barnwell, *Do Smartphones Have a Place in the Classroom*, ATLANTIC (Apr. 27, 2016), https://www.theatlantic.com/education/archive/2016/04/do-smartphones-have-a-place-in-the-classroom/480231/ (showing cell phone usage in general has negative effect on student and teacher performance).

25. Emily Ram, *The Newsies!: Teacher Survey Reveals Cell Phone Problems*, DAILY NEWS (Dec. 10, 2015, 2:00 PM), http://www.nydailynews.com/new-york/education/teacher-survey-reveals-issues-cell-phones-classes-article-1.2452229 . While it is beyond the scope of this paper, more study needs to be done on the overall effect of technology on teacher satisfaction, retention, and entry into the field.

26. *Id*.

27. Daniel Pulliam, *Effect of Student Classroom Cell Phone Usage on Teachers*, WESTERN KENTUCKY UNIVERSITY TOPSHOLAR (2017), https://digitalcommons.wku.edu/cgi/viewcontent.cgi?article=2921&context=theses.

ing are the findings that students within the proximity of others using smartphones are more likely to perform poorly in the classroom.[28] While more research is needed, it is becoming increasingly apparent that smartphones play a critical role in student behavior and performance in the classroom, which is causally linked to teacher attrition.[29]

Teacher attrition is a growing, nationwide issue that continues to be ignored; however, it is hugely deserving of our attention because states are uniformly reporting a shortage of teachers.[30] Additionally, the shortages are in subjects that are crucial to the success of students: forty-six states reported a shortage in special education, forty-seven in math, and forty-three in science.[31] For the 2017–18 school year, over 100,000 of the teachers filling those shortages were unqualified—meaning they did not meet certification standards for teachers.[32] This shortage is only expected to worsen as the national population increases.[33] With the education of our nation's future at stake, it is time for lawmakers to take action on behalf of teachers; practical, bi-partisan legislation is necessary to fight teacher attrition and cultivate healthy classroom environments.

Part II of this Article will first explain the purpose of wiretap (or recording) laws. It will then track the development of wiretap laws at the federal and state levels and illustrate several important distinctions.[34] Part III will discuss the evolution of the Fourth Amendment in the United States. It will also examine how the Fourth Amendment and wiretap laws work together and how they apply to teachers.[35] Part IV will look at the inadequacy of current legal remedies available to teachers who are surreptitiously recorded. It will then set forth possible

28. *Id.*

29. Barnwell*, supra note 25.*

30. Valeria Strauss, *Where have all the Teachers gone?*, WASH. POST (Sept. 18, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/09/18/where-have-all-the-teachers-gone/?utm_term=.b8ee87bc7798 .

31. *Id.*

32. *Id.*

33. Lauren Camera, *The Teacher Shortage Crisis Is Here*, U.S. NEWS (Sept. 14, 2016, 9:00 PM), https://www.usnews.com/news/articles/2016-09-14/the-teacher-shortage-crisis-is-here .

34. *See infra* notes 33–56.

35. *See infra* notes 57–135.

district and classroom policies to help prevent recordings. Lastly, it will discuss the dire need for legislation regulating cell phone use in the classroom among the states. This Article will show that—amidst controversial issues such as state funding and bathroom bills—a prohibition on surreptitious recordings is commonsense legislation that will push education in the right direction.[36]

II. WIRETAP LAWS: WHOSE CONSENT IS NEEDED?

Federal and state wiretap laws regulate when and how individuals may be recorded.[37] Current wiretap laws were designed with two goals in mind: (1) to protect individuals' Fourth Amendment right to privacy (2) while also preserving law enforcement's ability to conduct searches and seizures based on probable cause.[38] Over the years, the laws have evolved but the basic privacy interests behind them has largely remained the same.[39]

A. Federal Laws

In 1918, Congress temporarily enacted federal wiretap laws to protect government messages during World War I.[40] Following the war, Congress decided there was no longer a need for the wiretap laws and chose not to reenact them.[41] Congress's inaction led to states taking on the issue without the help of the federal government.[42] By 1928, forty-one of the then forty-eight states had statutes in place regulating the interception of messages, specifically through telephone and telegraph.[43] In 1934, Congress passed the Communications Act, which expanded traditional state statutes to include a prohibi-

36. *See infra* notes 132–75.

37. James X. Dempsey, *Communications Privacy In The Digital Age: Revitalizing The Federal Wiretap Laws to Enhance Privacy*, 8 ALB. L.J. SCI. & TECH. 65, 67 (1997).

38. *Id.*

39. *See generally* Gina Stevens & Charles Doyle, *Privacy: An Overview of Federal Statutes Governing Wiretapping and Electronic Eavesdropping,* Report for Congress 1, 2 (Jan. 13, 2003) https://epic.org/privacy/wiretap/98-326.pdf.

40. *See generally Id.*

41. *See generally Id.*

42. *See generally Id.*

43. *See generally Id.*

tion on the interception and disclosure of radio and wire communications.[44] The Communications Act was seen as a step towards further preserving the sanctity of an individual's Fourth Amendment right from the intrusion of a "Big Brother"[45] government.[46] The 1934 act, however, prevented the disclosure of intercepted communications but not the interception itself.[47] As a consequence, police surveillance rapidly increased until 1967 when the Supreme Court ruled that unrestricted electronic surveillance by law enforcement violates individuals' Fourth Amendment rights.[48] The Court held that police surveillance must be supported by a narrowly tailored warrant showing probable cause.[49] In response to the Court's decision, Congress passed Title III of the Omnibus Crime Control and Safe Street Act of 1968, which ensured the limited use of wiretapping by law enforcement upon a showing of probable cause.[50] Since 1968, Congress has amended aspects of Title III numerous times, either out of privacy concerns, law enforcement interests, or foreign intelligence interests.[51] The act now extends beyond surveillance to include oral communications and requires the consent of at least one person that is party to a communication.[52]

B. State Laws

Currently, all fifty states have adopted wiretap laws to address privacy concerns and allow for criminal prosecution at the state level.[53] Twelve states have statutes that offer its citizens added protections outside of federal law.[54] These states

44. *See generally Id.*

45. *See* George Orwell, 1984 (Plume Books 1983) (1949).

46. *See generally Id.*

47. *See generally* Stevens & Doyle, *supra* note 35.

48. *See* Dempsey, *supra* Note 33, at 70–71; *see generally* Stevens & Doyle, *supra* note 35.

49. Dempsey, *supra* note 33, at 71-72.

50. *Id.*

51. *See generally* Stevens & Doyle, *supra* note 35, at 7.

52. *Id.*

53. Reginald A. Hirsch, *Privacy Rights in a Public Society: Protecting Your Client and Yourself from Invasions of Privacy*, 57 S. TEX. L. REV. 579, 583 (2016).

54. Michael J. Gibson, *Just Because It's Legal Doesn't Mean You Can Do It: The Legality of Employee Eavesdropping and Illinois Workplace Recording Policies*, 46 LOY. U. CHI. L.J. 913, 920–21 (2015).

require what is called "two-party consent" for the recording of oral communications.[55] Two-party consent does not mean that only two parties must consent to the recording. Instead, two-party consent states require that *every* party involved in the conversation consent to the recording.[56] The remaining majority of states are "one-party consent" states, which offer protections similar to federal law. In one-party consent states, only one party must consent to the recording.[57] So long as the individual creating the actual recording is a party to the conversation, no additional consent is necessary.[58] Such states are largely unregulated because the party recording is always considered a consenting party so long as they are an actual party to the conversation and are not hiding away in a closet.[59] For teachers in one-party consent states, this means that students can video them without their consent or *awareness*, because it is likely that students are always a party to conversations within the classroom.[60]

III. PRIVACY LAWS IN THE CLASSROOM

For oral communications to be protected under federal and state wiretap laws, it must first be found that the individual had an objective expectation of privacy at the time of the communication. The U.S. Constitution guarantees individuals the right to security over "their persons" against unreasonable "intrusions into their privacy."[61] As society has evolved, the right to privacy for individuals has struggled to keep pace.[62] An invasion of one's privacy used to commonly be seen as listening outside the window of another or eavesdropping on a conversation through the walls.[63] With the invention of electricity

55. *Id.* at 920.

56. *Id.* at 916.

57. *Id.* at 919; *see also* Hirsch, *supra* note 49, at 583.

58. Gibson, *supra* note 50 at 919.

59. *Id.*

60. If there are school policies in place prohibiting classroom recordings without prior teacher consent, the school can punish the student.

61. U.S. CONST. amend. IV.; Berger v. New York, 388 U.S. 41, 59 (1967).

62. *Berger*, 388 U.S. at 59.

63. *Id.* at 45.

came the interception of private telegraph messages.[64] The telephone replaced the telegraph and brought with it wiretapping—the most sophisticated form of eavesdropping that the world had ever seen.[65] Since then, society has continued to modernize eavesdropping through the creation of recording devices, some of which are small enough to fit in the end of a ballpoint pen or within a cufflink.[66] Today, we now have smartphones which can instantly record audio, capture video footage, or snap pictures of unknowing targets, all at a moment's notice. [67]

Smartphones are embedded in nearly every facet of our modern-day society.[68] A 2017 study showed that smartphones are commonplace around the globe; in fact, over half of the world now uses one.[69] When it comes to students, a 2015 study showed that 86% of college students regularly use a smartphone, 82% of high school students, 66% of middle school students, and even 53% of elementary school students.[70] For teachers, this means that the presence of smartphones in the classroom is virtually inevitable.[71] And where smartphones go, so do social media applications.[72] More than 98% of college-age students regularly use some form of social media, and 90% of teens between the ages of thirteen to seventeen go online daily.[73] With more than 8 out of 10 students regularly using smartphones, all the while with the capability of a worldwide audience at their fingertips, it is no wonder teachers are growing concerned about their privacy rights

64. *Id.*

65. *Id.* at 46.

66. *Id.* at 46–47.

67. Cynthia A. Brown & Carol M. Bast, *Professional Responsibility: Making "Smart" Ethical Decisions While Making The Most Of "Smart" Technology*, 48 CREIGHTON L. REV. 737, 739 (2015).

68. *Id.*

69. Simon Kemp, *Digital In 2017: Global Overview*, WE ARE SOCIAL (Jan. 24, 2017), https://wearesocial.com/special-reports/digital-in-2017-global-overview .

70. *Student Mobile Device Survey 2015*, PEARSON (June 2015), http://www.pearsoned.com/wp-content/uploads/2015-Pearson-Student-Mobile-Device-Survey-College.pdf.

71. *Student Mobile Device Survey 2015*, *supra* note 66.

72. The issue of cyber-bulling within schools and social media liability is beyond the scope of this paper.

73. *See* Modo Labs Team, *Social Media Use Among College Students and Teens – What's In, What's Out, And Why*, MODO LABS BLOG (Apr. 26, 2016), https://www.modolabs.com/blog-post/social-media-use-among-college-students-and-teens-whats-in-whats-out-and-why/.

in the classroom.[74] Classroom lectures, comments, and disruptions are no longer contained within the classroom; they are now subject to potential scrutiny by millions across the globe.

Section A will now explore the general test for analyzing privacy rights, as set forth by the Supreme Court.[75] Section B will illustrate how courts around the nation have applied the test to teachers.[76] Section C will then take a closer look at Texas case law, which illustrates the many ambiguities in the test when applying it to teachers in the workplace.[77]

A. Fourth Amendment Standard

The recent reprimand of five Amarillo teachers who were recorded having a conversation over dinner has many teachers wondering exactly where they are safe from recordings.[78] Privacy is something that society—including teachers—greatly values. This concept is illustrated by the Fourth Amendment, which protects all individuals from unlawful searches and seizures.[79] Common-law further dictates that an individual's right to privacy is inherently protected under the Fourth Amendment.[80] This protection extends not only to the search and seizure of "tangible" objects but to the "recording of oral statements" as well.[81] This concept is best illustrated in the landmark case *Katz v. United States*. In *Katz*, the Court held that law enforcement's warrantless recording of the defendant's conversations in a phone booth directly violated his Fourth

74. *Student Mobile Device Survey 2015*, *supra* note 66.

75. *See infra* notes 74–85.

76. *See infra* notes 86–104.

77. *See infra* notes 105–35.

78. *See* Eline de Bruijn, *5 Texas educators return to classrooms after allegedly making fun of students with disabilities*, DALL. NEWS (Oct. 26, 2017),) https://www.dallasnews.com/news/texas/2017/10/18/texas-moms-heart-just-sank-read-teachers-making-fun-dyslexic-son. It has been held, generally, that privacy protections do not extend to crowded public places such as restaurants. *Wilkins v. NBC*, 71 Cal. App. 4th 1066, 1078 (Cal. App. Dep't Super. Ct. 1999).

79. U.S. CONST. amend. IV; see Berger v. New York, 388 U.S. 41, 59 (1976); *see also* Silverman v. United States, 365 U.S. 505, 511 (1961); *see also* Wong Sun v. United States, 371 U.S. 471, 485 (1963). The Fourth Amendment is not applicable in private school settings and is beyond the scope of this paper. MARY A. LENTZ, INTRODUCTION TO SCHOOL LAW § 1:3 (2017).

80. U.S. CONST. amend. IV.

81. Katz v. United States, 389 U.S. 347, 353 (1967) (holding that police could not use recordings obtained without a warrant to convict defendant of illegal wagering).

Amendment right.[82] In making this determination, Justice Harlan laid out a two-part test in his concurring opinion that has since been accepted as the "reasonable expectation of privacy" test.[83] It states that an individual has a legitimate expectation of privacy if (1) they demonstrate a subjective expectation that (2) society considers objectively reasonable.[84]

The Court also held that "the 4th amendment protects people, not places," but the place—among other circumstances—should be largely considered by courts under a privacy analysis.[85] For instance, in *Katz* the issue hinged not on whether there was a valid expectation of privacy in a phone booth, but, specifically, whether the defendant himself had a reasonable expectation of privacy in the phone booth, considering the circumstances.[86] Surrounding circumstances are analyzed by looking at several factors including:

1) The person's proprietary or possessory interest in the place searched;
2) Whether the person's presence in or on the place searched was legitimate;
3) Whether the person had a right to exclude others from the place;
4) Whether the person took normal precautions, prior to the search, which are customarily taken to protect privacy in the place;
5) Whether the place searched was put to private use; and
6) Whether the person's claim of privacy is consistent with the historical notion of privacy.

In *Katz*, the circumstances demonstrated a reasonable expectation of privacy because the defendant closed the door in the phone booth and reasonably believed the conversation was private.[87] The fact that the phone booth was open to the

82. *Id.* at 353.
83. *Id.* at 361.
84. *See* Texas v. Betts, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013).
85. *Katz*, 389 U.S. at 361; *see also* Crosby v. Texas, 750 S.W.2d 768 (Tex. Crim. App. 1987).
86. *Katz,* 389 U.S. at 352.
87. *Katz*, 389 U.S. at 352.

public was not conclusive. [88] Today—over fifty years later—the *Katz* analysis still stands as the precedential test to be used when analyzing Fourth Amendment claims.

B. Application in Schools

Applying the *Katz* analysis around the nation, courts have held that teachers maintain a diminished right to privacy while at work.[89] Despite such rulings, many teachers strongly believe that they should be allowed to teach free from invasive intrusions—including surreptitious recordings.[90] Most case law in the United States involves surreptitious recordings by school officials, not by students. When it comes to recordings taken by *school officials*, courts have generally held that the interest of districts in ensuring the well-being and safety of students is superior to the privacy interests of teachers.[91] But, courts have been reluctant to fully strip away the privacy rights of teachers. Instead, courts consider each situation on a case-by-case basis, looking at the totality of the circumstances surrounding the alleged invasion, including the *Katz* factors.[92] One factor that has proven to be highly influential with the courts is whether the teacher in question had exclusive use over the space where the recording took place or whether it was shared.[93]

Despite the courts' many unanimous holdings that privacy rights follow the individual and not the place, the location of a teacher's communications has proven to carry significant weight with the courts.[94] A Pennsylvania state court ruled that a school bus driver had no reasonable expectation of privacy on the bus he drove because the bus was a public space without any real restrictions to access.[95] An Ohio state court ruled that school custodians who were terminated based on footage from a hidden video had no reasonable expectation of privacy

88. *Id.*

89. *See* Plock v. Bd. of Educ., 545 F. Supp. 2d 755, 757 (N.D. Ill. 2007); Goodwin v. Moyer, 549 F. Supp. 2d 621, 633 (M.D. Pa. 2006).

90. Ralph D. Mawdsley, *The Law In Providing Education: School Board Control Over Education And A Teacher's Right To Privacy*, 23 ST. LOUIS U. PUB. L. REV. 609, 621–22 (2004).

91. *Id.* at 622.

92. *Plock*, 545 F. Supp. 2d at 757.

93. *Id.*

94. *Id.*

95. *Goodwin*, 549 F. Supp. 2d at 633.

in the break room because it was shared with fellow colleagues.[96] A New Hampshire state court took an even narrower approach when it held that a custodian who was involuntarily recorded in a classroom had no reasonable expectation of privacy—even though he was the only one with access to the room at the time the video was set to record.[97] The court ruled that "the classroom was not [the custodian's] personal space," even though he had sole access to the room at the time and his purpose in the room was limited to his custodial duties.[98]

Furthermore, state courts have almost sweepingly viewed classrooms as public settings, effectively eliminating the privacy rights of teachers.[99] A California court ruled that a science teacher had no reasonable expectation of privacy, because in a classroom "[c]ommunications and activities on the part of a teacher will virtually never be confined to the classroom."[100] Similarly, an Illinois court ruled that four special education teachers had no expectation of privacy in their classroom, because it is a public space in which they "communicate with members of the public."[101] The court further noted that it is not only possible that communications in the classroom might be repeated outside of the classroom, but it is "virtually" certain that they will be repeated, and, therefore, bear no reasonable expectation of privacy.[102] Teachers should expect that what they say *in* the classroom will be discussed by students with "parents, other students, other teachers, and administrators" *outside* of the classroom.[103] Around the nation, courts have cautiously limited the privacy rights of school employees during the scope of the job, whether it be on a bus,[104] a class-

96. Brannen v. Kings Local Sch. Dist., 761 N.E.2d 84, 90-91 (Ohio Ct. App. 2001).

97. *Compare* New Hampshire v. McLellan, 744 A.2d 611, 614 (N.H. 1999) (holding that a custodian had no expectation of privacy in a classroom because it was not the custodian's personal space—even though access at the time was restricted to the custodian), *with Brannen*, 761 N.E.2d 84 at 90-91 (holding that a teacher had no reasonable expectation of privacy in a break room because it was a public space shared with colleagues).

98. *McLellan*, 744 A.2d at 615.

99. *See Plock*, 545 F. Supp. at 757; Evens v. Superior Court of L.A. Cty., 91 Cal. Rptr. 2d 497, 499 (Cal. App. Dep't Super. Ct. 1999); *McLellan*, 744 A.2d at 606.

100. *Evens*, 91 Cal. Rptr. 2d at 499.

101. *Plock*, 545 F. Supp. at 758.

102. *Id.*

103. *Id.*

104. *See* Goodwin v. Moyer, 549 F. Supp. 2d 621, 634 (M.D. Pa. 2006).

room full of students,[105] or an empty classroom accessible only to a custodian.[106] The reasoning remains the same: the government's interest in the safety and well-being of students is superior to the privacy rights of school employees.[107]

C. Inconsistencies by the Courts

The application of the Fourth Amendment, as it relates to teachers, is still a very ambiguous and difficult application for the courts.[108] Courts have historically held that the privacy rights of teachers are not simply "shed" at the "school house gate;"[109] instead, teachers are granted protections under federal and state wiretap laws wherever they hold a reasonable expectation of privacy under the Fourth Amendment. Thus, courts must *first* perform a complicated Fourth Amendment analysis before they can then determine whether a teacher is protected under wiretap laws. When determining if a person held a reasonable expectation of privacy, the court's outcome can change based on the slightest variation in facts. Although Texas has little case law on the matter, what case law it does have demonstrates varied results.[110]

In *Roberts v. Houston Independent School District*,[111] the court held that a Houston teacher had no reasonable expectation of privacy in her classroom when she was recorded by school officials.[112] The court noted that "the activity of teaching in a public classroom does not fall within the expected zone of

105. *See Evens*, 91 Cal. Rptr. 2d at 499.

106. *See* New Hampshire v. McLellan, 744 A.2d 611, 615 (N.H. 1999).

107. *Goodwin*, 549 F. Supp. 2d at 634.

108. *See Goodwin*, 549 F. Supp. 2d at 634, *see also Evens*, 91 Cal. Rptr. 2d at 499.

109. *Cf.* Tinker v. Des Moines, 393 U.S. 503, 506 (1969) (holding that teachers' and students' freedom of speech and expression rights are not eliminated contingent on the setting but, instead, a stricter analysis is necessary; it follows that privacy rights would also not be eliminated simply because students and teachers are at school).

110. *Compare* Roberts v. Hous. Indep. Sch. Dist., 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (holding that "the activity of teaching in a public classroom does not fall within the expected zone of privacy"), *with* Long v. Texas, 535 S.W.3d 511, 539 (Tex. Crim. App. 2017), *cert. denied*, 138 S. Ct. 1006 (2018) (holding that a coach instructing his players during half-time in a locker-room had a reasonable expectation of privacy—even though the locker-rom was being used for instructional purposes at the time of the recording).

111. *Roberts*, 788 S.W.2d at 107.

112. *Id.* at 111.

privacy" under the Fourth Amendment, regardless of whether the teacher consents to the recording.[113] Furthermore, the fact that the teacher was openly recorded several times before and was—again—being recorded in plain view, demonstrates that any expectation of privacy she had was simply unreasonable.[114]

While the outcome in *Roberts* is similar to that of other state courts, a recent case heard by the Texas Court of Criminal Appeals resulted in a very different conclusion. *Long v. Texas* illustrates the ambiguity in privacy rights as applied to teachers, and why a more clear line must be drawn . *Long* was one of the first cases in the nation involving a surreptitious recording by a *student* instead of a school official. In this case, Coach Townsend—a high school basketball coach—was surreptitiously recorded giving half-time and post-game speeches to his players in the locker-room.[115] The student, C.L., snuck into the locker-room and hid her iPhone so that it would record Townsend's speeches.[116] C.L. then presented the video to the school board so that the board members could see "how he acts" before considering his contract renewal.[117] The district turned the video over to the police who charged C.L. with violating Texas' one-party consent wiretap statute since she was not a party to the conversation.[118] At trial, C.L. argued that she did not violate the statute because Townsend did not have a reasonable expectation of privacy.[119] She claimed that, at the time of the recording, the locker-room was serving as a public classroom similar to the public classroom in *Roberts*.[120] The trial court acquitted C.L, the Court of Appeals affirmed, but the Court of Criminal Appeals reversed and held that Townsend did have a reasonable expectation of privacy in the locker-room.[121] Like in *Katz,* here the court did not evaluate the content of Townsend's speeches to determine reasonableness; in-

113. *Id.*
114 . *Id.* at 108.
115. *Long*, 535 S.W.3d at 515.
116. *Id.* at 515–16.
117. *Id.*
118. *Id.* at 515, 517.
119. *Id.* at 518.
120. *Id*.
121. *Id.* at 518, 542.

stead, the court focused on the place where the speech took place. [122] In assessing the relevance of the locker-room, the court considered the following facts:

1) Townsend had a possessory interest and could exclude individuals from the locker room;
2) Townsend believed the room was restricted to players and coaches;
3) C.L. had to pose as an equipment manager to gain access to the room; and
4) The entry to the room was designed for additional privacy.[123]

Based on these facts, the Court held that Townsend had a reasonable expectation of privacy.[124]

In coming to its decision, however, the court carefully navigated around case law to rule that Townsend's expectation of privacy was reasonable. The court likened the case to *Mancusi v. Deforte*, a 1968 U.S. Supreme Court case.[125] In *Mancusi*, the Court held that an employee had a reasonable expectation of privacy in his shared office[126] (where police seized paper documents from the defendant's shared office space without a warrant).[127] The Court noted that the right to privacy is not automatically relinquished in shared spaces; instead, alleged privacy violations must be carefully scrutinized in context with the other facts.[128] In comparing Townsend's case to *Mancusi*, the court failed to distinguish between tangible objects and oral communications. The defendant in *Mancusi* had a reasonable expectation of privacy—even in a shared office—because the documents seized by police were tangible documents accessible only by the defendant.[129] In contrast, Townsend's speech was orated to a room full of coaches and teenage stu-

122. *Id.* at 527.

123. *Id.* at 530.

124. *Id.* at 538; Castillo v. Texas, No. 14-16-00296-CR, 2017 WL 4844481, at *4 (Tex. App.—Houston [14th Dist.] Oct. 26, 2017, no. pet.) (mem. op., not designated for public).

125. *Long*, 535 S.W.3d at 529.

126. *See id.*; *see also* Mancusi v. DeForte, 392 U.S. 364, 377 (1968).

127. *Mancusi*, 392 U.S. at 377.

128. *Mancusi*, 392 U.S. at 369–70.

129. *Id.* at 377.

dents. [130] Here, we see that the court go to great lengths to preserve Townsend's right to privacy, despite that fact that his communications lacked any reasonable expectation.

The court also distinguished Townsend's case from *Roberts v. Houston Independent School District*.[131] In *Roberts*, the court held that teaching in a public classroom does not fall within the zone of privacy.[132] C.L. argued that Townsend, a high school coach, is no different than any other classroom teacher because a coach's primary job is to educate.[133] Furthermore, C.L. argued that a public classroom is any place a teacher is instructing students—a locker-room in this instance.[134] In *Roberts*, the teacher's classroom was outside the zone of privacy because it was open to the public and there was nothing to indicate any restrictions on access.[135] Here, the court distinguished from *Roberts* because the locker-room was *restricted* to coaches and players.[136] To contend that classrooms such as in *Roberts* are an open forum without restrictions is outlandish. In doing so, however, the court was able to preserve a level of privacy for teachers and avoid overruling precedent. In *Long*, it is clear from the circumstances that the locker-room where Townsend was educating his athletes was functioning as a classroom and should also fall outside the zone of privacy.[137]

While the court's intentions in the preceding case were likely honorable, the opinion skirts and defies existing case law to ensure that teachers maintain some level of constitutional rights in the workplace.[138] The opinion created precedent that further complicates an already muddled issue. When and where a teacher holds a reasonable expectation of privacy is now more unclear than ever before. The opinion in *Long* makes

130. *Contra Long*, 535 S.W.3d at 525.

131. *Id.* at 532.

132. *Id.*

133. Long v. Texas, 469 S.W.3d 304, 310 (Tex. App.—El Paso 2015), *rev'd,* 535 S.W.3d 511 (Tex. Crim. App. 2017).

134. *Id.* at 311.

135. *Id.* at 531.

136. *Id.* at 520; Roberts v. Hous. Indep. Sch. Dist., 788 S.W.2d 107, 111 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

137. *Long*, 535 S.W.3d at 525.

138. *See Mancusi*, 392 U.S. at 377; *See also Roberts*, 788 S.W.2d at 107. The court also demonstrates some hesitancy to rule that a locker-room can be considered a public setting for purposes of recording. *Long*, 535 S.W.3d at 530–38.

it seem as though classroom access restrictions preserve privacy rights for teachers. If that is the case, most schools today have procedures in place that restrict classroom access to students, teachers, and other approved guests.[139] It follows that, under *Long*, all communications in classrooms are now protected by privacy laws. Further, if a locker-room speech is protected, surely statements made in a teacher's lounge or a janitor's closet, both of which restrict access, would also be protected. While the *Long* case may seem like just another case among many around the nation, it illustrates the confusion among courts surrounding privacy rights for teachers—especially as technology advances.

IV. PROTECTIONS FOR TEACHERS

In today's technological society—where teachers have less privacy than ever before—it is important that teachers, districts, and universities understand what recourse is available to protect themselves. Most courts have ruled that teachers maintain very little expectation of privacy in the classroom, and even teachers from two-party consent states—who are seemingly protected under the law—are still subject to surreptitious recordings.

Section A will analyze the limited legal actions available to teachers against students, such as defamation, intentional infliction of emotional distress, and invasion of privacy.[140] Section B will address classroom policies that districts, universities, and teachers could implement to discourage surreptitious recordings.[141] Lastly, section C identifies the need for lawmakers to enact legislation that bolsters inadequate district policies and lessens the necessity for legal action.[142]

A. Inadequate Legal Remedies

There are few recourses available to teachers who have

139. *School Safety and Security Measures*, NCES, https://nces.ed.gov/fastfacts/display.asp?id=334 (last visited March 5, 2018).

140. *See infra* notes 139–49.

141. *See infra* notes 150–57.

142. *See infra* notes 158–74.

been surreptitiously recorded by students, and what limited options they have only come to bear long after the damage has already been done. Legal claims available to teachers, such as defamation, intentional infliction of emotional distress, and invasion of privacy, are all traditionally difficult claims to prove in court.[143] But, even if a teacher can successfully get a judgment against a student, many states do not hold parents liable for the intentional torts of their minor children.[144] Teachers would have to wait years for the minor to become an adult and then try to collect from an eighteen-year-old right out of high school. Even in the case of college and graduate school teachers—although the student is an adult—it is still very likely that they, as students, are also judgment-proof. Thus, the odds of a teacher ever collecting on a judgment are slim. And even in circumstances where a tort remedy is available to teachers, the costs and stress of litigation are unlikely worth the end result.

Defamation is a difficult claim to win. On average, only 13% of defamation claims are successful.[145] Furthermore, such a claim requires that statements actually be false, which leaves no recourse for teachers whose actions are accurately depicted in surreptitious videos circulated on social media.[146] In contrast, juxtaposed video snippets of teachers that combine isolated true statements to give a false representation might be considered defamatory.[147] Likewise, students using recordings to make false implications about a teacher might also be considered defamatory.[148] But, damages in defamation cases can be difficult to prove and are often speculative.[149] Many states—

143. Stephanie Gironda, *Employment Torts*, ABA (2008), http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/106.pdf.

144. *See* Jamie A. Anderson & David C. Marlett, *Foster Parent Liability Risk*, 33 J. INS. REG. 265, 267 (2014); *see also* Matthiesen, Wickert, & Lehrer, S.C., *Parental Responsibility Laws In All 50 States*, https://www.mwl-law.com/wp-content/uploads/2013/03/parental-responsibility-in-all-50-states.pdf (last updated June 8, 2016).

145. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET, 122 (2007).

146. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

147. Campbell v. Clark, 471 S.W.3d 615, 625 (Tex. App.—Dallas 2015, no pet.); *see generally* Sandra F. Chance & Christina M. Locke, *When Even The Truth Isn't Good Enough: Judicial Inconsistency In False Light Cases Threatens Free Speech*, 9 FIRST AMEND. L. REV. 546, 570 (2011) (claiming false light invasion of privacy might also be fitting, but it is still not a recognized tort in several states and remains highly controversial).

148. *Sullivan*, 376 U.S. at 279-80.

149. Burbage v. Burbage, 447 S.W.3d 249, 262 (Tex. 2014).

such as Texas—have ruled that speculative evidence is not sufficient to entitle plaintiffs to an award.[150] Therefore, even if a claim does fall within the above-mentioned 13%, any damages available for recovery—such as loss of reputation and mental anguish—might be nominal and not worth the cost of litigation.

Similar to defamation is the tort of Intentional Infliction of Emotional Distress (IIED). IIED claims also carry extremely heavy burdens of proof, and are "nearly impossible to establish."[151] Additionally, the elements must be pleaded and proved in a way that differentiates it from a standard defamation claim, which can often be difficult to do based on the facts. If not, the plaintiff runs the risk of the claim being dismissed as duplicative or "gap-filling."[152] For example, a Texas vice-principal's IIED claim was dismissed because he failed to give separate facts that proved the offense was so egregious as to be considered IIED as opposed to defamation.[153] For teachers, IIED is a difficult claim to prove and will likely result in little to no payout.

Another claim teachers may bring with little avail is invasion of privacy. This tort punishes intrusions into "private affairs" that "would be highly offensive to a reasonable person."[154] But as we have seen, courts often do not recognize teachers as having an expectation of privacy in the classroom under the Fourth Amendment, which eliminates any possibility of an invasion of privacy claim. With defamation, IIED, and invasion of privacy claims offering such little chance of success in the courtroom, legal action is, practically speaking, out of the question for teachers who have been surreptitiously recorded.

B. School and Classroom Recording Policies

It is important that our teachers be able to teach without having to fear that they will become the next viral video on social media. However, due to the expensive and unsuccessful na-

150. *Id.* at 262.
151. Draker v. Schreiber, 271 S.W.3d 318, 327 (Tex. App.—San Antonio 2008, no pet.).
152. *Id.* at 327.
153. *Id.* at 325.
154. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1975).

ture of litigation, the threat of a lawsuit is unlikely to deter students wishing to record their teachers. Instead, the number of surreptitious recordings of teachers seems to be on the rise.[155] Fortunately for teachers, litigation is not the only method of deterrence available. There are several policies that schools and teachers can implement to decrease the likelihood of surreptitious recordings.

1. Common School Policies

One of the more obvious safeguards is for schools to have policies in place that prohibit classroom recordings without prior teacher consent, such as the ban implemented by California universities. Many states have statutes in place that allow schools to adopt such policies prohibiting student possession of cell phones during school activities.[156] For instance, a Texas statute allows for schools to enact policies banning "paging devices" from any "school related activity on or off school property."[157] Paging devices are broadly defined to include, among other things, cell phones. The statute further allows for schools to confiscate the devices if a student is in violation of the rules.[158] Schools can then charge students up to $15 to reclaim their device.[159] For many students, however, $15 is likely a small deterrent. In a generation where teens spend—on average—six hours per day on their smart-phone devices, the stakes are high and the penalty is far too low.[160] Furthermore, with class sizes approaching thirty students and campuses filled with thousands, policing cell phone usage is an impossible task for administrators and teachers, and is one that they

155. David Koeppel, *More People Are Using Smartphones To Secretly Record Office Conversations*, BUS. INSIDER (Jul. 28, 2011),) http://www.businessinsider.com/smartphones-spying-devices-2011-7.

156. CONN. GEN. STAT. § 10-223j (West, Westlaw current through 2018 Supplement to Gen. Statues); TEX. EDUC. CODE ANN. § 37.082 (West, Westlaw current through end of 2017 Reg. Sess.).

157. TEX. EDUC. § 37.082.

158. *Id.*

159. *Id.*

160. Brook Sassman, *The Number of Hours that Teens are Spending on Smartphones May Surprise You*, TODAY (Nov. 3, 2015), https://www.today.com/health/number-hours-teens-are-spending-smartphones-may-surprise-you-t53651.

should not have to bear.[161] Nonetheless, it is important that teachers ask questions and be aware of their school's policy on cell phone usage. While such policies are not perfect, every district should have one in place that carefully regulates the use of cell phones, to help prevent surreptitious recordings.

2. Common Classroom Policies

Teachers also retain some level of autonomy within their classrooms. If school policies do not speak to appropriate cell phone usage, teachers should implement their own classroom policies. One option is for teachers to ban cell phone usage in their classrooms and confiscate phones from policy violators. Another option is to confiscate all phones at the start of class and not return them to students until the conclusion of class. It is possible, however, that not all students will actually turn their phones in; especially those students with an agenda. Some students may bring an old phone to turn in and other students may simply withhold the fact that they have a phone.[162] While classroom policies such as these are certainly not an ideal solution, a few students who secretly hang onto their cell phones—mathematically—poses less of a risk than if all students still had their phones. To bolster the seriousness of classroom policy violations, some teachers have started sending home contracts with students regarding cell phone policies that must be signed by the student and parent. Such contracts specifically layout the classroom policy and the disciplinary action that will result from a violation. While there is no tangible data as to the effectiveness of such contracts, it is another viable option for teachers attempting to set classroom expectations at the start of the school year. No classroom policy is perfect, but having a policy is a good place for teachers to start.

161. *See* School and Staffing Survey (SASS), NCES https://nces.ed.gov/surveys/sass/tables/sass1112_2013314_t1s_007.asp (last visited March 5, 2018).

162. SASS, *supra* note 156.

C. A Need for Legislation

States need to adopt comprehensive legislation to combat surreptitious recordings and bolster largely ineffective classroom policies. In Texas, the "paging device" statute first allowed schools the ability to ban the usage of cell phones in 1995, long before the age of smart-phones and social media.[163] With the continual rise of surreptitious recordings, it appears that Texas's statute—and similar statutes around the nation—are out of date. While the statute does grant schools additional power outside of standard district punishments (i.e. suspension, detention, etc.), it still fails to provide a punishment under law that fits the crime. Instead, schools are allowed to issue a menial $15 fine or rely on limited traditional school punishments.[164] Meanwhile, the birth of "viral videos" has given way to a fearless group of new age students, vindicated by "likes," comments, shares, and views. With failing policies in place, and new viral videos of teachers popping up daily, it is time for states to reanalyze their current policies and implement new laws further combatting surreptitious recordings.[165]

163. TEX. EDUC. § 37.082.

164. *Id*; *see generally* 34 C.F.R. § 300.530 (Westlaw current through Mar. 1, 2018) (even with traditional punishments (e.g. on campus suspension, off-campus suspension, etc.) schools are still limited because federal law under IDEA and similar acts require that student placement changes not exceed 10 days).

165. Opposition claims that classroom recording prohibitions violate students' first amendment rights. Alex Lear, *U.S. appeals court hears SAD 75 student's 1st Amendment Claim*, FORECASTER (January 10, 2018), http://www.theforecaster.net/u-s-appeals-court-hears-sad-75-students-1st-amendment-claim/. In a recent case of first impression, parents of a special education student sued a school district claiming a violation of their son's First Amendment rights when he was prohibited from recording his teachers. When considering a first amendment claim, the court should apply the "substantial and material disruption" test laid out in *Tinker*. Tinker v. Des Moines, 393 U.S. 503 (1969). While there is a growing trend in favor of preserving First Amendment rights for recording in public (especially among law enforcement), it has long been held that states have a legitimate interest in the well-being of students that supersedes student and teacher privacy rights. Mawdsley, *supra* note 86, at 622; Matt Ford, *A Major Victory for the Right to Record Police*, ATLANTIC (Jul. 7, 2017), https://www.theatlantic.com/politics/archive/2017/07/a-major-victory-for-the-right-to-record-police/533031/; Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011). For many reasons that are beyond the scope of this paper, classroom recordings are unlike police recordings; therefore, classroom recording prohibitions should be held as constitutional by courts.

1. California Statute as a Starting Point for States[166]

Legislation is not always the answer to our problems but it can be a step in the right direction. California, a two-party consent state, has strong teachers' unions and is often a trailblazer when it comes to the rights and protections of teachers. In 1976, California legislatures recognized that surreptitious recordings were a problem that would only worsen as technology advanced.[167] In an effort to preserve classroom environments free from unnecessary disruptions, California enacted the following statute:

> The legislature finds that the use by any person, including a pupil, of any electronic listening or recording device in any classroom of the elementary and secondary schools without the prior consent of the teacher and the principal of the school given to promote an educational purpose disrupts and impairs the teaching process and discipline in the elementary and secondary schools, and such use is prohibited. Any person, other than a pupil, who willfully violates this section shall be guilty of a misdemeanor.
>
> Any pupil violating this section shall be subject to appropriate disciplinary action.
>
> This section shall not be construed as affecting the powers, rights, and liabilities arising from the use of electronic listening or recording devices as provided for by any other provision of law.[168]

As stated in the statute, it is a misdemeanor for non-students to record in a California classroom without prior consent.[169] In contrast, student violators are not subject to crimi-

166. More studies are needed to determine the effect that CAL. EDUC. CODE § 51512 has had on the number of surreptitious recordings by students and non-students.

167. CAL. EDUC. CODE § 51512 (West, Westlaw current through Ch. 3 of 2018 Reg. Sess.).

168. Id. An exception is made for pre-emptory laws such as federal IDEA and ADA requirements for disabled students. *See* CAL. EDUC. CODE § 78907 (West, Westlaw current through Ch. 3 of 2018 Reg. Sess.).

169. CAL. EDUC. CODE § 51512.

nal prosecution but are subject to reprimand under district policy.[170] Such punishments typically include multi-day suspensions from school or on-campus suspension. Although the statute is a good step towards protecting teachers and deterring, preventing, and punishing those that surreptitiously record teachers, it has very little bite for students and fails to give districts any additional power outside of what they already maintain. A student violation is not punishable under criminal prosecution but is, instead, punishable as seen fit by administrators. With that, California districts are left with minor punishments that, often, do not fit the crime when considering the damage caused in the lives of teachers. A three-day suspension is of little consolation to teachers that have to quit their jobs and move due to death threats.

2. Legislation Differences for One-Party v. Two-Party States[171]

It is time that the rest of the nation enact legislation. While California's statute is not perfect, it is a good jumping off point for lawmakers. However, most states—such as Texas—are unlike California, and only require the consent of one party for recordings. For one-party states, any proposed statute similar to California's would require an exception to the one-party consent rule.

A statute mandating a special exception to wiretap laws would not be unusual or unheard of. In fact, under federal law, an exception has been carved out for those in two-party consent states. Under the Americans with Disabilities Act, schools are required to provide auxiliary aids and services to students needing accommodations.[172] One such accommodation is for

170. *Id.*

171. State statutes should not exclude technology from classrooms (studies show the value of technology in the classroom) but should prohibit surreptitious recordings. Statutes should be used in conjunction with school policies banning the use of cell phones during academic hours to minimize the risk of surreptitious recordings. When it comes to the appropriate implementation of technology as learning tools, schools should consider using products that do not have recording capabilities (i.e. laptops and tablets without cameras). Eric Klopfer, Scot Osterweil, Jennifer Groff, & Jason Haas, *Using the Technology of Today, in the Classroom Today: The Instructional Power of Digital Games Social Networking Simulations and How Teachers Can Leverage Them* (2009), http://education.mit.edu/wp-content/uploads/2015/01/GamesSimsSocNets_EdArcade.pdf.

172. 42 U.S.C. § 12101 (Current through Pub. L. No. 115-122); 28 CFR 35.104(2) (Cur-

audio recordings.[173] In this instance, even in the minority two-party consent states, a teacher is required to permit recordings in the classroom for students needing recognized accommodations, regardless of whether they wish to consent to the recording. That exception supersedes the law of states and further infringes on a teacher's expectation of privacy, albeit for a legitimate reason. The law also supersedes many school policies that ban classroom recordings.

For one-party consent states, a statute requiring students to get the consent of teachers before recording––while it would require an exception to the current wiretap laws in Texas––would be beneficial if it provided an adequate punishment for violators.

a. Raise the Stakes by Allowing for Criminal Punishment

California's statute—while it is a good start—lacks any real punishment for student violators. The statute fails to provide any additional punishment deterrents outside of those already within the school's powers. As such, states should include language that allows for student violators to be punished with a low-stakes misdemeanor when enacting a similar statute. As an example, in Texas the lowest level misdemeanor available is a class C misdemeanor. Although the idea of imposing criminal punishment on students may seem harsh, a class C misdemeanor in Texas (and similar misdemeanors among the states) is only punishable by a fine of up to $500, without the possibility of jail time.[174] The level of severity would be similar to that of most traffic tickets, which states issues to minors on a daily basis.[175] Ticketing students is not a new concept among the states and is an option that, if used appropriately, can be very effective.[176]

rent through Mar. 1, 2018).

173. 42 U.S.C. § 12101; 28 CFR 35.104(2).

174. TEX. PENAL CODE § 12.23 (Current through end of 2017 Reg. & 1st Called Sess's of 85th Leg).

175. *Id.;* TEX. TRANSP. CODE ANN. § 542.301(b) (Current through end of 2017 Reg. & 1st Called Sess's of 85th Leg).

176. For tobacco possession charges by a minor, Texas allows for up to a $250 fine, 50 hours of community service, and attendance in a tobacco education program. Steve DiLella,

Further, states maintain prosecutorial discretion and could carefully analyze the appropriateness of criminal charges against student violators in each case. For example, prosecutors could elect to not fine a student who was innocently recording the lecture without consent for learning purposes, even though it would be a violation. Instead, prosecutorial discretion would allow for students whose acts caused more severe repercussions to be ticketed. For instance, a student who records a teacher for the purposes of posting the video online to embarrass and harass should be punished under the statute. Charging students with a fine—exceeding the allotted $15 in Texas—would almost certainly send a message to students that makes them think twice before recording teachers. It is time for lawmakers to step in and create a solution for a growing epidemic.

b. Exception for Recordings by School Officials

Recording in the classroom is almost inevitable considering most schools utilize technology to perform evaluations and classroom observations of teachers as required by law.[177] For this reason, statutes should include an exception that allows for the recording of teachers by school officials for school-related purposes. Courts have generally held that the interest of districts in ensuring the well-being and safety of students is superior to the privacy interests of teachers.[178] For this reason, it is important that any proposed statute allow for school officials to use recordings to observe and maintain standards among teachers. That being said, the scope of the exception should be narrowly tailored to only allow for recordings by school officials for legitimate school-related purposes. This will help to eliminate any potential abuse of the exception by school officials for purposes such as harassment.

Possession of Tobacco Products by Minors, OLR (Mar. 4, 2005), https://www.cga.ct.gov/2005/rpt/2005-r-0269.htm.

177. Grover J. (Russ) Whitehurst, Matthew M. Chingos, & Katharine M. Lindquist, *Evaluating Teachers with Classroom Observations*, BROWN CTR. EDUC. POL'Y BROOKINGS (May 2014), https://www.brookings.edu/wp-content/uploads/2016/06/Evaluating-Teachers-with-Classroom-Observations.pdf.

178. Mawdsley, *supra* note 87, at 622.

V. CONCLUSION

Despite federal and state laws governing the recording of oral communications, courts have consistently held that teachers have a diminished right to privacy in the classroom. While it is foreseeable that classroom instruction will be disseminated by students in some form, recordings posted to social media have far exceeded that expectation. Smartphones and social media are now bringing the actions of many teachers into the public light, creating trial by the public and taking away any sense of procedural justice embedded in the school system. No longer are administrators allowed to do a proper investigation and punish a teacher accordingly; instead, administrators must manage public outrage and put their own jobs at risk if they go against public opinion. For a teacher that is surreptitiously recorded, there are very little remedies available. Tort remedies have largely proven to be ineffective and inadequate. Additionally, school and classroom bans on cell phones have also proven to be insufficient. With an ever-growing shortage of teachers and few solutions on the horizon, now is the time—more than ever—for lawmakers to act. The enactment of state statutes criminalizing surreptitious recordings would further deter students and send a message that lawmakers around the nation stand with our teachers. While some surreptitious recordings may bring to light legitimate classroom issues, the power of reprimand should fall squarely in the hands of district administrators and not with YouTube users. If we continue to allow society to judge the actions of our teachers and issue punishment based on the recommendation of social media users, the teaching profession and our students' education will continue to suffer. A strong stance on classroom recordings by lawmakers will place the power of punishment back in the hands of our administrators—where it belongs—and give teachers a restored faith in the field of public education.