The Student-University Relationship and Access to Student Online Activity

RUTH JEBE[†] AND SUSAN PARK[‡]

I. INTRODUCTION

In 2009, Amanda Tatro was a mortuary science student at the University of Minnesota. During one of her laboratory courses, she gave in to her dark humor and posted off-color comments on her Facebook page about her laboratory work with cadavers.[1] Learning of her comments from a fellow student, the University imposed academic discipline measures against Tatro, which she challenged in Minnesota state courts.[2] The Minnesota Supreme Court sided with the University in a decision that is frequently criticized as threatening student free speech rights.[3] University of North Carolina (UNC) varsity football player Marvin Austin used his Twitter account to post the lyrics from a popular song.[4] Austin's tweets led to a multi-year investigation of UNC athletic programs by the National Collegiate Athletics Association (NCAA).[5] Although the NCAA declined to impose sanctions on UNC, the

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[†] Assistant Professor of Legal Studies in Business, College of Business and Economics, Boise State University.

[‡] Associate Professor of Legal Studies in Business, College of Business and Economics, Boise State University. This work was generously supported through a summer research grant from the Boise State University College of Business and Economics.

[1] Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).

[2] *See infra* notes 117–124 and accompanying text for discussion of the case. Tatro eventually graduated from the program but died in 2012. Abby Simons, *U Grad in Facebook Case Dies,* STAR TRIB. (June 26, 2012, 10:59 PM), http://www.startribune.com/u-grad-in-facebook-case-dies/160401465/.

[3] *See infra* notes 126-27 and accompanying text.

[4] Scott Davis, *The UNC Academic Scandal Investigation Began with a Football Player's Tweet About Popping Bottles in Miami*, BUS. INSIDER (Oct. 13, 2017, 4:48 PM), https://www.businessinsider.com/unc-academic-scandal-investigation-began-marvin-austin-tweet-2017-10; Viviana Bonilla López, *Student Tweets Causing Controversy for Universities*, USA TODAY, (Sept. 18, 2011, 8:30 AM), https://www.usatoday.com/story/college/2011/09/18/student-tweets-causing-controversy-for-universities/37386587/.

[5] The NCAA charged UNC with several NCAA violations including, among others, that the university "did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program. . . ." Jamie P. Hopkins et al., *Being Social: Why the NCAA Has Forced Universities to Monitor Student-Athletes' Social Media,* PITT. J. TECH. L. & POL'Y, Spring 2013, at 2, 3. Other charges related to academic fraud in the use of "fake" courses for athletes to maintain eligibility. NAT'L COLLEGIATE ATHLETICS ASS'N, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL PUBLIC INFRACTIONS DECISION 1–3 (2017), https://www.ncaa.org/sites/default/files/Oct2017_University-of-North-Carolina-at-Chapel-Hill_InfractionsDecision_20171013.pdf; Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html. The NCAA

University subsequently created a student social media policy that includes a requirement that a coach or administrator act as "team monitor" for student-athlete social media.[6] On February 14, 2018, a gunman entered Marjory Stoneman Douglas High School in Parkland, Florida and opened fire with a semi-automatic weapon, killing seventeen people.[7] The investigation of the accused shooter focused attention on his digital footprint, which revealed widespread social media use.[8] In the aftermath of the shooting, both secondary and post-secondary schools showed increased interest in monitoring student social media activity, ostensibly to avoid similar incidents.[9]

These stories represent some of the most vexing issues inherent in the relationship between institutions of higher education (IHEs) and their students.[10] Complying with NCAA regulations and ensuring the safety of students are legitimate concerns. But so are respecting students'

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eventually determined that it could not impose sanctions on the school. *Id.* The NCAA does not have a formal social media policy. Pete Warner, *NCAA Has Limited Stance on Student-Athletes' Use of Social Media,* BANGOR DAILY NEWS, (Jan. 17, 2014, 5:15 PM), https://bangordailynews.com/2014/01/17/sports/ncaa-has-limited-stance-on-student-athletes-use-of-social-media/ ("'The NCAA has stayed away from this area because of the state laws, and you're very borderline on the infringement of freedom of speech,' said Eileen Flaherty, UMaine's associate athletics director for compliance. 'The NCAA expects the institution to monitor.'").

[6] UNIV. OF N.C., DEPARTMENT OF ATHLETICS POLICY ON STUDENT-ATHLETE SOCIAL NETWORKING AND MEDIA USE (2018), https://s3.amazonaws.com/sidearm.sites/unc.sidearmsports.com/documents/2018/8/2/Department_of_Athletics_Policy_on_Student_Athlete_Social_Networking_and_Media_Use.pdf.

[7] Ray Sanchez, *'My School is Being Shot up' The Massacre at Marjory Stoneman Douglas, Moment by Moment*, CNN (Feb. 18, 2018, 2:54 PM), https://www.cnn.com/2018/02/18/us/parkland-florida-school-shooting-accounts/index.html.

[8] Eliott C. McLaughlin & Madison Park, *Social Media Paints Picture of Racist 'Professional School Shooter*,' CNN, (last updated Feb. 15, 2018, 9:59 PM), https://www.cnn.com/2018/02/14/us/nikolas-cruz-florida-shooting-suspect/index.html (describing the accused's Instagram and YouTube activity); Kelli Kennedy, '*Disturbing' Instagram Posts: What Nikolas Cruz, Suspected in Florida Shooting, Did Online*, USA TODAY (Feb. 15, 2018, 7:51 AM), https://www.usatoday.com/story/news/2018/02/15/nikolas-cruz-who-florida-shooting-suspect-social-media/340092002/ (discussing the accused's Instagram photos); Megan O'Matz & Brittany Wallman, *A Mass Murderer's Digital Trail: Nikolas Cruz Dropped Crumbs All Across the Worldwide Web*, S. FLA. SUN-SENTINEL (Oct. 26, 2018, 7:20 PM), https://www.usatoday.com/story/news/2018/02/15/nikolas-cruz-who-florida-shooting-suspect-social-media/340092002/ (explaining the accused's digital footprint as portrayed in law enforcement search warrant applications). Much of the accused shooter's social media activity was characterized as "disturbing." Kennedy, *supra* note 8; McLaughlin & Park, *supra* note 8.

[9] Aaron Leibowitz, *Can Monitoring Students on Social Media Stop the Next School Shooting?,* N.Y. TIMES (Sep. 6, 2018), https://www.nytimes.com/2018/09/06/us/social-media-monitoring-school-shootings.html; *Can Scanning Social Media Help Prevent a Shooting: Some Schools Think So*, CBS NEWS (Nov. 17, 2018, 12:34 PM), https:// www.cbsnews.com/news/social-sentinel-can-scanning-social-media-help-prevent-a-school-shooting/; Bridgette Matter, *Can Scanning Social Media Prevent a School Shooting?*, ATLANTA JOURNAL-CONSTITUTION (Feb. 14, 2019), https://www.ajc.com/news/can-scanning-social-media-prevent-school-shooting/lLjMlyTyqIgabs8Z17IoFO/.

[10] For purposes of this article, institutions of higher education (IHEs) include public community colleges, colleges, and universities that provide undergraduate and/or graduate degree programs. We use the terms IHE, college, and university interchangeably.

constitutional speech and privacy rights to access to their social media. The tensions between IHE duties to students and student rights reflect the fundamental complexity of the IHE-student relationship in the twenty-first century. This complexity is nowhere more evident than in issues surrounding IHE access to student social media. While well-developed speech and privacy law exists, its incomplete extension to the online world leaves both students and IHEs guessing as to the boundaries of their rights and responsibilities. Given the lack of clear rules for IHE access to student social media, "[t]he issues and questions are never-ending."[11]

State legislatures have taken notice of the lack of clear rules regarding student social media and IHE responsibilities and have responded. To date, sixteen states have enacted legislation placing some degree of limitation on IHE access to student social media accounts.[12] Legislators identify balancing student privacy with IHEs' legitimate information needs[13] and protection of student constitutional rights as catalysts for these regulations.[14] The potential for this legislation to provide clarity on the issue of when and to what extent IHEs can require access to student social media is apparent. Whether the legislation lives up to its potential is a separate issue. The phenomenon of IHEs requiring access to student social media and the legislation regulating it are so recent that no cases have analyzed the legality of either the legislation or the university demands. The legislation itself raises a host of issues. Is it necessary? Do individual statutes provide adequate protection for students while at the same time giving universities the flexibility, they need to provide a safe campus for all? Does the legislation respond to the nuances and tensions of the modern IHE-student relationship?

This article examines state attempts to regulate through legislation the IHE-student relationship as it relates to student social media.[15] Few scholarly

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[11] Andy Baggot, *Use of Social Media Presents New NCAA Compliance Challenges,* WIS. STATE J. (Oct. 24, 2013), http://host.madison.com/sports/columnists/andy_baggot/andy-baggot-use-of-social-media-presents-new-ncaa-compliance/article_f9496b1f-2976-55a6-ae5b-b6f8020b890c.html.

[12] *State Social Media Privacy Laws,* Nat'l Conf. of St. Legislatures, www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx (last visited Oct. 17, 2019).

[13] *See, e.g., State Senate Passes Bill to Guard Students' Social Media Passwords*, OREGONLIVE (Apr. 22, 2013),), https://www.oregonlive.com/politics/2013/04/state_senate_passes_bill_to_gu.html (Oregon state legislators discussing student privacy concerns and IHE information needs).

[14] *See, e.g*., Margaret Baum, *States Make Moves to Protect Students' Rights to Online Privacy*, STUDENT PRESS L. CTR. (Nov. 15, 2013), https://splc.org/2013/11/states-make-moves-to-protect-students-rights-to-online-privacy/ (Michigan legislation sponsor identifying student privacy as motivation for state bill); David L. Hudson, Jr., *Site Unseen: Schools, Bosses Barred from Eyeing Students', Workers' Social Media*, ABA J.: NAT'L PULSE MAG.(Nov. 1, 2012, 8:10 AM), http://www.abajournal.com/magazine/article/site_unseen_schools_bosses_barred_from_eyeing_students_workers_social_media/ (Delaware legislator stating the legislation is intended to protect students' First and Fourth Amendment rights).

[15] While interesting legal issues arise from IHE social media policies for student-athletes and elementary and secondary school access to student social media, these student populations are beyond the scope of the present article. For discussion of student-athlete social media issues, *see, e.g*., Meg

articles address the specifics of the state legislation prohibiting access to student social media passwords.[16] Thus, the article fills this gap in the literature by being among the first to analyze the legislation within the context of the modern university-student relationship. There is also little scholarship on the online speech rights of college students, a key issue this article addresses.[17] Finally, although an extensive literature investigates discrete aspects of the IHE-student relationship, these articles address individual aspects of the relationship as isolated components.[18] By contrast, this article takes a holistic approach, its aim being to chart and assess the broad array of factors that comprise the IHE-student relationship in the twenty-first century. This holistic approach unearths the increasing complexity of the IHE-student landscape and reflects the actual decision context for students and IHEs.

The article proceeds as follows: Part I introduces the state legislation protecting student social media passwords from IHE access. Part II then fleshes out the context of the legislation by surveying the evolution of the relationship between public universities and their students. It identifies student expectations regarding the recognition of their constitutional rights as well as their expectations regarding universities' obligations to protect them from various harms. In Part III, the article pinpoints key challenges in attempts to balance IHE duties and student rights and expectations. We

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Penrose, *Sharing Stupid $h*t with Friends and Followers: The First Amendment Rights of College Athletes to Use Social Media*, 17 SMU SCI. & TECH. L. REV. 449 (2014); Aaron Hernandez, Note, *All Quiet on the Digital Front: The NCAA's Wide Discretion in Regulating Social Media*, 15 TEX. REV. ENT. & SPORTS L. 53 (2013); John Ryan Behrmann, Comment, *Speak Your Mind and Ride the Pine: Examining the Constitutionality of University-Imposed Social Media Bans on Student-Athletes*, 25 JEFFREY S. MOORAD SPORTS L. J. 51 (2018). For discussion of student social media issues in elementary and secondary schools, *see, e.g.*, Victoria Cvek, Comment, *Policing Social Media: Balancing the Interests of Schools and Students and Providing Universal Protection for Students' Rights*, 121 PENN ST. L. REV. 583 (2016); Katherine A. Ferry, Comment, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717 (2018).

[16] *See* Katherine Pankow, *Friend Request Denied: Chapter 619 Prohibits Colleges from Requesting Access to Social Media Accounts,* 44 MCGEORGE L. REV. 620 (2013) (analyzing only the California statute); Michelle Poore, *A Call for Uncle Sam to Get Big Brother out of Our Knickers: Protecting Privacy and Freedom of Speech Interests in Social Media Accounts,* 40 N. KY. L. REV. 507 (2013).

[17] Elizabeth Nicoll, Note, *University Student Speech and the Internet: A Clusterf****, 47 NEW ENG. L. REV. 397, 399 (2012) ("Law reviews are saturated with discussions of the potential implications of social networking and the Internet on the free speech rights of high-school students, but discussion of this problem in the university context is virtually nonexistent.") (footnote omitted).

[18] *See, e.g.,* Alyson R. Hamby, Note, *You Are Not Cordially Invited: How Universities Maintain First Amendment Rights and Safety in the Midst of Controversial On-Campus Speakers*, 104 CORNELL L. REV. 287 (2018); Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103 (2018); Tyler Brewer, *The Restatement (Third) of Torts: Combating Sexual Assaults on College Campuses by Recognizing the College-Student Relationship*, 44 J. L. & EDUC. 345 (2015); Heather E. Moore, Note, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship,* 40 IND. L REV. 423 (2007).

conclude that, though well-intentioned, state student password legislation will be insufficient to meet these challenges.

II. STUDENT PASSWORD PROTECTION LEGISLATION

IHEs' interest in monitoring student social media communications likely originated with NCAA requirements regarding student-athletes. As social media use increased, IHEs began looking more closely at student-athletes' social media communications in an effort to comply with NCAA regulations.[19] Although the NCAA did not specifically require member schools to monitor athletes' online activity, it encouraged them to do so, which many universities did.[20] For example, Missouri State maintained a social media policy that prohibited athletes from posting any content with "offensive or foul language that could embarrass or ruin the reputation of yourself, your family, your team, the athletic department or Missouri State University."[21] Lacking specific guidance from the NCAA, many IHEs have turned to social media tracking companies to monitor student-athlete online communications and Internet use,[22] or to create internal monitoring mechanisms, such as UNC's "team monitor" for student-athlete social media.[23]

While IHEs monitor student-athlete communications for reasons associated with NCAA rules, schools have a variety of other motivations that could provide incentives to monitor communications of its non-athlete students. IHEs are often concerned about maintaining the school's reputation by avoiding negative publicity that could deter prospective

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[19] Alex Nicoll, *The Monitoring of Student-Athletes' Social Media and its Invasion of Privacy,* THE ARK. TRAVELER (Jan. 17, 2017), http://www.uatrav.com/sports/article_f39d73d6-dc41-11e6-8801-b7cddea0c64f.html ("The use of social media, especially among athletes, has been on a steady rise since the early-2000s, evident by a 58 percentage point increase from 2005 to 2015, according to a study by the Pew Research Center."); Michelle Brutlag Hosick, *Social Networks Pose Monitoring Challenge for NCAA Schools*, NCAA (Feb. 14, 2013), www.ncaa.org/about/resources/media-center/news/social-networks-pose-monitoring-challenge-ncaa-schools.

[20] Rex Santus, *Colleges Monitor, Restrict Athletes on Social Media,* AM. JOURNALISM REV. (Mar. 26, 2014), https://ajr.org,2014/03/26/social-media-monitoring-widespread-among-college-athletic-departments/. ("The NCAA says it doesn't require its member institutions to monitor social media, though 'the duty to do so may arise as part of an institution's heightened awareness when it has or should have a reasonable suspicion of rules violations,' according [to] an NCAA report."); Hosick, *supra* note 19.

[21] Santus, *supra* note 20, at 4. Many other universities had similar policies, including Kent State, Florida State, and Texas Tech. *Id.*

[22] Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES: SPORTS (Mar. 30, 2012), https://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html; Baum, *supra* note 14 (noting that many universities had signed contracts with social media monitoring companies such as FieldTrack and JumpForward, to monitor student athletes); Hopkins, *supra* note 5, at 4 ("[T]he NCAA's lack of social media monitoring policies creates uncertainty as to how member institutions should deal with potential violations of a non-existing policy.").

[23] See *supra* note 6 and accompanying text.

students from applying.[24] IHEs may seek to limit dissemination of controversial points of view on campus (e.g., controversial speakers or student groups) to, again, avoid the negative publicity and also, at times, because of safety concerns.[25] More recently, concerns over potential IHE liability in tort and for Title IX violations are driving university interest in student online communications.[26] All of these concerns present the potential for infringing on students' constitutional rights as schools throw the monitoring net wider by requiring students to provide the school with passwords and log-in information for their social media accounts.[27]

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[24] *See* Ashley Jocz, *New Oregon Legislation Forbids Universities from Accessing College Hopefuls' Social Media,* PORTLAND STATE VANGUARD (Jan. 20, 2014), http://psuvanguard.com /news/access-denied/ ("State representative Margaret Doherty (D-Tigard), who helped draft and back SB 344, said it was inspired by a friend's daughter who was asked to submit her Facebook username and password as part of her application to a college. Doherty says that schools ask for this information to see a student's character outside an academic application. 'We had heard of a few universities that were asking for access to [social media sites], and the bill started coming together. We wanted to show that if you're applying for school or for a job, you don't have to give up your password,' Doherty said. 'That information deserves to be private.'").

[25] *See, e.g.*, Katherine Mangan, *Controversial Speaker, His Event Canceled by Middlebury College, Finds an Audience in a Campus Seminar*, CHRON. OF HIGHER EDUC. (Apr. 19, 2019), https://www. chronicle.com/article/Controversial-Speaker-His/246152; Jillian Berman, *U.S. Colleges Spend Millions on Security to Host Controversial Speakers*, MARKETWATCH (Mar. 5, 2019), https://www.market watch.com/story/how-colleges-pay-for-free-speech-2018-10-08.

[26] Monitoring high school student social media for signs of potential violent conduct or suicidal tendencies is fairly common. *See, e.g.*, Lynn Jolicoeur & Lisa Mullins, *To Detect Threats and Prevent Suicides, Schools Pay Company to Scan Social Media Posts*, WBUR NEWS (Mar. 22, 2018), https://www.wbur.org/news/2018/03/22/school-threats-suicide-prevention-tech. Interest in monitoring student social media at the university level is growing. *See, e.g.*, Melanie Ehrenkranz, *In Troubling Experiment, UK University to Monitor Students' Social Media to Prevent Suicide*, GIZMODO (May 6, 2019), https://gizmodo.com/in-troubling-experiment-uk-university-to-monitor-stude-1835273823. Universities are increasingly sensitive to the content of students' social media activity. For example, Harvard University has rescinded admissions offers to prospective students based on private Facebook chat group posts that were allegedly obscene and racist. Hannah Natanson, *Harvard Rescinds Acceptances for at Least Ten Students for Obscene Memes,* THE CRIMSON (Jun. 5, 2017), https://www.thecrimson.com/article/2017/6/5/2021-offers-rescinded-memes. The University of Mary Washington was sued by a group of students for failing to protect them from anonymous online harassment. Scott Jaschik, *Redefining the Obligation to Protect Students*, INSIDE HIGHER ED (Dec. 20, 2018), https://www.insidehighered.com/news/2018/12/20/court-revives-lawsuit-over-online-threats-ma de-feminist-students-u-mary-washington. *See also* Kaitlin DeWulf, *An Unintended Consequence of Title IX*, STUDENT PRESS LAW CENTER (Oct. 7, 2016), https://splc.org/2016/10/an-unintended-consequence-of-title-ix/, for general discussion of key issues raised by Title IX for university campus newspapers.

[27] Schools possess unique leverage to make sure students comply with this requirement. For example, schools can make a student-athlete's status dependent on the athlete submitting to social media monitoring. For non-athletes and student-athletes alike, schools can attach the password requirement to scholarships and other financial aid. *See, e.g.,* Baum, *supra* note 14 (discussing social media law expert Bradley Shear's statement regarding laws' coverage of student contracts for financial packages such as merit or athletic scholarships. "'A school cannot put in a scholarship agreement or any other type of agreement . . . [a requirement] to hand over that information, at least for public institutions,' he said, noting that the law is murkier for private schools."); Hudson, *supra* note 14 ("According to attorney Bradley Shear, who follows this issue closely, "'it is an epidemic in the colleges. When did it become legal for public universities to be able to require their students to download spying software onto their personal iPhones or social media accounts to monitor pass-word-protected digital content?'").

Lawmakers in the past several years have become increasingly concerned about encroachments on student speech[28] and privacy rights.[29] To date, sixteen states have enacted statutes that prohibit universities from requiring students, including athletes, to give username and password information so that university officials can access their personal social media accounts.[30] Several other states have considered similar legislation.[31]

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[28] Hudson, *supra* note 14 ("'I introduced the legislation to protect our students' First and Fourth Amendment rights,' says Delaware state Rep. Darryl M. Scott. 'If a student is required to disclose their postings, as part of the college application process, would they write and share their thoughts freely? My concern was that they would not.' Scott adds that 'as the legislation was under consideration, I spoke with several students who agreed that the intent of the legislation was good and needed. I also spoke with five of the six higher-education institutions, both private and public, and they . . . also agreed.'").

[29] Jocz, *supra* note 24. *See also* Baum, *supra* note 14 ("Michigan State Sen. Aric Nesbitt said he first considered sponsoring a social media privacy bill . . . after reading an article about student-athletes who were asked for their social networking passwords. . . . 'I thought it was out of bounds,' Nesbitt said. 'We looked at it and thought it was a common sense idea . . . just because the information is electronic and not physical . . . it still needs protection.'"); *State Senate Passes Bill, supra* note 13 ("'[Oregon] Senate Bill 344 strikes a good balance between student privacy and legitimate information needs of colleges and universities,' said Sen. Ginny Burdick, a Portland Democrat and the bill's sponsor. Lawmakers say the bill is a pre-emptive measure to protect Oregon students from unwarranted checks on their personal accounts. 'This is really our privacy laws keeping up with what's out there,' said Sen. Tim Knopp, a Bend Republican.").

[30] *See* Arkansas: ARK. CODE ANN. § 6-60-104 (West, Westlaw through 2019 Reg. Sess.); California: CAL. EDUC. CODE § 99120 (West, Westlaw through Ch. 860 of 2019 Reg. Sess.), et seq; Cal Educ. Code Tit. 3, Div. 14, Pt. 65, Ch. 2.5 Note; Delaware: DEL. CODE ANN. tit. 14, § 8103 (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly).; District of Columbia: D.C. Code Ann. § 38-831.04 (West, Westlaw through Nov. 2019); Illinois: 105 ILL. COMP. STAT. ANN. 75/10 (West, Westlaw through P.A. 101-258); Louisiana: LA. REV. STAT. 51:1951 (West, Westlaw through the 2019 Reg. Sess.), et seq.; Maryland: MD. CODE ANN., EDUC. § 26-401(West, Westlaw through 2019 Reg. Sess.); Michigan: MICH. COMP. LAWS ANN. §§ 37.271-278 (West, Westlaw through P.A. 2019, No. 95 of 2019 Reg. Sess.); New Hampshire: N.H. REV. STAT. ANN. § 189:70 (West, Westlaw through Ch. 345 of 2019 Reg. Sess.); New Jersey: N.J. STAT. ANN. § 18A:3-29 (West, Westlaw through L. 2019, c. 266 and J.R. No. 22), et seq.; New Mexico: N.M. STAT. ANN. § 21-1-46 (West, Westlaw through First Reg. Sess. of 2019); Oregon: OR. REV. STAT. ANN. § 350.272 (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.); Rhode Island: 16 R.I. GEN. LAWS ANN. § 16-103-1 (West, Westlaw through Ch. 310 of 2019 Reg. Sess.), et seq.; Utah: UTAH CODE ANN. § 53B-25-101 (West, Westlaw through 2019 Gen. Sess.), et seq.; Virginia: VA. CODE ANN. § 23.1-405 (West, Westlaw through 2019 Reg. Sess.); Wisconsin: WIS. STAT. ANN. § 995.55 (West, Westlaw through 2019 Act 5). Many states also passed legislation that included similar prohibitions to employers. *See Access to Social Media Usernames and Passwords,* NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 15, 2019), http://www.ncsl.org/research/ telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx; *Employer Access to Social Media Usernames and Passwords*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 31, 2014), http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords.aspx. *See also* Susan Park, *Employee Internet Privacy: A Proposed Act that Balances Legitimate Employer Rights and Employee Privacy*, 51 AM. BUS. L. J. 779 (2014); Robert Sprague, *No Surfing Allowed: A Review and Analysis of Legislation Prohibiting Employers from Demanding Access to Employees' and Job Applicants' Social Media Accounts*, 24 ALB. L.J. SCI. & TECH. 481 (2014); Jordan M. Blanke, *The Legislative Response to Employers' Requests for Password Disclosure*, 14 J. HIGH TECH. L. 42 (2014); Poore, *supra* note 16.

[31] In addition to the sixteen enacted statutes, at least twenty-one more states have considered such legislation. Between 2013 and 2019, over seventy bills related to student username and password protection were introduced. *See Access to Social Media Usernames and Passwords*, *supra* note 30; *Employer Access to Social Media Usernames and Passwords, supra* note 30. This number does not include amended bills or bills that were introduced but rejected in the statutes that have adopted the legislation. The table in the Appendix provides detail of each enacted statute.

Many of the statutes identify protecting student privacy as a key objective. For example, California's statute contains a revealing statement of legislative purpose:

> The Legislature finds and declares that quickly evolving technologies and social media services and Internet Web sites create new challenges when seeking to protect the privacy rights of students at California's postsecondary educational institutions. It is the intent of the Legislature to protect those rights and provide students with an opportunity for redress if their rights are violated.[32]

The Delaware legislature included a similar statement of legislative purpose that draws attention to student privacy and speech rights. It acknowledges that Internet users have a reasonable expectation of privacy in their online communications.[33] It also notes the importance of universities serving as a "public" square[34] and expresses an interest in making sure that universities do not act to chill student speech.[35]

These legislative statements of intent are interesting. Along with the rationale espoused by lawmakers who supported some of these bills, these statements contemplate the tension that exists between IHEs and student interests. Before examining that relationship, however, we first take a closer look at the legislation itself.

A. Legislation Summary

The statutes vary dramatically in so many ways that a comprehensive analysis would be needlessly complex. Therefore, this section provides a simple summary of the legislation, divided into five categories: parties to whom the statutes apply, covered accounts or devices, prohibited acts, exemptions or exceptions, and, finally, possible enforcement mechanisms and penalties.

Most of the statutes apply only to postsecondary institutions, their employees or agents, and students or prospective students.[36] Almost all of

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[32] S.B. 1349, 2012 Cal. State Leg. (codified at CAL. EDUC. CODE § 99120 *et seq* (West, Westlaw through Ch. 860 of 2019 Reg. Sess.).

[33] SB 434, 2012 Gen. Assemb. (Md. 2012).

[34] DEL. CODE ANN. tit. 14, § 8101 (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly), et seq, ("WHEREAS, the current trend for young Americans toward using social networks as a primary vehicle for effecting positive social and political change establishes social networks as the new digital age 'public square' for important discourse.").

[35] *Id.* ("WHEREAS, permitting public and nonpublic institutions of higher learning to demand that students and applicants provide access to their social networking site profiles and accounts could substantially chill the important discourse occurring on social networking sites.").

[36] *See, e.g.,* ARK. CODE ANN. §§ 6-60-104(a)(2), 6-60-104(a)(4) (West, Westlaw through 2019 Reg. Sess.); LA. REV. STAT. §§ 51:1952(1), 51:1952(2) (West, Westlaw through the 2019 Reg. Sess.); R.I.

the statutes provide a definition of the institution,[37] while just a few define student or applicant.[38]

The laws vary widely regarding the types of covered accounts and how those accounts are defined. Many are internally inconsistent.[39] For example, although the California statute specifically states that it applies to social media, the definition includes, among other things, online accounts and email,[40] which is broader than the common understanding of social media.[41] Delaware's statute, on the other hand, applies to only social media.[42]

Regarding prohibited acts, most statutes prohibit IHEs from requiring students or applicants to provide password and login information that would allow access to their social media or online accounts.[43] Illinois's statute

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GEN. LAWS § § 16-103-1(4), 16-103-1(2), 16-103-1(3) (West, Westlaw through Ch. 310 of 2019 Reg. Sess.). Illinois is the only statute that extends beyond postsecondary education to elementary and secondary school. 105 ILL. COMP. STAT. 75/10 (West, Westlaw through P.A. 101-258). Several proposed bills also include K-12 institutions. *See, e.g.,* H.B. 2415, 27 Leg., (Haw. 2014); H.B. 1023, 27 Leg., (Haw. 2013); H.B. 1420, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014).

[37] *See, e.g.,* ARK. CODE ANN. § 6-60-104(a)(2) (West, Westlaw through 2019 Reg. Sess.); DEL. CODE ANN. tit. 14, § 8102(a) (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly); 105 ILL. COMP. STAT. 75/5 (West, Westlaw through P.A. 101-258); MICH. COMP. LAWS ANN. § 37.272(b) (West, Westlaw through P.A. 2019, No. 95 of the 2019 Reg. Sess.); N.J. STAT. ANN. § 18A:3-29 (West, Westlaw through L.2019, c. 266 and J.R. No. 22.); OR. REV. STAT. Ann. § 350.272(5)(a) (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.); UTAH CODE ANN. § 53B-25-102(2) (West, Westlaw through 2019 Reg. Sess.).

[38] ARK. CODE ANN. § 6-60-104(a)(4) (West, Westlaw through 2019 Reg. Sess.); DEL. CODE ANN. tit. 14, § 8102(b), (e) (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly).

[39] This is also true regarding the similar employment statutes. *See* Park, *supra* note 30, at 787–88.

[40] CAL. EDUC. CODE § 99120 (West, Westlaw through Ch. 860 of 2019 Reg. Sess.). *See also* OR. REV. STAT. ANN. § 350.272(5)(b) (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.); ARK. CODE ANN. § 6-60-104(a)(3)(a) (West, Westlaw through 2019 Reg. Sess.); 16 R.I. GEN. LAWS ANN. § 16-103-1(1) (West, Westlaw through Ch. 310 of 2019 Reg. Sess.).

[41] Social media is defined as a form of interactive online communication based on user interaction and user generated content. Kathleen McGarvey Hidy, *Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 MARQ. L. REV. 1045, 1046 n.1 (2019); Stacy A. Smith, Note, *If Dr. Martin Luther King, Jr. Had a Twitter Account: A Look at Collective Action, Social Media, and Social Change*, 12 SEATTLE J. SOC. JUST. 165, 168 (2013). Social media is generally considered different from other forms of online communication (such as email) due to its interactive nature. Smith identifies three defining characteristics of social media: 1) the information posted is not necessarily directed at anyone in particular; 2) the information posted can be discussed; and 3) the information posted can be shared with people not included within the scope of the original post. *Id.*

[42] DEL. CODE ANN. tit. 14, § 8102(d) (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly). *See also* N.J. STAT. ANN. § 18A:3-29 (West, Westlaw through L.2019, c. 266 and J.R. No. 22.); N.M. STAT. ANN. § 21-1-46(E) (West, Westlaw through First Reg. Sess. of 2019); 105 ILL. COMP. STAT. 75/5 (West, Westlaw through P.A. 101-258); MICH. COMP. LAWS ANN. § 37.272(d) (West, Westlaw through P.A. 2019, No. 95 of the 2019 Reg. Sess.); UTAH CODE ANN. § 53B-25-102(1)(a) (West, Westlaw through 2019 Reg. Sess.). Arkansas is the only state that expressly names specific social media sites—Facebook, Twitter, LinkedIn, MySpace and Instagram—that are to be included in the definition, although that list is to be "without limitation." *See* ARK. CODE ANN. § 6-60-104(a)(3)(C) (West, Westlaw through 2019 Reg. Sess.).

[43] *See, e.g.,* ARK. CODE ANN. § 6-60-104(b)(1) (West, Westlaw through 2019 Reg. Sess.); CAL. EDUC. CODE § 99121(a)(1) (West, Westlaw through Ch. 860 of 2019 Reg. Sess.); DEL. CODE ANN. tit. 14, § 8103(a) (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly); MICH. COMP. LAWS ANN. § 37.274(a) (West, Westlaw through P.A. 2019, No. 95 of the 2019 Reg. Sess.); N.H. REV. STAT ANN. § 189:70(I)(a) (West, Westlaw through Ch. 345 of 2019 Reg. Sess.); N.J. STAT. ANN. § 18A:3-30(a) (West,

extends to include both students and their parents or legal guardians.[44] Many laws prohibit "shoulder surfing"[45] (looking over a person's shoulder to view the content on the screen of the device).[46] Others prevent institutions from requiring students to add the university or its representative to their contact list to give the university access to their contacts and private pages,[47] from changing the privacy settings on the account to allow for public viewing,[48] or from gaining indirect access through a student's other contacts.[49] New Jersey even prevents the institution from inquiring about the existence of personal social media accounts.[50] Many statutes prohibit retaliation as well.[51]

Exceptions or exemptions are equally varied in the legislation. The New Jersey statute contains no exceptions at all.[52] Most statutes, however, allow universities to access content that is otherwise publicly available.[53] Some

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Westlaw through L.2019, c. 266 and J.R. No. 22.); N.M. STAT. ANN. § 21-1-46(A) (West, Westlaw through 1st Reg. Sess. of 54th Legis.); OR. REV. STAT. ANN. § 350.272(1)(a) (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.); UTAH CODE ANN. § 53B-25-201(1) (West, Westlaw through 2019 Reg. Sess.).

[44] *See, e.g.,* 105 ILL. COMP. STAT. 75/10(a) (West, Westlaw through P.A. 101-258).

[45] *See, e.g.,* CAL. EDUC. CODE § 99121(a)(2)-(3) (West, Westlaw through Ch. 860 of 2019 Reg. Sess.); DEL. CODE ANN. tit. 14, § 8103(b) (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly); 105 ILL. COMP. STAT. 75/10(a) (West, Westlaw through P.A. 101-258); MICH. COMP. LAWS ANN. § 37.274(a) (West, Westlaw through P.A. 2019, No. 95 of the 2019 Reg. Sess.); N.M. STAT. ANN. § 21-1-46(A) (West, Westlaw through 1st Reg. Sess. of 54th Legis.); OR. REV. STAT. ANN. § 350.272(1)(b) (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.); 16 R.I. GEN. LAWS ANN. § 16-103-2(2) (West, Westlaw through Ch. 310 of 2019 Reg. Sess.).

[46] *See Shoulder Surfing*, TECHOPEDIA, http://www.techopedia.com/definition/4103/shoulder-surfing (last visited Oct. 23, 2019) ("Shoulder surfing refers to the act of obtaining personal or private information through direct observation."); Oxford Univ. Press, *Shoulder Surfing*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/us/definition/english/shoulder-surfing (last visited Oct. 23, 2019) ("The practice of watching a person who is getting money from a machine, filling out a form, etc., in order to find out their personal information.").

[47] *See, e.g.,* ARK. CODE ANN. § 6-60-104(b)(2)(A) (West, Westlaw through 2019 Reg. Sess.); DEL. CODE ANN. tit. 14, § 8103(d) (Westlaw through Ch. 218 of 2019-2020 Gen. Assembly); MD. CODE ANN., EDUC. § 26-401(b)(2)(i) (West, Westlaw through 2019 Reg. Sess.);

[48] *See, e.g.,* ARK. CODE ANN. § 6-60-104(b)(2)(B) (West, Westlaw through 2019 Reg. Sess.); MD. CODE ANN., EDUC. § 26-401(b)(2)(ii) (West, Westlaw through 2019 Reg. Sess.).

[49] DEL. CODE ANN. tit. 14, § 8103(e) (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly).

[50] N.J. STAT. ANN. § 18A:3-30(b) (West, Westlaw through L. 2019, c. 266 and J.R. No. 22). The New Jersey statute also prohibits institutions from asking students to waive their rights under the statute. *Id.* § 18A:3-31.

[51] *See, e.g.,* UTAH CODE ANN. § 53B-25-201(2) (West, Westlaw through 2019 Gen. Sess.); OR. REV. STAT. ANN. § 350.272(1)(c) (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.); N.M. STAT. ANN. § 21-1-46(B) (West, Westlaw through First Reg. Sess. of 2019); N.J. STAT. ANN. § 18A:3-30(c) (West, Westlaw through L. 2019, c. 266 and J.R. No. 22); MICH. COMP. LAWS ANN. § 37.274(b) (West, Westlaw through P.A. 2019, No. 95 of 2019 Reg. Sess.); DEL. CODE ANN. tit. 14, § 8104 (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly); CAL. EDUC. CODE § 99121(b) (West, Westlaw through Ch. 860 of 2019 Reg. Sess.); MD. CODE ANN., EDUC. § 26-401(b)(3) (West, Westlaw through 2019 Reg. Sess.); N.H. REV. STAT ANN. § 189:70(I)(d) (West, Westlaw through Ch. 345 of 2019 Reg. Sess.); 16 R.I. GEN. LAWS § 16-103-4(1) (West, Westlaw through Ch. 310 of 2019 Reg. Sess.).

[52] Similarly, the New Mexico and Rhode Island statutes have only one exception that allows IHE's to access student social media information that is publicly available. 16 R.I. GEN. LAWS § 16-103-5 (West, Westlaw through Ch. 310 of 2019 Reg. Sess.); N.M. STAT. ANN. § 21-1-46(D) (West, Westlaw through First Reg. Sess. of 2019).

[53] *See, e.g.,* ARK. CODE ANN. § 6-60-104(d) (West, Westlaw through 2019 Reg. Sess.); 105 ILL.

statutes provide exceptions that allow the institution to investigate possible student misconduct and/or violations of the law.[54] Many of these laws allow the institution to require information necessary for access to institution-owned or provided devices or accounts,[55] or for those used for educational purposes.[56]

Most of the statutes do not provide any penalty or enforcement provision.[57] Of those that do, the violations range from petty offenses[58] to misdemeanors.[59] Some statutes also allow for a civil remedy, although the monetary recovery amounts are minimal or, in at least one state, non-existent.[60]

Of all the enacted statutes, Delaware's in particular contemplates the unique setting of a university, the particular challenges universities face regarding athletes and student safety, and the current ways in which universities access student social media. For instance, the Delaware statute is the only one that addresses (and prohibits) digital device-monitoring software.[61] It also contains exceptions for health and safety that exempt "investigations by an academic institution's public safety department or policy agency who have a reasonable articulable suspicion of criminal activity" or any "investigation, inquiry or determination conducted pursuant to an academic institution's threat assessment policy or protocol."[62]

When looked at in isolation, these statutes appear to be a step in the right direction in terms of recognizing and protecting student rights. Lawmaker statements indicate a legitimate intent to do so. However, the IHE-student

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COMP. STAT. ANN. 75 / 10(c) (West, Westlaw through P.A. 101-258); MICH. COMP. LAWS ANN. § 37.276(2) (West, Westlaw through P.A. 2019, No. 95 of 2019 Reg. Sess.); N.M. STAT. ANN. § 21-1-46(D) (West, Westlaw through First Reg. Sess. of 2019); UTAH CODE ANN. § 53B-24-202(2) (West, Westlaw through 2019 Gen. Sess).

[54] *See, e.g.,* CAL. EDUC. CODE § 99121(c)(1) (West, Westlaw through Ch. 860 of 2019 Reg. Sess.); 105 ILL. COMP. STAT. ANN. 75 / 10(D) (West, Westlaw through P.A. 101-258); OR. REV. STAT. ANN. § 350.272(2)(a)-(b) (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.); N.H. REV. STAT § 189-70(II)(a) (West, Westlaw through Ch. 345 of 2019 Reg. Sess.).

[55] *See, e.g.,* UTAH CODE ANN. § 53B-24-102(1)(a)-(b) (West, Westlaw through 2019 Gen. Sess.); MICH. COMP. LAWS ANN. § 37.276(1)(a)-(b) (West, Westlaw through P.A. 2019, No. 95 of 2019 Reg. Sess.); 105 ILL. COMP. STAT. 75 / 10(b)(2) (West, Westlaw through P.A. 101-258).

[56] OR. REV. STAT. ANN. § 350.272(2)(c)(4) (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.).

[57] The Arkansas, California, Delaware, New Mexico, and Oregon statutes provide no language that indicates the consequence for violating the provisions of the statute.

[58] *See, e.g.,* 105 ILL. COMP. STAT. 75 / 20 (West, Westlaw through P.A. 101-258).

[59] *See, e.g.,* MICH. COMP. LAWS § 37.278(1) (West, Westlaw through P.A. 2019, No. 95 of 2019 Reg. Sess.).

[60] N.J. STAT. ANN. § 18A:3-32 (West, Westlaw through L. 2019, c. 266 and J.R. No. 22). The statute allows for injunctive relief, compensatory and consequential damages, and reasonable attorneys' fees and costs.

[61] DEL. CODE ANN. tit. 14, § 8103(c) (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly). *See also* H.B. 846*,* 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) ("No academic institution shall monitor or track a student's or applicant's personal electronic communication device by installation of software upon the device or by remotely tracking the device by using intercept technology.").

[62] DEL. CODE ANN. tit. 14, § 8105 (West, Westlaw through Ch. 218 of 2019-2020 Gen. Assembly). *See also* VA. CODE ANN. § 23.1-405 (E) (West, Westlaw through 2019 Reg. Sess.).

relationship is deeply complex. Although well-intended, a closer look at the varying interests involved, and the pressure on IHEs to meet competing demands, reveal that the student password legislation does not adequately contemplate that complexity. Part III explores this complex relationship in detail.

III. EVOLUTION OF THE UNIVERSITY-STUDENT RELATIONSHIP

The legal relationship between universities and their students has evolved over time. This evolution displays identifiable philosophies that inform the current challenges of the relationship for the twenty-first century.

Prior to the 1960s, the doctrine of *in loco parentis* applied to university-student relations.[63] Some commentators have implied that the concept meant that the school stood as the guardian of its students.[64] However, others have more accurately understood the doctrine as immunizing the university-student relationship from the reach of the law. The doctrine, they argue, did not impose a duty on colleges to protect their students.[65] In fact, colleges had virtually no responsibilities to their students.[66] Instead of imposing duties toward students, *in loco parentis* shielded the schools' decisions and actions with regard to students from legal scrutiny.[67] Courts gave wide deference to colleges' decisions on students, as they would to parents' decisions about their children.[68]

During the 1960s and early 1970s, students challenged the paternalism of i*n loco parentis*, winning increased autonomy for themselves and redefining the university-student relationship.[69] By the mid-1970s, courts were struggling to fill the void left by the demise of the concept.[70] Increasingly, courts saw college students as adults and the relationship between the school and the student as contractual.[71] Thus, the university had no legal duty to protect students (because they were seen as adults), but did have the duty to abide by any obligations the university assumed toward students.[72] Schools were seen as bystanders with regard to students' lives.[73]

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[63] Kristen Peters, Note, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 433 (2007).

[64] Heather E. Moore, Note, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 IND. L. REV. 423, 450 (2007) (discussing *in loco parentis* in the context of student dependence on institutions); Ann MacLean Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625, 640 (2008) (describing the death of *in loco parentis* as abrogating the duty of care).

[65] Peters, *supra* note 63, at 435.

[66] *Id.* at 436.

[67] *Id.* at 435.

[68] *Id.* at 434; Susanna G. Dyer, Note, *Is There a Duty?: Limiting College and University Liability for Student Suicide*, 106 MICH. L. REV. 1379, 1387 (2008).

[69] Peters, *supra* note 63, at 436–37.

[70] *Id.* at 438.

[71] Dyer, *supra* note 68, at 1387; Peters, *supra* note 63, at 437.

[72] Peters, *supra* note 63, at 438; Dyer, *supra* note 68, at 1387.

[73] Brewer, *supra* note 18, at 385 (noting that, once *in loco parentis* was dismissed from college law,

This approach ushered in the era of treating IHEs as businesses, with attempts by courts to apply general tort principles to businesses.[74] For example, courts used tort concepts associated with landlords' obligations to impose liability on universities on the basis of the school's ownership of premises (dorms, lecture halls, etc.).[75]

Dissatisfaction with the bystander approach, which treated schools as unable to affect student behavior and seemed to ignore student safety issues, has led courts to revisit the university-student relationship. Although students still expect to be treated as adults regarding recognition of their constitutional rights, courts are beginning to leverage tort law to impose obligations on colleges by applying aspects of the "special relationship" doctrine to the school-student relationship. Courts still generally hold that the relationship is not per se special within the meaning of tort law.[76] However, courts are now more willing to impose liability on universities on the basis of a multi-factor analysis of the school-student relationship. This approach recognizes the unique expectations of millennial college students (and their parents) who, on the one hand, fully expect to be treated as adults in cases involving constitutional rights, but have also grown up in a world in which they have not been expected to fend for themselves.[77] Thus, they arrive on college campuses lacking the necessary skills to provide for their own protection and expect the university to fill that role.[78] The cases involving student self-harm and harm caused by other students demonstrate the challenges of adapting existing tort law to this new context, as will be discussed in more detail in Part B. 1.[79] First, however, we turn to a discussion of the status of public college student constitutional rights.

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courts treated colleges as bystanders to their students' lives); Peters, *supra* note 63, at 438 (contending that courts cast colleges as bystanders, allowing colleges to escape liability for student injuries).

[74] Peters, *supra* note 63, at 444.

[75] *Id.*; Brewer, *supra* note 18, at 383-388; Andrea A. Curcio, *Institutional Failure, Campus Sexual Assault and Danger in the Dorms: Regulatory Limits and the Promise of Tort Law*, 78 MONT. L. REV. 31, 64-66 (2017).

[76] Peters, *supra* note 63, at 448. *But see generally*, Brewer, *supra* note 18 (arguing that Section 40 of the Restatement (Third) of Torts recognizes that colleges owe an "affirmative duty" to protect their students). *See also* discussion of *Scheiszler Shin*, *Regents*, and *Nguyen*, *infra* notes 195-231 and accompanying text.

[77] Peters, *supra* note 63, at 459–60 (describing millennial college students as "coddled," having been sheltered from risks and, therefore, still reliant on their parents); Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1812 (2017) (noting that because the current generation of college students were sheltered by their parents, college has become a time of extended adolescence, rather than a transition to full adulthood).

[78] Peters, *supra* note 63, at 459-60 (arguing that millennial college students will expect colleges to provide safe environments beyond an ordinary duty of care); Papandrea, *supra* note 77, at 1811–12 (explaining that college students want school administrators to define the limits of permitted speech, to protect students from expression that makes them uncomfortable).

[79] See *infra* notes 174-232 and accompanying text for discussion of recent tort-based cases.

A. Student Constitutional Rights

Generally, public university students expect IHEs to recognize three major constitutional rights: free speech, due process, and privacy rights.

1. First Amendment Speech Rights

Government regulation of speech is governed by forum analysis, under which the legitimacy of restrictions on speech depends on the traditional use of the location where the speech occurs.[80] The law recognizes three different forums: public forums, limited public forums, and nonpublic forums.[81] Permissible restrictions on speech vary based on the forum. For example, attempts to impose content-based restrictions in public forums will be struck down unless the restrictions pass strict scrutiny.[82] Content-based restrictions are permissible in limited public forums if the restrictions are reasonably related to the purpose of the forum.[83] Universities have aspects of both public and limited public forums.[84] Post-secondary education has long been seen as a marketplace of ideas, where students are intentionally exposed to diverse ideas and points of view.[85] However, the unique characteristics of the education environment generally give IHEs greater latitude to restrict speech.[86]

Courts have grappled with the tension between the public form and limited public forum concepts in the cases delineating First Amendment free speech guarantees in the education context. The foundational case, *Tinker v. Des Moines School District*, established the basic principle that students' First Amendment rights extend to the school environment.[87] In *Tinker*,

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[80] Nisha Chandran, *Crossing the Line: When Cyberbullying Prevention Operates as a Prior Restraint on Student Speech*, 2016 U. ILL. J.L. TECH. & POL'Y 277, 290; Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103, 109-10 (2018).

[81] Chandran, *supra* note 80, at 290; Hutchens & Fernandez, *supra* note 80, at 109–10. Public forums are spaces with an established tradition of use for free expression by all, such as a public park. Limited public forums are spaces where use can be limited to either specific groups or certain topics, such as a university-owned meeting space, and nonpublic forums are spaces that are not generally open to public expression. *Id.*

[82] Chandran, *supra* note 80, at 290.

[83] *Id.*

[84] Jeffrey C. Sun, Neal H. Hutchens & James D. Breslin, *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 J. CONST. L. 49, 63-64 (2013); Patrick Miller, Note, *University Regulation of Student Speech: In Search of a Unified Mode of Analysis*, 116 MICH. L. REV. 1317, 1326 (2018).

[85] Sun, et al., *supra* note 84, at 87 (noting that part of the collegiate experience is to challenge students to examine their values and beliefs); Daniel Marcus-Toll, Note, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3402 (2014) (explaining that the marketplace of ideas theory uses the First Amendment as a vehicle for personal enlightenment); Papandrea, *supra* note 77, at 1825 (likening universities to public squares where students confront ideas with which they disagree).

[86] Sun, et al., *supra* note 84, at 64 (noting that the education mission of schools gives them the authority to impose regulations on use of campus facilities consistent with their mission).

[87] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

several high school students were suspended from school for wearing black armbands to classes to protest the U.S. involvement in Vietnam.[88] Identifying the tension between the students' free speech interests and the school's interest in prescribing appropriate conduct on its premises, the Supreme Court upheld the students' right to wear the armbands.[89] The Court adopted the reasoning from a Fifth Circuit case and held that the state could not limit student speech in school unless the speech "materially and substantially" interfered with appropriate discipline in the school, or invaded the rights of others.[90] The Court specifically noted that schools could not limit student speech simply out of a desire to avoid the "discomfort and unpleasantness" of confronting unpopular viewpoints.[91] "The classroom is peculiarly the 'marketplace of ideas,'" the Court said, and as such its charge is to expose students to a range of ideas, rather than to "foster a homogeneous people."[92]

Subsequent cases applied *Tinker*'s reasoning for students at the college level. In *Widmar v. Vincent*, for example, the Supreme Court held it unconstitutional for a university to exercise content-based discrimination against religious speech in denying a student group the use of university facilities.[93] Having created a forum generally open for use by student groups, the university's action in denying use of the facilities to a student religious group violated the students' speech rights.[94] In *Board of Regents of University of Wisconsin System v. Southworth*, the Court examined the constitutionality of a student fee system used to fund student organizations.[95] Several students challenged the school's policy, claiming that the fee violated their First Amendment rights by forcing them to fund speech that was offensive to their personal beliefs.[96] Recognizing that the purpose of the university's extracurricular activities funded by the program was to stimulate diverse speech and ideas, the Court upheld the viewpoint-neutral fee allocation program.[97]

Tinker has come to stand for the proposition that students' free speech rights do not end at the schoolhouse gate.[98] However, federal and state courts have created several important exceptions to *Tinker*'s mandate that

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[88] *Id.* at 504.

[89] *Id.* at 505–07 (noting that the Supreme Court in prior cases had identified the need to acknowledge the authority of school officials to control conduct in schools, but consistent with constitutional safeguards).

[90] *Id.* at 512–13.

[91] *Id.* at 509.

[92] *Id.* at 511–12 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

[93] Widmar v. Vincent, 454 U.S. 263 (1981).

[94] *Id.* at 276-77 (holding that the university's content-based exclusion of religious speech violated the principle that state regulation of speech should be content-neutral).

[95] Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000).

[96] *Id.* at 217, 227.

[97] *Id.* at 233–34.

[98] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

constitute significant restrictions on students' speech rights. First, courts have limited students' speech rights when the speech was deemed lewd and offensive. In *Bethel School District No. 403 v. Fraser*, a high school disciplined a student for making sexually explicit remarks at an official school assembly.[99] The Court engaged in implicit forum analysis in upholding the school's disciplinary action against the student. Recognizing that public school students' free speech rights are not automatically identical to the speech rights of adults in other settings, the Court noted that a school need not tolerate student speech that was inconsistent with the school's "basic educational mission."[100] This is essentially an argument that the school was a limited public forum, where administrators could restrict speech that was outside the purpose of the forum.[101] The school could, therefore, take action to "disassociate itself" from the offensive speech to demonstrate its inconsistency with the values of public school education by punishing the student.[102] Commentators have argued that *Fraser* departed from *Tinker* by granting significant deference to school administrations to determine appropriate behavior in the school environment.[103]

Two years later, the Court relied on *Fraser* to decide the landmark case, *Hazelwood School District v. Kuhlmeier.*[104] *Hazelwood* involved a dispute over the content of a high school newspaper created by students as part of a journalism course.[105] Although the paper was written by students, the school partially funded the paper, and the journalism course instructor had ultimate editorial authority over the paper's content.[106] The Supreme Court held that *Tinker* did not govern the case because the link to a school course meant that the newspaper was not a public forum for First Amendment purposes.[107] The school's authority over the newspaper as part of the curriculum meant that the public might perceive the newspaper as bearing the "imprimatur" of the school.[108] Thus, the question in *Hazelwood* was whether the First

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[99] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

[100] *Id.* at 685.

[101] The Court wrote at length that the mission of public schools is to educate students as to the "habits and manners of civility." *Id.* at 681–83. Given this mission, it followed that speech that could be characterized as socially inappropriate could be restricted. *Id.* at 685 (noting that the First Amendment does not prohibit school officials from determining that lewd speech would undermine the school's education mission). For an argument that *Fraser* was not properly construed as a public forum case, *see* James C. Dever, III, Note, Tinker *Revisited:* Fraser v. Bethel School District *and Regulation of Speech in the Public Schools*, 1985 DUKE L. J. 1164, 1165, 1178–84 (arguing that the restrictions in *Fraser* were valid time, place, and manner restrictions).

[102] *Fraser*, 478 U.S. at 685–86.

[103] Karyl R. Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 177–78 (2003).

[104] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[105] *Id.* at 260. The content in dispute included a story on the impact of divorce on students and an article describing students' experiences with pregnancy. *Id.*

[106] *Id.* at 262–63.

[107] *Id.* at 270.

[108] *Id.* at 271. The Court identified two factors as indicating a connection to curriculum. An activity is part of the curriculum where it is supervised by faculty and designed to impart knowledge or skills to

Amendment required schools to *promote* particular student speech.[109] The Court answered this question in the negative, holding that a school can exercise editorial control over "school-sponsored expressive activities," so long as the school's actions are reasonably related to "legitimate pedagogical concerns."[110]

Hazelwood has been interpreted broadly by courts, and the federal circuits are split as to the exact contours of its meaning.[111] Commentators criticize the courts' expansion of the *Hazelwood* curricular test beyond the logic of the original decision.[112] Subsequent cases have disconnected the twin prongs of *Hazelwood*, largely ignoring its focus on student speech that can be imputed to the school. Instead, courts have focused on the second prong—activities that relate to legitimate pedagogical concerns—in isolation. Courts have found a wide range of student expressive activity to implicate curriculum and, therefore, to be open to restriction by schools, regardless of whether the expression could be argued to bear the "imprimatur" of the school.[113] The implications of this expanded notion of *Hazelwood*'s holding are exacerbated by the deference accorded schools in their decisions around curriculum.[114] Literature studying the *Hazelwood* line of cases also remarks on the multiple approaches different circuit courts have developed to apply the case.[115] This confusion among the circuits contributes to the misinterpretation and misuse of *Hazelwood*'s reasoning and holding. As such, *Hazelwood* and its progeny pose a considerable threat to student free speech rights.[116]

A second exception to *Tinker*'s reach has been created at the college level, specifically, with regard to degree programs that involve specific professional standards. In *Tatro v. University of Minnesota*, for example, the

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the student participants. *Id.*

[109] *Id.* at 270–71.

[110] *Id.* at 273.

[111] For discussion of circuit court approaches to applying *Hazelwood*, *see, e.g.*, Marcus-Toll, *supra* note 85, at 3409–16 (reviewing the legal tests developed by the circuit courts for *Hazelwood*); Frank D. LoMonte, "*The Key Word is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305 (2013) (arguing that the approaches taken by different circuit courts have misconstrued *Hazelwood* in both secondary and post-secondary settings).

[112] LoMonte, *supra* note 111, at 306 (arguing that subsequent cases have "unmoored" *Hazelwood* from its foundations); Marcus-Toll, *supra* note 85, at 3395, 3401 (claiming that the legal tests used by the circuit courts neither protect students' speech rights nor meet the needs of schools).

[113] LoMonte, *supra* note 111, at 320–24 (contending that subsequent court decisions have applied *Hazelwood* to speech not reasonably attributable to the school).

[114] Sun et al., *supra* note 84, at 65 (noting that courts afford institutions heightened authority to regulate speech arising in class settings or triggering curricular concerns); Papandrea, *supra* note 77, at 1845 (discussing the deference shown schools on curricular matters).

[115] Marcus-Toll, *supra* note 85, at 3409–16.

[116] LoMonte argues that subsequent interpretation and application of *Hazelwood* present "a special threat by extending *Hazelwood* from a case about disowning sponsorship of speech into a case about disciplining speech." LoMonte, *supra* note 111, at 309. Some states have taken action to attempt to reverse the impact of the *Hazelwood* decision by passing what are termed "anti-*Hazelwood*" statutes. Laura Rene McNeal, *Hush Don't Say a Word: Safeguarding Students' Freedom of Expression in the Trump Era*, 35 GA. ST. U. L. REV. 251, 283–87 (2019).

Minnesota Supreme Court limited student speech rights where the speech transgressed relevant conduct codes associated with the student's degree program.[117] *Tatro* involved a mortuary science student's blog comments about laboratory work with cadavers.[118] The university disciplined the student ostensibly for violating the academic program rules, which the school argued were related to legitimate pedagogical concerns.[119] The student claimed that her blog posts were activities outside her degree program.[120] The Minnesota Court declined to apply either the *Tinker* "substantial disruption" standard or the *Hazelwood* "legitimate pedagogical concerns" standard in reviewing the university's actions.[121] Instead, the court focused on the "special characteristics" of degree programs with professional standards in crafting a legal rule for review of school disciplinary action.[122] Under *Tatro*, a university may regulate student online speech that violates established professional conduct standards where the restrictions are "narrowly tailored" and "directly related to established professional conduct standards."[123]

The *Tatro* court explicitly rejected *Hazelwood*'s legitimate pedagogical concerns test, but it implicitly based its decision on the connection of the professional standards at issue to the degree program curriculum.[124] Similarly, other courts have limited student speech rights where instructors determined from student comments that they would not adhere to

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[117] Tatro v. Univ. of Minn., 816 N.W.2d 509 (2012).

[118] Tatro's posts appeared in her Facebook account. *Id.* at 512–13.

[119] *Id.* at 512–14. The mortuary science program was designed to prepare students to be licensed funeral directors and morticians. As such, the program involved laboratory courses in anatomy, embalming, and restorative art that used human cadavers from the university's Anatomy Bequest Program. Students were required to sign forms acknowledging their responsibility to comply with Program rules and any laboratory policies in course syllabi. *Id.* at 512. Tatro was issued a failing grade for her laboratory course and was placed on probation for the remainder of her undergraduate career. *Id.* at 514–15.

[120] *Id.* at 514. Tatro argued in her disciplinary hearing that she intended her Facebook posts to be read by her family and friends. *Id.*

[121] *Id.* at 517–20. The Court rejected the *Hazelwood* analysis based on its finding that the public could not reasonably perceive Tatro's Facebook posts to "bear the imprimatur of the University." *Id.* at 518. It declined to apply *Tinker* because the purpose of the "substantial disruption" standard from *Tinker* (*i.e.*, to limit disruptions in the school environment) did not fit the purpose of the sanctions imposed on Tatro (to inculcate the values of respect, discretion, and confidentiality in connection with work on human cadavers). *Id.* at 519–20.

[122] *Id.* at 520.

[123] *Id.* at 521. The legal test established by the Court has been criticized as over-broad and, therefore, threatening to student speech. *See, e.g.*, Ashley C. Johnson, *"Narrowly Tailored" and "Directly Related": How the Minnesota Supreme Court's Ruling in* Tatro v. University of Minnesota *Leaves Post-Secondary Students Powerless to the Often Broad and Indirect Rules of their Public Universities*, 36 HAMLINE L. REV. 311 (2014).

[124] *Tatro*, 816 N.W.2d at 520. The Court specifically noted the university's claim that it was entitled to set and enforce "reasonable course standards" designed to teach professional norms. The court's decision at least implicitly relied on the reasoning of two other courts that had concluded that compliance with professional standards could constitute valid curricular requirements. *Id.* (*citing* Ward v. Polite, 667 F.3d 727, 732 (6th Cir. 2012) and Keeton v. Anderson-Wiley, 664 F.3d 865, 878 (11th Cir. 2011)).

professional codes of conduct.[125] This exception to *Tinker* has been interpreted as part of *Hazelwood*'s broad reach into issues that are connected to curriculum,[126] and has been generally criticized.[127]

The trajectory of student free speech cases raises several worrying issues. An obvious area of concern is the application of forum analysis to social media. Forum analysis has its roots in the concept of specific locations in physical space.[128] But social media defies this concept in that it separates the location where the speech is created from the location where the speech is experienced.[129] A post on Facebook can be created any place that has an Internet connection and can be disseminated to any other place—including a university campus—that has Internet connections. Forum analysis would require that courts determine what forum controls for purposes of restricting the speech.[130] Is it the forum where the speech was created or the forum where the speech is received? Is the concept of forum useful at all as applied to social media? The Supreme Court has yet to give guidance on the application of forum analysis to social media, and the circuit court decisions display a jumble of legal tests for regulation of speech created off-campus via social media.[131]

Second, the expansive interpretation of the *Hazelwood* decision and the line of cases related to professional standards threaten to nearly engulf student free speech rights.[132] To date, courts have not succeeded in articulating a test for determining what matters relate to curriculum (and, therefore, can be restricted) and what matters do not.[133] More fundamentally, it is not clear whether and to what extent *Hazelwood*, a case about the high school environment, applies to the university context. There is no consistency among circuits or scholars on this key issue.[134] Courts seem

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[125] LoMonte, *supra* note 111, at 333–39 (reviewing cases related to counseling certifications and nursing credentials).

[126] *See*, *e.g.*, Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 394–395 (2013) (arguing that these cases are connected to *Hazelwood*'s emphasis on school control over speech as it relates to curricular concerns). *See also* Papandrea, *supra* note 77, at 1844–48 (exploring the expansion of *Hazelwood* to the university context).

[127] For criticism of the *Tatro* decision, *see generally* Meggen Lindsay, Note, Tinker *Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students* – Tatro v. University of Minnesota, 38 WILLIAM MITCHELL L. REV. 1470 (2012); Johnson, *supra* note 123.

[128] Marcus-Toll, *supra* note 85, at 3418 (noting that regulation of student speech under *Tinker* used a "territory-based" approach).

[129] Sun et al., *supra* note 84, at 58 (arguing that physical location cannot be used as a factor in differentiating instructional from non-instructional contexts for online speech).

[130] *Id.* at 72 (noting that online speech may require reconceptualization of location as related to learning contexts).

[131] Elizabeth A. Shaver, *Denying Certiorari in* Bell v. Itawamba County School Board*: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1554–1580 (2017).

[132] LoMonte, *supra* note 111, at 320 (arguing that application of *Hazelwood* has shrunk *Tinker*-level speech protection almost out of existence).

[133] *Id.* at 324–25 (criticizing the expansion of *Hazelwood*'s notion of pedagogical concerns).

[134] *See, e.g.*, Christopher N. LaVigne, Note, Hazelwood v. Kuhlmeier *and the University: Why the High School Standard is here to Stay*, 35 FORD. URB. L.J. 1191, 1218–22 (2008) (arguing that federal

increasingly inclined to avoid the difficult decisions about student speech by deferring to school administrators. The deference that courts accord schools could begin to act as a prior restraint on student speech.[135] Uncertainty as to what is or is not permissible speech may have a chilling effect on student expressive activity, even speech initiated off-campus.[136] Further, as IHEs face the possibility of increased liability to students for violations of Title IX or for other harm to students,[137] the temptation is for schools to proactively monitor student activity that could result in liability.[138] The potential for this suspicionless monitoring to chill student speech is clear.

2. Due Process and Privacy Rights

Students at public universities are clearly entitled to some minimum level of due process.[139] Interestingly, this right was recognized in early cases that questioned and moved away from the concept of *in loco parentis*.[140] In *Dixon v. Alabama State Board of Education,* the Fifth Circuit Court of Appeals held that public university students were entitled to "at least fundamental due process" before being expelled.[141] This right has been extended to academic suspension as well.[142] However, these protections were described as "rudimentary"[143] and give great deference to IHEs to make decisions to protect their educational function.[144]

Public student privacy rights are governed by the Fourth Amendment,

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circuit courts have correctly applied *Hazelwood*'s forum analysis to college cases). *Contra, see generally* Edward L. Carter et al., *Applying* Hazelwood *to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157 (2006) (surveying circuit court cases applying *Hazelwood* to college speech and noting confusion and disagreement between commentators and federal courts regarding *Hazelwood*).

[135] A prior restraint is a content-based restriction on speech in advance of the dissemination of that speech. Chandran, *supra* note 80, at 291.

[136] *Id.* at 303 (arguing that the existence of prior restraints raises the issue of self-censorship).

[137] *See infra* Parts III.B.1 and B.2.

[138] One commentator has termed school measures to regulate student online activity without any prior speech made by students "suspicionless prevention techniques." Chandran, *supra* note 80, at 286–89 (discussing various school initiatives to avoid liability for cyberbullying).

[139] Jason A. Zwara, *Student Privacy, Campus Safety, and Reconsidering the Modern Student-University Relationship,* 38 J.C. & U.L. 419, 434 (2012).

[140] *Id.* at 433.

[141] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *See also* Zwara, *supra* note 139, at 433–34; Peters, *supra* note 63, at 437.

[142] Goss v. Lopez, 419 U.S. 565 (1975). *See also* Blake Padget, Note, *Process Has Come Due: An Argument for Creation of Due Process Rights for Private University Students,* 49 U. TOL. L. REV. 485, 489 (2018) (arguing that courts will analyze academic dismissals under a more lenient standard than disciplinary dismissals).

[143] *Goss*, 419 U.S. at 581.

[144] Naomi M. Mann, *Taming Title IX Tensions,* 20 U. PA. J. CONST. L. 631, 650 (2018) ("Educational institutions are entitled to deference when they are exercising their authority to make operational decisions, including maintaining discipline. Discipline and adherence to community standards are part of the educational process, and therefore educational institutions are well-suited to implement these goals.").

which protects the right of people against unreasonable searches and seizures. Broadly, this has been held to mean that the people have a reasonable expectation of privacy and government cannot conduct a search without individualized suspicion.[145]

One of the many exceptions to Fourth Amendment search protection has been in "special need" situations beyond the normal parameters of law enforcement. In such cases, the individual's privacy expectations must be balanced "against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[146] Public safety has been deemed a special need to justify drug testing of public employees in a variety of contexts: railroads,[147] U.S. Customs Service,[148] nuclear power plants,[149] and correctional facilities,[150] among others.

The special needs rationale has not prevailed in all claimed circumstances, however. The Georgia Supreme Court declined to find a special need in *Chandler v. Miller,* holding that a statute requiring certain candidates for state-wide office to attest that they had passed a drug test was a "symbolic" rather than true special need because the state had not produced any evidence that such candidates had engaged in behavior that met a legitimate governmental concern such as public safety.[151] Thus, the need must be a specific rather than general threat to safety. Moreover, when public safety is the stated rationale, "the Court has consistently viewed the 'safety' accomplished by the drug testing as being for the benefit of the public, or third parties, not the safety of the individuals being tested."[152]

The special needs doctrine has been applied to students at public schools in a handful of cases.[153] Its application to public universities is minimal. Most special needs cases at the university level involve drug testing of college athletes or dormitory searches.

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[145] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

[146] Nat'l. Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665–66 (1989).

[147] Skinner v. Railway Labor Execs.' Ass'n., 489 U.S. 602, 620 (1989).

[148] *Von Raab*, 489 U.S. at 665.

[149] Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988).

[150] McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987).

[151] Chandler v. Miller, 520 U.S. 305, 321–22 (1997) ("Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not 'special,' as that term draws meaning from our case law.").

[152] Jeremy L. Kahn, Note, *Shedding Rights at the College Gate: How Suspicionless Mandatory Drug Testing of College Students Violates the Fourth Amendment,* 67 U. MIAMI L. REV. 217, 238 (2012).

[153] *See e.g.,* New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding for the first time that the Fourth Amendment warrant and probable cause requirements did not apply to the activities of public school authorities, who need only have reasonable grounds to justify a search); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (finding that the special needs doctrine supports suspicionless drug testing of public school students if the school has a legitimate interest in doing so and the test is not overly intrusive); and School Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822 (2002) (upholding drug testing of public-school students involved in extracurricular activities).

Many courts considering the constitutionality of student-athlete drug testing have found that the policy in question did not raise constitutional issues because it was enforced by the NCAA, which is not a state actor.[154] Most courts that have reached the constitutional issue have found against the student athletes, finding that they have diminished privacy interests by virtue of their unique position as athletes.[155] Just one case, *University of Colorado v. Derdeyn,* held that a public university's drug testing policy was unconstitutional.[156] The court found that the drug testing policy was not based upon any actual drug abuse problem, as would be required by the special needs doctrine.[157] The *Derdeyn* court also noted that university students must be treated as adults, such that the *in loco parentis* doctrine did not apply.[158]

One recent case, *Kittle-Aikeley v. Strong*,[159] considered the constitutionality of a blanket drug testing policy of all students. In this case, the Eighth Circuit Court of Appeals held that a Linn State College policy that required all incoming students to pass a drug test to remain enrolled failed the special needs test.[160] The court specifically distinguished college students from students in public high schools, finding that its policy was not applicable to a particular crisis, and that "Linn State's students are not children committed to the temporary custody of the state."[161]

The demise of *in loco parentis* often took place in cases involving student privacy in dorm rooms. During the bystander era of student rights that arose as *in loco parentis* began to wane, public universities became increasingly obligated to abide by the constitutional requirements students would have in their homes.[162] Applied to college housing, courts have uniformly held that "a student who occupies a college [or university] dormitory room enjoys the protection of the Fourth Amendment."[163] A housing application cannot contain a blanket waiver of Fourth Amendment rights or otherwise be construed as a consent to search for all purposes including for law enforcement reasons.[164] "Otherwise, the regulation itself

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[154] Many of these cases have found that the drug testing in question does not implicate the Constitution because it is required by the NCAA, which is not a state actor. *See, e.g.,* NCAA v. Tarkanian, 488 US. 179 (1988).

[155] *See e.g.* Hill v. NCAA, 865 P.2d 633 (Cal. 1994).

[156] University of Colo. v. Derdeyn, 863 P.2d 929 (Colo. 1993).

[157] *Id.* at 933.

[158] *Id.* at 938. *See also* Kahn, *supra* note 152, at 240.

[159] Kittle-Aikeley v. Strong, 844 F.3d 727 (8th Cir. 2016).

[160] *Id.* at 740.

[161] *Id.*

[162] Zwara, *supra* note 139, at 437–38, 441 (discussing Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975), Morale v. Grigel, 422 F. Supp. 988 (D.N.H. 1976), and State v. Houvener, 186 P.3d 370 (Wash. Ct. App. 2008)).

[163] Bryan R. Lemons, *Public Education and Student Privacy: Application of the Fourth Amendment to Dormitories at Public Colleges and Universities*, 2012 BYU EDUC. & L.J. 31, 38 (2012).

[164] *Id.* at 58.

would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room."[165]

This does not mean, however, that colleges may never enter private dorm rooms. Some courts have held that universities did not violate a student's Fourth Amendment rights by entering the dorm room when the student had previously given consent in the housing agreement to allow university officials to enter a dorm room for purposes of daily maintenance or upon reasonable suspicion of dangerous activity.[166]

Assuming that the above frameworks apply generally to the privacy interests that a student may have in an online social media account, it seems unlikely that a university request for access would be universally acceptable. In light of *Kittie-Aikeley,* a request for such information as a condition of acceptance or continued enrollment in the university would not be constitutionally permissible. The institution may have the right to ask for such information in conjunction with a legitimate inquiry or investigation into student safety, although the statutory language of much of the legislation makes it difficult to determine what this might mean.[167] The special needs doctrine may justify an IHE's demand for social media account information in some circumstances, such as an active shooter scenario or other potential harm to students caused by third parties.[168] However, it is not likely to apply in the specific situations where a student threatens to harm herself because the need contemplated by the special needs doctrine is safety of the general public, rather than individuals.[169]

Thus, students generally expect to be treated as adults when it comes to the exercise of fundamental rights. On the other hand, however, students who enter college in the twenty-first century increasingly lack the independence of their Baby Boomer parents, who experienced the revolutionary climate of many colleges in the 1960's.[170] Generally, they have been raised by "helicopter parents"[171] and exhibit a heightened reliance on their parents and the desire for constant familial guidance.[172] Parents also expect public universities to provide a safe environment for their children.[173]

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[165] *Id*.

[166] Zwara, *supra* note 139, at 444 (discussing Moore v. Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968)).

[167] *See supra* notes 43–51, 54, 139–44, 146–152 and accompanying text; *see also infra* note 264 and accompanying text.

[168] *See supra* notes 146–152 and accompanying text.

[169] Kahn, s*upra* note 152, at 227–29, 238.

[170] Peters, *supra* note 63, at 459–60.

[171] The term "helicopter parents" denotes parents whose tendency is to hover or be hyper-involved in their college-aged children's lives. Peters, *supra* note 63, at 459; Papandrea, *supra* note 77, at 1812.

[172] Peters, *supra* note 63, at 459–60; Papandrea, *supra* note 77, at 1812.

[173] Wendy S. White, *Students, Parents, Colleges: Drawing the Lines*, CHRON. OF HIGHER EDUC. (Dec. 16, 2005), at B16 (arguing that while the law treats college-age students as both children and adults,

Contemporary universities are thus caught in a bind between respecting students' free speech and privacy rights and meeting expectations for student safety.

B. Student Expectations Regarding Safety

Universities' responsibility to protect students from harm arises both from common law (in the form of tort law) and statutes (in the form of Title IX). The duty coalesces around three key issues: student suicide, violent attacks against students, and sexual harassment and assault of students.

1. Harm to Students

An increasingly important safety issue for colleges is student suicide. Although suicide rates among students attending college are lower than for comparable age groups not in college,[174] the phenomenon garners considerable media attention and raises complex issues for IHEs.

Traditionally, institutions of higher education have been protected from liability for student suicides.[175] The law generally regards college students as adults, with responsibility for their own conduct.[176] Additionally, under the law, the actions of students who committed suicide were seen as the sole proximate cause of their death, shifting liability away from the college.[177] However, this approach is beginning to change.

State court decisions vary as to whether IHEs have a duty to prevent student suicide. These cases are generally brought as wrongful death suits and follow one of two approaches. In some cases, plaintiffs claim that the college's undertaking to render services to the student imposed a duty to act with reasonable care.[178] These cases often focus on the school's provision of mental health or counseling services to students, or on campus security services. Other cases are based on a claim that the college stands in a special relationship with its students—a relationship that imposes tort duties on the school.[179]

Jain v. State of Iowa involved a claim that the university was negligent

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parents view their children solely as children and want to ensure colleges meet their obligations to students).

[174] Dyer, *supra* note 68, at 1383 (noting that college students are less likely to commit suicide than noncollege students of the same age); Doris Iarovici, MD, *Perspectives on College Student Suicide*, NAT'L NETWORK OF DEPRESSION CTRS. (Aug. 6, 2015), https://nndc.org/perspectives-on-college-student-suicide (explaining that the suicide rate for college students is about half as low as for age-matched, non-student emerging adults).

[175] Daryl J. Lapp, *The Duty Paradox: Getting it Right After a Decade of Litigation Involving the Risk of Student Suicide*, 17 WASH. & LEE J.C.R. & SOC. JUST. 29, 37 (2010).

[176] *See supra* notes 69–75 and accompanying text.

[177] Dyer, *supra* note 68, at 1385.

[178] RESTATEMENT (SECOND) OF TORTS § 323 (1965).

[179] RESTATEMENT (SECOND) OF TORTS § 314A (1965); RESTATEMENT (THIRD) OF TORTS § 40(a) (2012).

in providing a service, in that case, the service of notifying parents when a student engaged in self-destructive behavior.[180] The Iowa Supreme Court addressed the application of Section 323 of the Second Restatement of Torts, which sets out the principle that a duty voluntarily assumed must be performed with due care.[181] To prove the assumption of a duty under Section 323(a), the plaintiff must show that the defendant's actions increased the harm to the plaintiff above the risk the plaintiff faced if the defendant had not provided the service.[182] Here, the court found that no affirmative action by the university increased the risk that the student would harm himself.[183] Alternatively, under Section 323(b), the plaintiff can argue that they relied on the provision of the service, to their detriment. This section has been interpreted to mean that a plaintiff must show reliance based on specific actions or representations [by the IHE] that cause a person to forego other alternatives of protecting themselves.[184] Where there was no indication that the student relied on the support offered by the school to his detriment, the court found no basis to impose liability on the college.[185]

Other states have interpreted the duties associated with rendering services more broadly. *Mullins v. Pine Manor College* looked at duties outside the context of student suicide, but its analysis identified many of the same issues present in the suicide cases.[186] In *Mullins*, the Massachusetts Supreme Court relied on the tort principle that a duty voluntarily assumed must be performed with due care.[187] The court recognized that the mere fact

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[180] Jain v. State, 617 N.W.2d 293 (Iowa 2000). Jain involved a student, Sanjay Jain, who committed suicide in his dormitory room. During conversations with resident assistants (RAs) for the dormitory, Sanjay had signaled his intention to commit suicide, but assured them that he would seek counseling. The RAs and the university's assistant director for residence life continued to encourage Sanjay to seek help at the university counseling services. Because of the university's policy of privacy with respect to its students, they did not notify Sanjay's parents of his difficulties. *Id.* at 295-96. The university had an unwritten policy dictating that where a student exhibited evidence of self-destructive behavior, the dean of students could make the decision to contact the student's parents under an exception under the Family Education Rights and Privacy Act (FERPA). *Id.* at 296-99. However, no information on Sanjay's condition was transmitted to the dean of students before Sanjay's death. *Id.* at 296.

[181] RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965) (The section states that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from the failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.").

[182] *Jain*, 617 N.W.2d at 299 (In other words, the court noted, "the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun performance. . . ." (quoting Power v. Boles, 673 N.E.2d 617, 620 (Ohio Ct. App. 1996)).

[183] *Id.* The court noted the numerous attempts by university personnel to offer Sanjay support and to encourage him to seek counseling, whether university-provided or otherwise. The plaintiff had argued that, once the university saw the need to recommend counseling for Sanjay, it had the duty to bring the matter to the attention of the dean of students for the purpose of notifying Sanjay's parents.

[184] *Id.* at 300 (citing Power v. Boles, 673 N.E.2d 617, 620 (Ohio Ct. App. 1996)).

[185] *Id.*

[186] Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983). The plaintiff in *Mullins* had been raped on campus while a student at Pine Manor College and sued the college and its vice president for operations to recover damages for her injuries.

[187] *Id.* at 336 (citing RESTATEMENT (SECOND) OF TORTS §323 (AM. LAW INST. 1965)) (noting that

that the college had undertaken to render a service to the students was not enough to impose a duty; the plaintiff must show that the school's failure to exercise due care increased the risk of harm, or that the student suffered harm because they relied on provision of the service.[188] Finding that students and parents clearly rely on colleges to safeguard students, the court refused to overturn the jury's verdict in favor of the plaintiff.[189] In affirming the verdict, the court focused on specific findings of fact with regard to students' reliance on campus safeguards, as well as on whether the risk to the student (i.e., being the victim of criminal conduct) was foreseeable.[190] Pine Manor College, the court noted, had developed security protocols to protect students, which the court found to be recognition by the college of the risk of attacks on students.[191] Thus, according to *Mullins*, the issue of the foreseeability of harm to the student, whether from themselves or another, plays an important role in determining potential liability of the IHE.

Several cases arguing for IHE liability have been based on the plaintiffs' claims that universities have a special relationship with their students that imposes tort duties. These cases reflect principles from the Restatement Third of Torts Section 40(a), which states that "an actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship."[192] This section imposes an affirmative duty of reasonable care, regardless of the source of the risk; a duty of care can exist for a party that had no part in creating the risk.[193] Among the relationships noted as being within the ambit of Section 40(a) are schools and their students.[194] The notion of the "special relationship" has provided the foundation for several key cases involving student suicide.

In *Schieszler v. Ferrum College*,[195] the plaintiff argued that the

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the relevant service in this case was that of providing their students with "protection from the criminal acts of third parties.").

[188] *Mullins,* 449 N.E.2d at 336.

[189] *Id.* at 336–37 (explaining that the jury could have found that students and their parents rely on the willingness of colleges to exercise due care to protect them).

[190] *Id.* at 337.

[191] *Id.* at 335, 337 (contending that the precautions colleges take to protect students against criminal acts of third parties would make little sense unless criminal acts were foreseeable).

[192] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 40(a) (AM. LAW INST. 2012). The corresponding section in the RESTATEMENT (SECOND) OF TORTS is § 314A (AM. LAW INST. 1965).

[193] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 40(a) cmts. g, h (AM. LAW INST. 2012); *Compare* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 37 (AM. LAW INST. 2012), which provides that no duty of care exists for those who did not create the risk.

[194] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 40(b)(5) (AM. LAW INST. 2012).

[195] Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D. Va. 2002). The plaintiff was the personal representative of the estate of Michael Frentzel, who had been a student at Ferrum College. Frentzel had disciplinary issues while at the college, as well as a turbulent relationship with his girlfriend. Dormitory resident assistants and campus police knew of a note in which Frentzel indicated that he intended to hang himself. The college's dean of student affairs also knew of Frentzel's threat and required Frentzel to sign

Restatement principles applied to colleges and their students, a question that Virginia courts had not previously considered.[196] Surveying special relationship cases from other contexts, the federal court determined that the crux of finding a duty from a special relationship was identifying whether the harm to the student was foreseeable.[197] Where the defendant knew of an "imminent probability" of harm, a trier of fact could find that a special relationship existed between the plaintiff and the defendant.[198] Specifically, the court found that the evidence presented facts from which the jury could conclude that there was an imminent probability that Frentzel would harm himself and that the defendants had notice of these facts, creating a special relationship between the college and Frentzel and imposing a duty on the college to exercise reasonable care.[199] For the *Schieszler* court, then, whether a special relationship exists in specific college-student circumstances depends on the foreseeability of harm to the student.

In 2005, a Massachusetts court followed *Schieszler*'s focus on foreseeability in *Shin v. Massachusetts Institute of Technology*.[200] Elizabeth Shin was a student at MIT who experienced psychiatric problems beginning in her freshman year.[201] In the spring of her sophomore year, Shin began to express suicidal thoughts and eventually committed suicide.[202] Shin's parents sued both MIT medical professionals and MIT administrators.[203] In deciding the defendants' motion for summary judgment, the court revisited the concept of the special relationship, as defined in the Restatement and discussed in *Schieszler*. As did the *Schieszler* court, the court in *Shin* focused exclusively on the issue of foreseeability in concluding that MIT had a special relationship with Elizabeth Shin.[204] After reviewing her history at MIT, the court concluded that sufficient evidence existed that MIT

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a statement that he would not hurt himself. A few days later, Frentzel hung himself in his dorm room. *Id.* at 605. The plaintiff sued the college, the resident assistant, and the dean of students.

[196] The court made its determination in the context of the defendants' motion to dismiss the complaint for failure to state a claim. *Id.* at 606. The Restatement notes that the existence and contours of the duty imposed by a special relationship between school and student is contextual, with reasonable care for elementary-age students differing from reasonable care for college students. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 40 cmt. l (AM. LAW INST. 2012).

[197] *Schieszler*, 236 F. Supp. 2d at 609.

[198] *Id.*

[199] *Id.* The court also noted that it had considered whether the college could have foreseen that it would be expected to take affirmative action to assist Frentzel. Citing *Mullins*, the court stated that, although colleges do not stand *in loco parentis* with their students, students and their parents have a "reasonable expectation, fostered . . . by colleges themselves," that the school will exercise reasonable care to protect students from harm. *Id.* at 609–10.

[200] Shin v. Mass. Inst. of Tech., 19 Mass. L. Rptr. 570 (Mass. Super. Ct. 2005).

[201] For a detailed account of Shin's time at MIT, see *id.* at 570–73.

[202] *Id.* at 571, 573. Shin died as a result of burns suffered from a fire in her dorm room. The medical examiner determined that the burns were self-inflicted, and her death was ruled a suicide. *Id*. at 573.

[203] The complaint named MIT mental health personnel, against whom the plaintiffs alleged gross negligence and negligent provision of medical services. *Id*. at 575. Several MIT academic administrators were also named as defendants, under tort liability theories. *Id.* at 576.

[204] *Id.* at 577 (noting the *Schieszler* court's finding that a trier-of-fact could have found that there was an imminent probability that decedent would try to hurt himself).

administrators could "reasonably foresee that [Shin] would hurt herself without proper supervision," and that, therefore, a "special relationship" existed between Shin and MIT.[205]

The decisions in *Schieszler* and *Shin* seem to open the door for expansion of liability where IHEs fail to prevent student suicide. However, commentators have criticized the decisions as poorly reasoned[206] and incorrectly focused only on the foreseeability factor in determining whether a special relationship existed.[207] Thus, commentators argued that these cases are aberrations, limited to their own facts.[208]

Two cases from 2018, however, resurrected the concept of special relationship as creating liability for harm to students. In *Regents of the University of California v. Superior Court*, the California Supreme Court held that universities have a special relationship with their students and a duty to protect them from "foreseeable violence" during curricular activities.[209] The case involved a mentally disturbed UCLA student who stabbed a fellow student during a chemistry lab.[210] The victim of the attack sued the university, alleging negligence in that the school had a special relationship with her as an enrolled student, carrying with it a duty to take reasonable protective measures to ensure her safety against foreseeable violent attacks by third parties.[211] The lower courts took the traditional position that the university had no duty to protect students,[212] but the California Supreme Court disagreed with the rulings. The court started from the premise that the law imposes no duty to take affirmative steps to protect another, absent a special relationship.[213] Relying on Section 40 of the Third Restatement of Torts, together with California precedent, the court noted that the common features present in cases that found a special relationship—one party relying on the other for protection and the other party able to control the means of protection—existed in the university-student relationship.[214] University students, the court argued, depend on the college

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[205] *Id.* at 577. The court denied the administrators' motion for summary judgment, which led to the case settling out of court. Marcella Bombardieri, *Parents Strike Settlement with MIT in Death of Daughter*, BOS. GLOBE (Apr. 4, 2006), http://archive.boston.com/news/education/higher/articles/2006/04/04/parents_strike_settlement_with_mit_in_death_of_daughter/.

[206] Lapp, *supra* note 175, at 40–44 (noting that both the *Schieszler* and *Shin* courts misread *Mullins* and confined themselves to an analysis of the foreseeability of harm only).

[207] Dyer, *supra* note 68, at 1393–94 (explaining that using foreseeability as the sole factor in finding a special relationship nullifies the tort doctrine of no affirmative duties).

[208] Lapp, *supra* note 175, at 49–53 (reviewing post-*Shin* cases that have declined to follow its reasoning).

[209] Regents of Univ. of Cal. v. Super. Ct., 413 P.3d 656 (Cal. 2018).

[210] For a detailed account of the events leading to the attack, see *id.* at 660-662.

[211] *Id*. at 662. The lawsuit named the perpetrator of the attack, the Regents of the University of California, and several UCLA employees as defendants, with a single cause of action for negligence against the UCLA defendants.

[212] *Id*. at 662–63.

[213] *Id*. at 663–64.

[214] *Id*. at 664–65.

to provide "structure, guidance, and a safe learning environment," while colleges have the ability to ensure students' safety for activities that they sponsor and facilities that they control.[215] This dynamic of dependence and control led the court to conclude that the university has a special relationship with enrolled students while students were "engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services."[216] This special relationship gives rise to a duty to take reasonable steps to protect students when the university becomes aware of a foreseeable threat to student safety.[217]

A second case, *Nguyen v. Massachusetts Institute of Technology*, looked at the issue of special relationship in the context of student suicide.[218] The student, Han Duy Nguyen, had a history of academic and mental health issues while a graduate student at MIT, which culminated in his suicide.[219] Nguyen's parents sued the school, claiming that MIT breached the duty of care owed to Nguyen, resulting in his death.[220] In assessing the plaintiffs' claims, the Massachusetts Supreme Court noted that the student-university relationship involved a "complex mix of competing considerations," including students' vulnerability, their right to privacy, and their desire for independence, all of which can conflict with their need for protection.[221] The court identified three relevant categories of factors used to delineate duties in tort law: the mutual dependence of the plaintiff and the defendant, the plaintiff's reasonable reliance on the defendant to render aid, and whether the defendant could reasonably foresee that it would be expected to protect the plaintiff.[222] Based on these factors, the court identified a narrow set of circumstances where a special relationship existed with a corresponding duty for the school to take action. Only where a university has "actual knowledge" of a student's suicide attempt or of a student's "stated plans" to commit suicide must the school take "reasonable measures" to protect the student from self-harm.[223] The court construed this as a limited duty, created

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[215] *Id*. at 667–68.

[216] *Id*. at 664–667. Although the RESTATEMENT (THIRD) OF TORTS § 41 imposes a duty based on a special relationship with the person posing risks, the court did not explicitly rely on this provision in its decision. Finding that the university had a special relationship with the victim of the attack, the court concluded that it did not need to decide whether the school had a separate duty to control the behavior of the attacker. *Id.* at 664.

[217] *Id.* at 673–74.

[218] Nguyen v. Mass. Inst. of Tech., 479 Mass. 436 (2018).

[219] For a detailed account of Nguyen's two-year history at MIT, see *id.* at 438–48.

[220] *Id.* at 437. The lawsuit named the Massachusetts Institute of Technology (MIT) and several MIT employees as defendants. *Id.* at 436.

[221] *Id.* at 452.

[222] *Id.* at 452.

[223] *Id.* at 453. The court saw this duty as balancing the competing needs of students with the realistic limits of school personnel, especially those faculty, staff, and administrators with no training or background in mental health. The requirement of actual knowledge of a student's plan to commit suicide relieved "nonclinicians" from the responsibility of attempt to diagnose mental health problems. *Id.* at 457. The court also noted that the burden imposed on the university by the duty was not "insubstantial," but that the school reaped financial benefit from students' tuition, making the duty a reasonable balancing

only by actual knowledge of a student's plan to commit suicide.[224] Citing *Mullins* and *Schieszler*, the court grounded this legal duty in the concept of foreseeability.[225] Thus, previous suicide attempts and/or expressed plans to commit suicide made suicide foreseeable.[226] Further, students' reliance on the university for assistance justified the imposition of this duty on the school.[227]

The *University of California* and *Nguyen* cases are recent enough that no other cases follow or reject their rulings. Assessing their specific influence at this point would be speculation. However, the trajectory of the law is generally moving in the direction of increased liability of universities for harm to students. Disquiet with the bystander philosophy in addition to changing norms and expectations around millennial college students signal pressure on courts to revisit the issue of IHE liability. These two cases can be seen as an indication of judicial willingness to rethink tort law's application to the evolving university-student relationship.

For IHEs, this poses a dilemma, especially as it relates to acquiring information about their students. Both the *University of California* and *Nguyen* decisions relied on the foreseeability of harm to students as the critical factor in creating a duty for universities.[228] Whether or not harm is foreseeable is based on knowledge, specifically what the university knows about the campus environment in general and what it knows about its students.[229] If university liability is based on what it knows, should the school pursue a policy of knowing nothing or knowing everything? A policy of distancing itself from knowledge of its students harkens back to the bystander era, when university-student relationships were at arms-length, at best.[230] This can hardly be good for students. On the other hand, the foreseeability factor may incentivize universities to collect information on students to anticipate and try to prevent those "foreseeable" harms that befall students and for which courts increasingly impose liability. Significantly, much of the information schools may want most comes from unofficial sources such as student social media where students may be more candid than in official communications. MIT student Han Duy Nguyen, for

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of interests. *Id.* at 456–57.

[224] *Id.* at 455, 457 (noting the "limited circumstances" creating the duty and referring to the duty as "limited").

[225] *Id.* at 455.

[226] *Id*.

[227] *Id*. On the facts of the case, the court found that no duty, as it had defined it, existed between MIT and Nguyen. *Id.* at 458.

[228] *Id.* at 455 (stating that the creation of a special relationship and imposition of duty hinges on foreseeability); Regents of the Univ. of Cal. v. Sup. Ct., 413 P.3d 655, 670-71 (Cal. 2018) (calling foreseeability the "most important" factor in creating the duty to protect others).

[229] For example, the California Supreme Court in *Regents of Univ. of Cal.* discussed recent school shootings and school awareness of the potential for campus violence. *Regents of Univ. of Cal*., 413 P.3d at 670–71.

[230] *See supra* notes 69-75 and accompanying text. One commentator has argued that increasing IHE liability incentivizes IHE disengagement with students. Lapp, *supra* note 175, at 33.

example, stated in discussions with school staff and faculty that he wanted to separate his mental health issues from his academic issues, and did not want to discuss his mental health issues.[231] As we saw previously, mortuary science student Amanda Tatro expressed thoughts about her degree program and course work on her Facebook site that she would likely never have expressed directly to university officials.[232] For universities, using foreseeability of harm as the touchstone for imposing liability may incentivize attempts to intrude into student communications not directly related to university programs or activities.

2. Title IX

The obligations that Title IX of the 1964 Civil Rights Act[233] places on IHEs is yet another area where universities find themselves without clear direction regarding their duties to ensure student safety. Not only do the courts apply different Title IX standards and legal obligations, depending upon the jurisdiction, but the duties imposed upon universities have been vague and implemented inconsistently across the country.[234] They also change, sometimes dramatically, when a new administration takes office.[235]

Title IX of the 1964 Civil Rights Act mandates that institutions receiving federal funds cannot discriminate on the basis of sex.[236] Over the years it has been interpreted broadly to prevent not only gender discrimination in athletics, but it also now applies to protect any student or employee from gender discrimination,[237] which encompasses sexual harassment and sexual

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[231] For example, Nguyen repeatedly declined to use the mental health services provided by MIT due to embarrassment over his depression and stated that he wanted to separate the fact of his depression from his academic struggles. Nguyen v. Mass. Inst. of Tech., 479 Mass. 436, 438-41 (2018).

[232] *See supra* notes 117-124 and accompanying text for discussion of *Tatro*.

[233] 20 U.S.C. § 1681 *et seq* (2016).

[234] Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct,* 52 TULSA L. REV. 121, 123 [hereinafter Pappas, *Dear Colleague*] ("In the very best light, university compliance with Title IX was highly inconsistent and largely ineffective during [2011-2014].").

[235] *See* Mann, *supra* note 144, at 632-33. ("In recent years, Title IX has become increasingly politicized, with enforcement largely dependent upon who is in power in the Executive Branch. Schools are caught in the middle of this politicization, as the requirements on them shift from administration to administration.").

[236] 20 U.S.C. § 1681(a) (2016) ("No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."). Almost all colleges and universities receive federal funding and thus are subject to Title IX. J. Brad Reich, *When Is Due Process Due?: Title IX, "The State," and Public College and University Sexual Violence Procedures*, 11 CHARLESTON L. REV. 1, 7 (2017).

[237] REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, U.S. DEP'T EDUC. OFFICE OF CIVIL RIGHTS (Jan. 2001) https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. *See also* Brian A. Pappas, *Out from the Shadows: Title IX, University Ombuds, and the Reporting of Campus Sexual Misconduct,* 94 DENV. L. REV. 71, 75 (2016) [hereinafter Pappas, *Out from the Shadows*]; Mann, *supra* note 144, at 641.

violence.[238]

The Office of Civil Rights (OCR), a division of the Department of Education (DOE), enforces Title IX.[239] A student who alleges a violation of Title IX has two available remedies: filing a claim with the IHE, which is then obligated to conduct an investigation, or bringing a private right of action against the IHE.[240] All schools covered by Title IX are required to take action to prevent sexual discrimination and harassment and to act when complaints are received.[241] Generally, an IHE must act "when it has actual or constructive notice (that is whether it knew or should have known) of potential sex discrimination. Once it is on notice the education institution has a duty to respond, which includes, but is not limited to, investigation and adjudication of the sex discrimination."[242]

Before 2011, the legal standards for IHE compliance with Title IX were unclear.[243] In 2011, the OCR issued the renowned "Dear Colleague Letter" that clarified the standards, offered detailed guidance, and imposed additional obligations on universities for Title IX compliance.[244] Additionally, the OCR increased the number of Title IX compliance investigations and began publicizing IHEs under investigation and publishing settlement agreements that had been previously kept confidential.[245] As a result, IHEs—which were reportedly reluctant to draw attention to the problem of sexual assault to avoid the negative publicity and possible enrollment declines—began to change their policies regarding prevention and discipline in sexual assault cases.[246] The "[i]ncreased attention to sexual misconduct has also led to a proliferation of complaints

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[238] Pappas, *Out from the Shadows*, *supra* note 237, at 75.

[239] U.S. Dep't Educ., Title IX and Sex Discrimination, http://www2.ed.gov/print/about/offices/list/ocr/docs/tix_dis.html (last revised April, 2015).

[240] Pappas, *Out from the Shadows*, *supra* note 237, at 77-78.

[241] REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, U.S. DEP'T EDUC. OFFICE OF CIVIL RIGHTS (Jan. 2001) https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. *See also* Drew Barnhart, Comment, *The Office of Civil Rights' Failing Grade: In the Absence of Adequate Title IX Training, Biased Hearing Panels and Title IX Coordinators have Harmed both Accusers and Accuseds in Campus Sexual Assault Investigations,* 85 UMKC L. REV. 981, 985 (2017).

[242] Mann, *supra* note 144, at 639.

[243] Pappas, *Out from the Shadows*, *supra* note 237, at 77.

[244] *Id.* at 76, 78 ("The Dear Colleague Letter issued on April 4, 2011 dramatically shifted the interpretation of Title IX enforcement by prescribing the knowledge and evidentiary standards for handling sexual misconduct disputes and by requiring universities to address student-to-student sexual misconduct on or off campus. . .. In concert with the new law, federal administrators are making it clear that preventing and handling campus sexual assaults must be a university priority.") (footnotes omitted); Barnhart, *supra* note 241, at 985.

[245] Mann, *supra* note 144, at 643-44.

[246] *Id.* at 644 ("In response to OCR's pressure between 2011 and 2016 to come into Title IX compliance per its definitions, many educational institutions changed both their sexual assault policies and their disciplinary systems.").

and lawsuits."[247]

IHE enforcement of Title IX has been highly criticized from a variety of angles. One of the most prevalent critiques is that universities have failed to provide adequate due process to alleged perpetrators in conducting investigations.[248] Others argue, on the other hand, that universities have opted to remain intentionally unaware of campus assaults,[249] do little to nothing when complaints are filed,[250] or that they resolve investigations in favor of the accused far too often, leaving victims (who are often female) without adequate recourse.[251] Moreover, although the 2011 Dear Colleague letter reiterated that IHEs were obligated to hire Title IX coordinators,[252]

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[247] Pappas, *Out from the Shadows*, *supra* note 237, at 79; Mann, *supra* note 144, at 635 ("In the midst of these shifting debates, educational institutions are facing legal challenges from complainants and respondents in courts and through OCR complaints.") (footnotes omitted).

[248] *See, e.g.,* Reich, *supra* note 236; Mann, *supra* note 144, at 662 ("Procedural due process has been a central rallying cry for those dissatisfied with the protections offered to respondents in current sexual assault disciplinary processes."); Brian A. Pappas, *Abuse of Freedom: Balancing Quality and Efficiency in Faculty Title IX Processes,* 67 J. OF LEG. EDUC. 802, 807 (2018) ("[T]he added compliance requirements [of the Dear Colleague Letter] resulted in a dramatic expansion of university Title IX efforts and shifted the focus to developing systems and processes for student-to-student cases. University processes were met with complaints that student perpetrators were being denied fundamental due-process rights."); Barnhart, *supra* note 241, at 991 (arguing that OCR guidelines focus on the rights of the accuser rather than the accused by, among other things, not requiring accusers to be present at the hearing or being subject to cross-examination by the accused).

[249] *See, e.g.,* Nancy Chi Cantalupo, *Burying our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence,* 43 LOY. U. CHI. L.J. 205, 220 (2011) ("[S]chools have incentives not only to remain unaware of the general problem and specific instances of campus peer sexual violence, but also to actively avoid knowledge about both."); Brian Bardwell, Comment, *No One Is an Inappropriate Person: The Mistaken Application of* Gebser*'s "Appropriate Person" Test to Title IX Peer-Harassment Cases*, 68 CASE WESTERN RES. L. REV. 1343, 1359 (2018) ("A separate review of records from the Department of Education's Office of Civil Rights, which is responsible for enforcing Title IX, reached similar conclusions, finding that actual and perceived failures to take sexual harassment seriously were a recurring theme among noncompliant schools, with schools tacitly and sometimes explicitly discouraging victims from triggering investigations.").

[250] Scott Jaschik, *Court Revives Lawsuit over Online Threats Made to Feminist Students at U of Mary Washington*, INSIDE HIGHER ED. (Dec. 20, 2018), https://www.insidehighered.com/news/2018/12/20/court-revives-lawsuit-over-online-threats-made-feminist-students-u-mary-washington.

[251] *See* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education,* 125 YALE L.J. 2038, 2104 (2016) ("The pattern repeatedly encountered by survivors of sexual violation in school is that educational institutions side with sexual abusers and the law sides with the institutions."); *But see* Pappas, *Out from the Shadows, supra* note 237, at 97 ("By contrast, universities have a strong interest in vigorously investigating these cases and carrying out discipline when it is merited. This interest serves the value of setting clear norms, punishing bad actors, and deterring future misconduct. Each university holds an interest in protecting the broader university community from sexual misconduct. That interest also serves the value of protecting the university from liability for failing to do enough to stamp out misconduct. In pursuit of these goals, a university will often want to investigate and discipline even if the complainant does not. Reconciling these tensions is difficult.").

[252] Pappas, *Out from the Shadows, supra* note 237, at 77; Pappas, *Dear Colleague*, *supra* note 234, at 126 ("[F]ederal funding recipients are required to 'designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX], including any investigation of

their approaches varied widely from campus to campus.[253]

After the 2016 election, the OCR, under new leadership, revoked the 2011 Dear Colleague Letter, claiming that it "lacked basic elements of due process and failed to ensure fundamental fairness."[254] However, even assuming that the new administration will further reduce federal enforcement of Title IX,[255] IHEs still reside in a complex, murky legal area regarding their obligations to enforce Title IX in a way that respects the rights of all involved and ensures student safety. "The difficulty of the dilemma is compounded by the fact that universities are increasingly expected to change the culture and norms shaping campus sexual misconduct so as to reduce the extent of the problem."[256]

IV. STUDENT PASSWORD STATUTES AND THE BALANCE BETWEEN IHE-STUDENT INTERESTS

Part III of this article surveyed the key tensions between IHEs and their students. It identified the struggles of federal and state judiciaries in setting and defining the boundaries of the university-student relationship around major issues. Review of relevant cases and literature demonstrates a general state of discontent with the results of these lawsuits, especially as to the potential to infringe on students' constitutional rights. This discontent raises the question of whether the existing state student password legislation provides a better balance of IHE-student interests. In theory, statutes that prohibit IHEs from accessing private student information, to avoid a chilling impact on speech, might seem to strike a fair balance. Practically, however, this may not be the case. Even the best of the state password statutes contain significant deficiencies. They also do not recognize the complexity of the student-IHE relationship.

Two key gaps in most of the statutes would make it relatively easy for IHEs to circumvent the prohibitions and access student social media. At the most basic level, the statutes fail to deter university attempts to gain student social media passwords because most have no enforcement provisions or

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any complaint communicated to such recipient alleging its noncompliance with [Title IX] or alleging any actions which would be prohibited by [Title IX].' " (quoting 34 C.F.R. § 106.8(a) (1972)).

[253] Pappas, *Dear Colleague*, *supra* note 234, at 163–64 ("In the aftermath of the 2011 Dear Colleague Letter, compliance with Title IX remains, at best, inconsistent. Evidence indicates Title IX Coordinators between 2011 and 2014 did not consistently comply with requirements requiring mandatory reporting, did not consistently provide notice to respondents, and often departed from the investigation, documentation, and reporting requirements.").

[254] Press Release, *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP'T OF EDUC. (Sept. 22, 2017) https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

[255] Pappas, *Out from the Shadows, supra* note 237, at 80 ("With the election of Donald Trump, federal oversight of how colleges and universities handle sexual assault will likely subside or disappear. The Republican Platform notes that sexual assault should be 'investigated by civil authorities and prosecuted in a courtroom, not a faculty lounge.'").

[256] *Id.*

penalties.[257] This lack of enforcement unbalances the risk assessment as IHEs contemplate the use of student social media to reduce their liability exposure across a variety of terrains. For example, as states increasingly base IHE tort liability on the concept of foreseeability of student conduct, universities may be tempted to gather information on students' thoughts and emotions regarding harming themselves or others. Having information on students facilitates IHE intervention to limit exposure to liability, but it could also incentivize colleges to intrude into private student social media. Weighing the risk of lawsuits against the risk of violating a statute with no penalty, universities may act to protect themselves rather than their students' privacy. Without adequate enforcement mechanisms and penalties, the statutes essentially become paper tigers: mechanisms that seem to prohibit specific conduct but are ineffectual in actually changing behavior.

An additional issue is whether the statutes may be invoked as an affirmative defense in a lawsuit against a college for failing to "foresee" harm to a student that results in either suicide or an attack.[258] Could a university essentially claim that this type of harm may not have been foreseeable because a password statute prohibited its ability to access important information about the student? For information that is in the public areas of a student's social media, a password statute should not alter the assessment of foreseeability or the IHE's liability position. Public information is available to anyone, including the college, and could be, therefore, incorporated into a foreseeability determination. However, restricted access to information on a social media site (such as a portion of the site that requires a password or other permission from the content's author to access it) presents different issues. A key variable is the extent to which universities will be expected to monitor student social media activity as part of anticipating harm to students. If a student is using campus mental health services, for example, is the university on notice that it may be liable for violent conduct perpetrated by the student or for a suicide attempt? Will colleges then want to monitor student social media activity to more closely gauge the potential for the student to harm themselves or others? This cascading foreseeability could result in IHEs pressuring students to turn over social media passwords to allow for enhanced monitoring. In this situation, relevant student password legislation may prevent university intrusion into social media if the student refuses to turn over their password. In those states without such legislation, students most in need of university support—those struggling with mental health issues—may find themselves the target of pressure to allow the institution access to private social media content.[259]

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[257] *See supra* note 57 and accompanying text.

[258] *See supra* notes 209–32 and accompanying text.

[259] Several legislatures apparently considered at least some of these issues as they drafted their statutes. For example, some statutes specifically provide that IHE's have no obligation to search or monitor internet use. *See, e.g.,* Utah Code Ann. § 53B-25-203(1) (West, Westlaw through 2019 Gen.

Second, many of the statutes suffer from vague drafting and inadequate definitions. For example, what specific internet sites and tools are covered? What is "social media" or a "social networking site" and what is not?[260] The statutes also differ as to their prohibited acts. What exactly is it that IHEs can and cannot do?[261] Do the prohibited acts capture all behaviors necessary to protect student rights? Last, are the statutory exceptions/exemptions drafted so broadly as to swallow the rule? For example, some of the statutes permit schools to require student passwords where the IHE is investigating student "misconduct."[262] At what point does misconduct contemplate the potential to cause harm to others? This point is important because, arguably, the university might invoke the special needs doctrine to justify intrusion into student social media where the school claims there is potential for harm to other students.[263] Moreover, if the definition of misconduct ignores adequate due process, this exception could permit IHEs to infringe speech or privacy rights without appropriate protections.[264] This possibility is especially troubling, given that due process protection for students can be rudimentary and that courts defer to university decisions on appropriate due process protections for students.[265]

A second major issue with the legislation is that it does not reflect the complexity of the IHE-student relationship. This relationship is characterized by different and competing interests between schools and students. There is also an additional layer of complexity in the interrelationships among students' rights and harms, critical areas where rights and harms overlap and come into conflict. For example, protecting students from sexual discrimination and violence, as Title IX obligates IHEs

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Sess.); Mich. Comp. Laws Ann. § 37.277(1) (West, Westlaw through P.A. 2019, No. 95, of the 2019 Reg. Sess.). On the other hand, some of these same statutes also limit institutions from liability for failure to ask for access to students' personal internet accounts (even though elsewhere the statute expressly prohibits them from doing so). *See, e.g.,* La. Rev. Stat. 51:1951 (West, Westlaw through the 2019 Reg. Sess.); Utah Code Ann. § 53B-25-203(2) (West, Westlaw through 2019 Gen. Sess.).

[260] *See supra* notes 39–42 and accompanying text for varying uses of the term "social media" in state statutes.

[261] *See supra* notes 43–51 and accompanying text.

[262] *See supra* note 54 and accompanying text.

[263] *See supra* notes 146–52 and accompanying text.

[264] For example, the Oregon statute contains some minimal protection against a college engaging in an unwarranted search of a student's social media by requiring that a misconduct investigation seeking to access student social media may do so only "on the receipt of specific information about activity associated with a personal social media account." OR. REV. STAT. ANN. § 350.272(2)(a) (West, Westlaw through 2018 Reg. Sess. and 2018 Special Sess.). The California statute contains no such protection for students. *See* CAL. EDUC. CODE § 99121(c)(1) (West, Westlaw through Ch. 860 of the 2019 Reg. Sess.) (providing that the statute "shall not…[a]ffect a public or private postsecondary education institution's existing rights and obligations to… investigate alleged student misconduct or violations of applicable laws and regulations").

[265] *See supra* notes 139–44 and accompanying text.

to do, may implicate speech rights.[266] Students may claim they are being harassed through social media by fellow students and urge the university to take action, as did students at the University of Mary Washington when male students launched a harassment campaign against members of a student feminist organization.[267] The university was reluctant to take action against the alleged perpetrators, citing its fear that doing so would violate their First Amendment right to free speech.[268] While the university did eventually act against the perpetrators, the feminist group considered its response too little, too late and ultimately brought a Title IX administrative complaint against the school,[269] which the university is now defending.[270] Conversely, an IHE may assert a legitimate interest in protecting a female student who alleges that she is being harassed by a fellow student via social media. But the alleged perpetrator may claim that the school is chilling constitutionally protected speech by requiring access to his social media accounts. Taking action against students also often has significant due process implications, as many commentators have addressed.[271]

IHEs' interest in their curriculum and degree programs also has implications for student speech. Courts have upheld university decisions to discipline students who object to or complain about assignments, or who otherwise vent about their courses.[272] Most courts have held that this speech

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[266] Susan DuMont, *Campus Safety v. Freedom of Speech: An Evaluation of University Responses to Problematic Speech on Anonymous Social Media*, 11 J. BUS. & TECH. L. 239, 243–45 (2016) (discussing the intersection of free speech and Title IX); A.J. Bolan, Note, *Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault*, 86 GEO. WASH. L. REV. 805, 837–38 (2018) (discussing academic and compelled speech concerns around proposed revisions to Title IX).

[267] Jaschik, *supra* note 26.

[268] Administrative Complaint at ¶¶ 59–60, Feminists United on Campus et al., v. Univ. of Mary Wash., U.S. Dep't of Educ., Office of Civil Rights, https://www.kmblegal.com/wp-content/uploads/2015/05/Complaint-Press-Feminists-United-et-al-v.-University-of-Mary-Washington.pdf.

[269] The Administrative Complaint alleged that the university's failure to take adequate action against the alleged perpetrators constituted a violation of its obligations under Title IX. *Id.* at ¶ 88.

[270] The University of Mary Washington brought a motion to dismiss the complaint, based primarily on its argument that it had limited control over the social media sites the perpetrators used and, therefore, the school's inaction did not constitute a violation of Title IX. Feminist Majority Found. et al. v. Univ. of Mary Wash. et al., 283 F. Supp. 3d 495 (E.D. Va. 2017). The district court agreed with the university and dismissed the complaint. On appeal, the Fourth Circuit Court of Appeals reinstated the plaintiffs' complaint, finding that an insufficient response by the university could constitute illegal sex discrimination under Title IX. Feminist Majority Found. et al. v. Richard Hurley et al., 911 F.3d 674 (4th Cir. 2018).

[271] *See, e.g.*, Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 507–10 (2012) (arguing that the OCR's Dear Colleague letter failed to balance the due process interests inherent in a Title IX complaint). *See also supra* note 248 and accompanying text. The Secretary of Education recently proposed new Title IX rules for colleges that attempt to respond to complaints raised about the lack of due process in prior regulations. Press Release, Betsy DeVos, Secretary, *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, U.S. DEP'T OF EDUC. (Nov. 16, 2018), https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all.

[272] LoMonte, *supra* note 111, at 333–39.

is not protected by *Tinker,* but must be assessed under *Hazelwood* because it is related to pedagogy and/or curriculum.[273] Applying *Hazelwood* results in a legal standard where complaints related to a course are not protected speech and may leave students vulnerable to discipline.[274] As Amanda Tatro discovered, even speech created off-campus on a student's personal Facebook page can lead to discipline if the speech is related to a course or degree program.[275] The potential of the *Hazelwood* standard to have a chilling effect on student speech with any connection, however tenuous, to school activities is clear.

The existing landscape of First Amendment free speech law and Title IX restrictions raise the question of whether state student password legislation can counter the broad reach of *Hazelwood*. For example, would the legislation protect student comments about a specific course posted on the student's Facebook site? This is a question with no simple yes or no answer, largely because Facebook provides a "multitude of privacy options that allow users to select a specific audience for posted content."[276] Facebook information that is not public information[277] may be outside the reach of the college. Student password legislation would apply to this restricted content because it is password protected.[278] To prevent a university from viewing their Facebook comments and potentially acting on them, then, students must tightly manage their privacy settings, limiting comments related to the school or the student's courses to some specific audience that does not include the institution.[279]

It is unclear how courts will interpret the student password statutes in the context of the labyrinth of social media privacy settings. The larger question is the impact of student speech law, and the statute's attempts to protect student speech, on the university-student relationship. Since the password legislation does not protect public information on social media, students maybe loathe to question or criticize their school, courses, or instructors in any public forum. This could drive student criticism

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[273] *Id.* at 336.

[274] *Id.* at 337.

[275] *See supra* notes 117–24 and accompanying text. *See also* Papandrea, *supra* note 77, at 1856 (arguing that courts deciding professionalism cases reason that any speech, regardless of where it is published, can be the basis of disciplinary action by the school).

[276] Park, *supra* note 30, at 796. *See also Facebook – Basic Privacy Settings & Tools,* FACEBOOK HELP CENTER, https://www.facebook.com/help/325807937506242 (last visited Oct. 17, 2019).

[277] *Facebook—Control Who Can See What You Share*, FACEBOOK HELP CENTER, https://www.facebook.com/help/1297502253597210?helpref=about_content (last visited Oct. 17, 2019).

[278] In the employment context, some court decisions support the idea that employees have a privacy interest in information that they have sought to keep private. Park, *supra* note 30, at 800.

[279] The privacy status of posted information is further complicated by those with whom the student may interact in Facebook, including other students or family. Tagging posts, or being tagged by others, can mean that the student loses some control over the audience for the information and its privacy status. *Facebook—Share and Manage Posts on Your Timeline*, FACEBOOK HELP CENTER, https://www.facebook.com/help/1640261589632787/?helpref=hc_fnav (last visited Oct. 17, 2019).

underground to those social media spheres that are password protected. The loss of trust and openness could breed student suspicion of authority, or worse, student acceptance of university intrusion into student social media as the status quo. Further, student reluctance to openly voice questions about university policies or courses undercuts the notion of the university as the marketplace of ideas, a forum where students learn how to be citizens in an open society.[280]

Protecting students from self-harm is complicated by their general right to privacy (which at least one student insisted upon[281]) and also because federal legislation ensures privacy of student information.[282] Similarly, student speech and privacy rights make it difficult to identify potentially violent students and uncover plans to perpetrate violence against the college community.[283] These challenges, each of which raises liability issues, can incentivize IHEs to monitor student social media activity to gain information that could help protect students from harm (and thus avoid possible liability). Such an outcome is somewhat ironic, given that the original purpose of the statutes was to protect student privacy.[284] It seems unlikely that law-makers intended to limit IHEs' ability to protect students from the harm described in Part III, given that the purpose of the statutes to begin with was student protection.

Thus, although the lawmakers who enacted this legislation had noble intentions, this legislation is not robust enough—nor could it be—to fully

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[280] *See supra* notes 85, 92, and 97 and accompanying text.

[281] The student in *Nguyen*, for example, repeatedly stressed to MIT administrators that he was embarrassed by the stigma attached to the use of mental health services and wanted to limit the number of people who knew about his issues. Nguyen v. Mass. Inst. of Tech., 479 Mass. 436, 438–39 (2018). Although receiving mental health treatment outside of MIT, Nguyen refused to allow MIT administrators to discuss his progress with his treatment providers. *Id.* at 440. Similarly, Sanjay Jain hid his struggles at the University of Iowa from his family, communicating to them that everything at college was "awesome" even while on disciplinary probation. Jain *ex rel* Estate of Jain v. State, 617 N.W.2d 293, 295 (Iowa 2000).

[282] For example, the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a federal law that protects the privacy of student education records. Generally, schools must have written permission from the student in order to release any information from a student's education record. *Family Educational Rights and Privacy Act (FERPA),* DEP'T EDUC., https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html (last updated Mar. 1, 2018). IHEs often point to FERPA as prohibiting them from disclosing information about a student, including mental health issues or the potential for self-harm, to anyone without the student's consent. Massie, *supra* note 64, at 647–48. Massie argues that FERPA contains exceptions allowing IHEs to disclose information without student consent, under certain circumstances. *Id.* at 648.

[283] *See supra* Parts II.A.1 and 2.

[284] *See supra* notes 28–35 and accompanying text. *See also* Representative Gary Bies and Representative Melissa Sargent, Wisconsin State Legislature, Wisconsin Assembly Republicans Columns, *Rep. Bies: Protecting Social Media Privacy,* (Sept. 3, 2013) http://legis.wisconsin.gov/assembly/republicans/columns/Pages/bies-social-media.aspx (**"**Another nice thing about the legislation is that it provides clarity. The Wisconsin bill is intended to give 'employers and universities the clarity they need when deciding on a cohesive social media policy. They will now know explicitly what they are allowed to do and what they are not allowed to do under the law.'").

recognize the complexities of the modern university-student relationship. The co-sponsor of Oregon's law identified the need to balance student privacy with the information needs of IHEs as a driver for that state's legislation,[285] while Delaware state representative Darryl M. Scott said he introduced his bill to protect students' First Amendment rights.[286] However laudable these goals, the legislation is unlikely to attain them. State legislative attempts to balance student privacy with IHE information needs is incomplete, given the changing context and expectations between IHEs and students. Our rapidly changing society, including college students and their parents, seems uncertain about the extent to which college students should be treated as adults. This ambivalence makes defining student privacy expectations and rights difficult and will frustrate state attempts to protect them. In addition, state password laws endeavoring to protect student speech rights, when set against the background of First Amendment jurisprudence, are likely to fail. The unmistakable trajectory of that jurisprudence is greater curtailment of student speech rights, which is beginning to reach online speech and social media. These larger forces undercut the legal potential of existing state statutes to protect student social media passwords.

V. CONCLUSION

This article has presented an overview of the complex landscape of IHE-student relationships and investigated state statutes purporting to protect student social media passwords from IHE intrusion. While clearly well-intentioned, the statutes as they exist are not up to the task of balancing the rights and harms inherent in the IHE-student relationship. Neither students nor universities can rely on the statutes. For students, the statutes fail to protect their constitutional rights and minimize potential harm to them. For IHEs, the statutes limit their options to act on their responsibilities to students. Universities' inability to access student social media accounts may limit its liability insofar as the school could not foresee a specific harm because it could not monitor student social media. However, this argument has not been tested and we do not know how courts will interpret the impact of student password statutes on schools' conduct. Generally, the trajectory of the law is to increase IHE liability for foreseeable harm; whether the statutes limit this liability remains to be seen.

Some of the statutes' failings can be attributed to issues of statutory drafting and lack of clarity. However, the fundamental problem is that society asks much of IHEs and, at the same time, is not sure exactly what it wants IHEs to do. On one hand, students clearly expect to rely upon the constitutional rights that the rest of society enjoys. On the other hand, many

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[285] *State Senate Passes Bill, supra* note 13.

[286] Hudson, *supra* note 14.

students lack the ability of fully functioning adults to protect themselves from harm. The law thus far has failed to adequately address this tension. This uncertainty as to what the student-IHE relationship should be leads to *ex post facto* imposition of liability on IHEs and inadequate protection of students.

APPENDIX: STUDENT PASSWORD PRIVACYLEGISLATION (AS OF JULY 11, 2019)						
State	*Applicable Parties*	*Online Accounts or Devices*	*Prohibited Acts*	*Exceptions / Exemptions*	*Enforcement Provisions and Penalties*	*Miscellaneous Provisions*
ENACTED STATUTES						
Arkansas ARK. CODE ANN. § 6-60-104 (West, Westlaw through 2019 Reg. Sess.)	• Current and prospective students • Institution of higher education	• Social media account • Names specific social networking sites	• Shall not "require, request, suggest, or cause" • Prohibits "as a condition of acceptance in curricular or extracurricular activities to add "an employee or volunteer of the institution" to a contact list	• Institution of higher education may search for information in the public domain • Does not prevent an institution of higher education from complying with the "requirements of federal or state laws, rules, or regulations"	(no penalty or enforcement provision)	
California CAL. EDUC. CODE §§ 99120–99122 (West, Westlaw through Ch. 860 of 2019 Legis. Sess.)	• Public and private postsecondary educational institutions, and their employees and representatives • Student, prospective student, or student group	• Social media	• Shall not "require or request" • Prohibits shoulder surfing • Prohibits retaliation	• Allows for investigations into "alleged student misconduct" or violation of the law • Allows for "adverse action . . . "for any lawful reason"	(no penalty or enforcement provision)	• Requires institution to post its social media policy on the institution's website
Delaware DEL. CODE ANN. tit. 14, §§ 8101–05 (West, Westlaw through 2019–2020 Gen. Assembly)	• Academic institution • Applicant • Student	• Electronic communications device • Social networking site	• Shall not "request or require" disclosure of password information • Shall not "require or request access via shoulder surfing • Prohibits monitoring or tracking a device via software installation or remote tracking • Prohibits requiring student or applicant to add employer or representative to contact list • Prohibits indirect access through other contacts • Prohibits retaliation	• Two "Health and Safety" exceptions: • Investigation into "reasonable articulable suspicion of criminal activity • Investigation or inquiry into threat assessment policy	(no penalty or enforcement provision)	• Statute is titled "Education Privacy Act"

State	*Applicable Parties*	*Online Accounts or Devices*	*Prohibited Acts*	*Exceptions / Exemptions*	*Enforcement Provisions and Penalties*	*Miscellaneous Provisions*
Illinois 105 ILL. COMP. STAT. ANN. 75/1-20 (West, Westlaw through P.A. 101-258)	• Elementary or secondary school • Post-secondary school • Student, parent or guardian	• Social networking website	• Post-secondary schools (only) shall not "request or require" password or other information to gain access • Prohibits shoulder surfing (again, post-secondary only)	• Post-secondary schools may: • maintain school policies related to the Internet and electronic equipment; • monitor school equipment and email; • search for information in the public domain; and • investigate and require a student's cooperation if "specific information" indicates potential violations of disciplinary rules have occurred • Elementary or secondary schools subject to just one provision • must give notice; • may ask for information if "specific information" indicates that school policy has been violated; and • must provide notice of the policy beforehand	• Guilty of a "petty offense" (post-secondary institutions only)	• Statute is titled "Right to Privacy in the School Setting Act"
Louisiana LA. STAT. ANN. §§ 51:1951-1955 (West, Westlaw through the 2019 Reg. Sess.)	• "Educational institution" • Student or prospective student	• "Electronic communications device" • "Personal online account"	• Shall not: • "request or require" password or disclosure; • "expel, discipline, or otherwise penalize	• May ask for access to: • an electronic communications device paid for by the institution; or • An account or service provided by the institution because a student is admitted or used for educational purposes • May view information that can be obtained without violating other provisions of the statute or in the public domain • May restrict access to certain websites while using a device or network owned by the institution	(no penalty or enforcement provision)	• Statute is titled "Personal Online Account Privacy Protection Act" • Law does not create a duty to search or monitor student Internet use; institution will not be liable for failure to do so

State	*Applicable Parties*	*Online Accounts or Devices*	*Prohibited Acts*	*Exceptions / Exemptions*	*Enforcement Provisions and Penalties*	*Miscellaneous Provisions*
Maryland MD. CODE ANN., EDUC. § 26-401 (West, Westlaw through 2019 Reg. Sess.)	• Institution of postsecondary education • Student	• Access information • Personal electronic account	• May not request or require • Prohibits requiring student or applicant to add employer or representative to contact list • Prohibits IHE from asking for changes to privacy settings • Prohibits retaliation and refusal to admit student	• Accounts owned or provided by the institution not included in definition of "personal electronic account" • May ask for access to accounts IHE provides • May view information that can be obtained without violating other provisions of the statute or in the public domain	• Civil action – injunctive relief and up to $1000 in damages	• Law does not create a duty to search or monitor student Internet use
Michigan MICH. COMP. LAWS ANN. §§ 37.271-278 (West, Westlaw through P.A. 2019, No. 95 of 2019 Reg. Sess.)	• Educational institution • Student or prospective student	• Personal internet account	• Shall not request • Prohibits shoulder surfing • Prohibits retaliation	• May ask for access to: • an electronic communications device paid for by the institution; or • An account or service provided by the institution because a student is admitted or used for educational purposes • May search for information in the public domain	• Criminal penalty – misdemeanor ($1000 fine) • Civil action - $1000 in damages	• Statute created new act – "Internet Privacy Protection Act" • Law does not create a duty to search or monitor student Internet use; institution will not be liable for failure to do so
New Hampshire N.H. REV. STAT. § 189:70 (West, Westlaw through Ch. 345 of 2019 Reg. Sess.)	• Educational institution • Student or prospective student	• Personal social media account	• Require or request • Prohibits shoulder surfing • Prohibits requiring student or applicant to add employer or representative to contact list • Prohibits retaliation and refusal to admit student	• May conduct investigation into student misconduct • May ask minor's parents for access • May monitor use of IHE computer network • May request a student to voluntarily share info		

State	*Applicable Parties*	*Online Accounts or Devices*	*Prohibited Acts*	*Exceptions / Exemptions*	*Enforcement Provisions and Penalties*	*Miscellaneous Provisions*
New Jersey N.J. STAT. ANN. § 18A:3-30 (West, Westlaw through L.2019, c.266 and J.R. No. 22)	• Public or private institutions of higher education • Students • Applicants	• Social networking website	• Shall not require • Prohibits institution from inquiring about existence of social media account • Prohibits retaliation	(no exceptions or exemptions)	• Civil remedy • Applicants entitled to injunctive relief, compensatory and consequential damages ("taking into consideration any failure to admit the applicant in connection with the violation; • Current or former student entitled to injunctive relief, compensatory and consequential damages	• Prohibits employers from asking employee or applicant for a waiver of the provisions of the statute
New Mexico N.M. STAT. ANN. § 21-1-46 (West, Westlaw through First Reg. Sess. of 2019)	• Public or private institutions of post-secondary education • Students • Applicants or potential applicants	• Social networking website	• Shall not "request or require" • Prohibits shoulder surfing • Prohibits retaliation	• Institution may search for information in the public domain	(no penalty or enforcement provision)	
Oregon OR. REV. STAT. ANN. § 350.272 (West, Westlaw through 2018 Reg. Sess. and 2018 Spec. Sess.)	• Public or private educational institution • Students or prospective students	• Social media	• Shall not "require or request or otherwise compel" • Prohibits shoulder surfing • Prohibits retaliation	• May investigate compliance with laws or policies that prohibit misconduct "upon receipt of specific information" but only through sharing of content, not required password information • Institution may revoke a student's access to institutional equipment or computer networks • Statute does not apply to accounts used solely for educational purposes or to social media accounts that the institution provides, so long as student has advance notice of monitoring	(no penalty or enforcement provision)	• Institution not liable for obtaining access to student's account by way of enforcing a policy regarding the use of university equipment, so long as the student gives consent

State	*Applicable Parties*	*Online Accounts or Devices*	*Prohibited Acts*	*Exceptions / Exemptions*	*Enforcement Provisions and Penalties*	*Miscellaneous Provisions*
Rhode Island 16 R.I. GEN. LAWS ANN. §§ 16-103-1 – 16-103-6 (West, Westlaw through Ch. 310 of the 2019 Reg. Sess.)	• Students and applicants • Educational Institution or school	• Social media account	• Shall not "require, coerce, or request" • Prohibits shoulder surfing • Prohibits requests to divulge • Prohibits requests for access to participate in IHE activities • Prohibits retaliation and refusal to admit student	• Statute does not apply to information in the public domain	• Civil remedy, but no specified amount	
Utah UTAH CODE ANN. §§ 53B-25-101 to -301 (West, Westlaw through 2019 Gen. Sess.)	• Postsecondary institution • Students and prospective students	• Personal internet account	• May not request disclosure • Prohibits retaliation	• Allows a request for password info to access: • an electronic communications device paid for by the institution • an account or service provided by the institution because the student was admitted or used for educational purposes • Allows for viewing or access to information available in the public domain	• Civil remedy of $500	• Statute created new act – "Internet Postsecondary Institution Privacy Act" • Law does not create a duty to search or monitor Internet use; institution will not be liable for failure to do so
Virginia VA. CODE ANN. § 23.1-405 (West, Westlaw through End of the 2019 Reg. Sess.)	• Students and applicants • Public and private institutions of higher education	• Social media account	• May not require	• Statute does not prevent campus police from performing official duties	(no penalty or enforcement provision)	

State	*Applicable Parties*	*Online Accounts or Devices*	*Prohibited Acts*	*Exceptions / Exemptions*	*Enforcement Provisions and Penalties*	*Miscellaneous Provisions*
Wisconsin WIS. STAT. ANN. § 995.55 (West, Westlaw through 2019 Act 5)	• Students and prospective students • Educational institutions	• Access information • Personal internet account	• May not request or require • Prohibits retaliation and refusal to admit student	• Allows a request for password info to access to an electronic communications device paid for by the institution • Allows for viewing or access to information available in the public domain	• Any "person" who violates the act may "forfeit" no more than $1000	• Law does not create a duty to search or monitor Internet use; institution will not be liable for failure to do so