
GIVE ME YOUR PASSWORD: THE INTRUSIVE SOCIAL MEDIA POLICIES IN OUR SCHOOLS

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I. INTRODUCTION

In early 2011, a twelve-year-old middle school student in Minnesota was disciplined due to three postings on her Facebook wall.¹ In the first posting, the student expressed her dislike for an employee at the middle school;² in the second, the student expressed her interest in discovering the identity of the person who “told on her” for writing the first posting; in the third, the student engaged in a conversation with a male student about “sexual topics”.³ The student made each Facebook posting outside of school hours and from her home.⁴ School officials confirmed this information in a disturbing manner by threatening the student with disciplinary action unless she provided them with her usernames and passwords for her email and Facebook accounts.⁵

“Forced Consent”⁶ social media policies of schools and universities

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¹ R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1132–33 (D. Minn. 2012).

² *Id.* at 1133.

³ *Id.* at 1133-34 (internal quotation marks omitted) (More specifically, the student wrote, “I want to know who the f&#\$ [sic] told on me.”).

⁴ *Id.* at 1133.

⁵ *Id.* at 1133-34 (School officials initially received the information regarding the first two posts from a tip. Then, school officials learned of the third posting from the guardian of the male student engaged in the online conversation with R.S. and subsequently confirmed the information by demanding the student’s Facebook password.)

⁶ “Forced Consent,” as used in this Comment, originates from an article discussing how the California Supreme Court’s review of a lower court forced a juror to consent to allowing his Facebook postings to be disclosed to the parties to the case. See Cindy Cohn & John Eisenberg, *EFF Asks Supreme Court to Reverse “Forced Consent” to Facebook Dis-*

have required students to give officials access to students' personal social media accounts.⁷ In some instances, school officials require students to obey a school administrator's demand for access to social media accounts to investigate an allegation of misconduct.⁸ In other instances, application of these policies is not triggered by actual misconduct, but by the school's eagerness to maintain a positive reputation regarding the character and conduct of its students.⁹ Secondary and postsecondary educational institutions' use of these practices raises significant legal questions,¹⁰ as the practices conflict with a person's fundamental rights to privacy and freedom of expression.¹¹ Privacy rights trace their roots to the common law principle "that the individual shall have full protection in person and in property."¹² Over time, the scope of this principle broadened, developing into the right to be left alone, and the term "property" grew to comprise both tangible and intangible forms of posses-

closure, EFF (Jul. 31, 2012), available at <http://commens.org/1bTfSYH>. According to the Supreme Court's ruling in *Schneckloth v. Bustamonte*, consent under Fourth Amendment jurisprudence must be voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). Thus, consent is involuntary when it the product of "duress or coercion, expressed or implied." *Id.*; see, e.g., Lysander Spooner, *Forced Consent* (1873) (discussing the problems of an American government that forces its citizens to support it, rather than to do so voluntarily) ("The idea that, although government should rest on the consent of the governed, yet so much force may nevertheless be employed as may be necessary to produce that consent, embodies everything that was ever exhibited in the shape of usurpation and tyranny in any country on earth.").

⁷ See also David L. Hudson, Jr., *Site Unseen: Schools, Bosses Barred from Eyeing Students', Workers' Social Media*, A.B.A. J. 22 (Nov. 2012) (noting that both schools and "[m]any universities require students to let officials access their social media, and in some cases impel students to install spying software. Some colleges force their student-athletes to consent to the monitoring of their" social media accounts); see, e.g., *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1128 (discussing how school officials forced a student to log-in to her social media account so they could monitor the account).

⁸ Hudson, Jr., *supra* note 7, at 22. Indeed, this was the case with the twelve-year-old student, where school officials sought her username and password after the officials learned of her Facebook posts. *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1134.

⁹ See Kellie Woodhouse, *University of Michigan Athletes Sign Social Media Policy in Bid to Avoid Controversy As Twitter Incidents Multiply*, THE ANN ARBOR NEWS (Oct. 29, 2012, 5:47 AM), <http://commens.org/1gFcCYA> (discussing comments from University of Michigan's football coach on how the school wants its players to represent the program); see also Bob Sullivan, *Govt. Agencies, Colleges Demand Applicants' Facebook Passwords*, NBC NEWS (Mar. 6, 2012), available at <http://commens.org/1fA5JVf> (observing that colleges have begun to request applicants' social media log-in information during interviews).

¹⁰ See Hudson, Jr., *supra* note 7, at 22 ("There are multiple incidents around the country where schools are invading the social media privacy rights of K-12 students.").

¹¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 333-34 (1985) (holding that students have the right to be free from unreasonable searches and seizures); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969) (recognizing students' fundamental right to freedom of expression).

¹² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

sion.¹³ Arguably, a person's privacy rights now encompass his or her right to control access to personal social media accounts.¹⁴ Notably, a person's right of free expression originates from the United States Constitution and has developed to "allow free trade in ideas."¹⁵

In today's society, social media plays an integral role in our everyday lives—from emails between friends to social network postings that detail the activities of someone's day.¹⁶ A few types of social networks that are popular among students, both in secondary and postsecondary education, are Facebook,¹⁷ Twitter,¹⁸ and Instagram.¹⁹ Social network sites have privacy policies and terms and conditions for users, giving them the "the ability to control how their information is shared."²⁰ However, the degree of privacy each of these social networks recognizes varies depending on the networks' privacy policies.²¹

In general, courts will uphold "forced consent" policies over the student's reasonable expectation of privacy when the school's teachers and administrators have a substantial interest "*in maintaining discipline in the classroom and on school grounds.*"²² Supporters of forced consent policies argue that the policies help monitor criminal and other types of conduct that negatively reflect the educational institution.²³ On the other hand, opponents of these administrative practices argue that these policies violate students' privacy rights.²⁴ These

¹³ *Id.*

¹⁴ Connie Davis Powell, *Privacy for Social Networking*, 34 U. ARK. LITTLE ROCK L. REV. 689, 692 (2012).

¹⁵ Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 1017 (2008) (internal quotations omitted).

¹⁶ Nir Orr, *Modern Social Media and Information Transmission Problems*, iHLS (Dec. 23, 2012), <http://commens.org/1dXfNmh> ("Today's social media has become the playground of nearly every person in the world.").

¹⁷ See AMANDA LENHART ET AL., SOCIAL MEDIA AND MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS, PEW RESEARCH CTR. 3 (Feb. 3, 2010), available at <http://commens.org/MpCF83>.

¹⁸ Jim Edwards, *Facebook is No Longer the Most Popular Social Network For Teens*, BUSINESS INSIDER (Oct. 24, 2013), available at <http://commens.org/1n6G5Z2>.

¹⁹ See MAEVE DUGGAN & JOANNA BRENNER, THE DEMOGRAPHICS OF SOCIAL MEDIA USERS—2012, PEW RESEARCH CTR. 6 (Feb. 14, 2013), available at <http://commens.org/1bTgAoO>.

²⁰ Connie Davis Powell, "*You Already Have Zero Privacy. Get over It!*" *Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146, 165 (2011).

²¹ Powell, *supra* note 20, at 165–67.

²² R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1143 (D. Minn. 2012) (emphasis in original) (internal quotation marks omitted).

²³ Ian Hanner, *Universities Force Student-Athletes to Reveal Their Facebook Passwords*, THE COLLEGE FIX (Mar. 29, 2012), <http://commens.org/1eLlaGd>.

²⁴ Scott G. McNealy, *What Are Privacy Interests? You Already Have Zero Privacy. Get over It*, HEALTH LAW HANDBOOK § 10:5, at 361 (Alice G. Gosfield, ed., 2012) (discussing

“forced consent” policies have been challenged as unreasonable searches that infringe upon a student’s freedom of expression, in violation of the First and Fourth Amendments.²⁵

This Comment argues that social media policies in secondary and postsecondary schools that allow school officials to request or demand students to consent to their social media accounts being accessed or monitored violate the First and Fourth Amendments.²⁶ This Comment also argues that state legislatures in California and Delaware should enact statutes that would ban social media policies in educational institutions that force students to consent to disclosing social network account information.²⁷ Furthermore, this Comment argues that judicial review is necessary to determine the constitutionality of these social media policies.²⁸

Part II focuses on the origins of a person’s right to privacy under the Fourth Amendment and how its interpretation has developed from English common law into the modern view. In addition, Part II will focus on the First Amendment’s freedom of expression history. Part III briefly examines various forms of social networks that are popular amongst students in secondary and postsecondary educational institutions. Part III also examines how these social networks recognize the rights of users in keeping personal information from being involuntarily disclosed to third parties. Part IV of this Comment explores the different types of social media policies forcing students to disclose social network account information that have been reported in secondary and postsecondary schools. Part IV also discusses the consequences of students’ failure to consent to these policies. Part V investigates the modern views from supporters and opponents of social media policies. Part VI discusses how policies that force students to consent to monitoring of their social media accounts are flawed. Part VII suggests that state legislators should enact and amend statutes

the societal values surrounding privacy rights, as well as the work of privacy advocates); Hanner, *supra* note 23.

²⁵ *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1133 (“Plaintiffs argue that the punishment of [the student’s] out-of-school wall postings violated her First Amendment right to free speech . . . [and that] the officials’ . . . search of [the student’s] private Facebook account constituted an unlawful search under the Fourth Amendment.”). Pertinently, the First Amendment to the Constitution holds that, “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The Fourth Amendment states, in pertinent part, that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated.” U.S. CONST. amend. IV. These Amendments apply to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV § 1.

²⁶ See discussion *infra* Part VI.

²⁷ See discussion *infra* Part VII; see also Hudson, Jr., *supra* note 7, at 22; Dina Abou Salem, *California First to Endorse Comprehensive Social Media Privacy Law*, ABC NEWS (Dec. 27, 2012, 3:50 PM), <http://comcnns.org/LFzK1v>.

²⁸ See discussion *infra* Part VII.

to prohibit the monitoring of students by these means. In addition, Part VII suggests that the judicial system should determine whether these forced consent policies are constitutional. Part VIII discusses the importance of uniform legislation and how the proposed amendment to current privacy statutes will provide students with broader protection.

II. THE DEVELOPMENT OF THE RIGHT TO PRIVACY AND FREEDOM OF EXPRESSION

It is important to discuss how the rights to privacy and freedom of expression have developed before analyzing the use of forced consent policies in educational institutions under the First and Fourth Amendments. Although the breadth of a person's rights to privacy and free expression have expanded over time, both rights trace their roots back to common law principles.²⁹

A. Right to Privacy under the Fourth Amendment

The Fourth Amendment provides “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated.”³⁰ One of the key purposes of the Amendment is to protect the privacy of an individual.³¹ The right to privacy originates from the common law principle “that the individual shall have full protection in person and in property.”³² However, scholars have taken note of the necessity to redefine the extent of such protection to meet developing changes in society.³³

In his concurrence in *Katz v. United States*, Justice Harlan articulated a two-pronged test in determining whether a person is protected under the Fourth Amendment from unreasonable searches: (1) that a person has a subjective expectation of privacy; and (2) that the expectation be one that society is prepared to recognize as ‘reasonable.’³⁴ In *United States v. Jones*, the Supreme

²⁹ See Warren & Brandeis, *supra* note 12, at 198 (“The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”); Jay, *supra* note 15, at 783 (“Comparing the current body of First Amendment law, there is a radical difference in outlook regarding freedom of expression between the eighteenth and the late twentieth and early twenty-first centuries.”).

³⁰ U.S. CONST. amend. IV.

³¹ Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 312-13 (2010).

³² Warren & Brandeis, *supra* note 12, at 193.

³³ Powell, *supra* note 14, at 690; Warren & Brandeis, *supra* note 12, at 193 (Warren and Brandeis recognized that “[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”).

³⁴ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Court reaffirmed a statement by Justice Harlan in his concurring opinion in *Katz*: a search is a government intrusion into a constitutionally protected area where one has a reasonable expectation of privacy for the purpose of obtaining information.³⁵ Moreover, the Court held that trespass alone does not equal a search, but it must be conjoined with an attempt to find or to obtain something.³⁶

Furthermore, in *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, the district court interpreted the Supreme Court's holding in *New Jersey v. T.L.O.* as establishing that students "enjoy a Fourth Amendment right to be free from unreasonable searches and seizures by school officials."³⁷ In *T.L.O.*, an assistant vice principal demanded that a student hand her purse to him, after that student had denied smoking in a school restroom.³⁸ Next, the administrator reached into the purse for the cigarettes, noticed rolling papers—which he associated with marijuana use—and, as a result, conducted a thorough search of the purse, revealing drug-related paraphernalia and marijuana.³⁹ Although the Court found that the search of the student's purse for cigarettes by school officials was not unreasonable under the Fourth Amendment,⁴⁰ the Court concluded that the Fourth Amendment's prohibitions extend to searches conducted by public school officials.⁴¹ Further, the *T.L.O.* Court recognized that a "search of a child's person or of a closed purse or other bag carried on her person . . . is undoubtedly a severe violation of subjective expectations of privacy," and the court was willing to recognize such expectations as reasonable.⁴²

B. Freedom of Expression under the First Amendment

The First Amendment of the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech."⁴³ At the time of the First Amendment's enactment, America's legal tradition "was not generous toward the rights of speakers . . . especially not if their words were critical of

³⁵ *United States v. Jones*, 132 S. Ct. 945, 951 (2012).

³⁶ *Id.* at 951 n.5. It should also be noted that, "situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis." *Id.* at 953.

³⁷ *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1141 (D. Minn. 2012).

³⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

³⁹ *Id.*

⁴⁰ *Id.* at 346–47.

⁴¹ *Id.*

⁴² *Id.* at 337–39. The *T.L.O.* Court recognized that students could have legitimate privacy interests in "nondisruptive yet highly personal items such as photographs, letters, and diaries" that they carry in their "purses or wallets." *Id.* at 339.

⁴³ U.S. CONST. amend. I.

the government or its officials.”⁴⁴ More specifically, the First Amendment sought to protect those who voiced their criticism “of the government or its officials.”⁴⁵ However, these protections did not extend to publications of information deemed “improper” or “illegal.”⁴⁶ For instance, English common law did not offer protection for various forms of speech classified as sedition.⁴⁷ This tradition carried over to the United States during its formation and its adoption of the First Amendment, and also included profanity, blasphemy, and speech that “had ‘a bad tendency’ to cause crime.”⁴⁸ As an illustration, “[t]he protection of free speech would not protect a man [in] falsely shouting fire in a theatre and causing panic.”⁴⁹

The First Amendment has been interpreted “to guard the interests of both the speaker in disseminating information and the listener in receiving it.”⁵⁰ It also prevents the government from prohibiting speech or expressive conduct despite disapproval of the expressed ideas.⁵¹ The Supreme Court has recognized the importance of freedom of expression as it “may contribute to society’s edification.”⁵² Moreover, the Court has held that the “right to receive information and ideas, regardless of their social worth is fundamental to our free society.”⁵³ This protection has also been extended to public educational institutions in that school officials cannot have absolute control over these fundamental rights of students.⁵⁴ For example, as long as a student’s ideas and expressions do not substantially or materially interfere with school activities or the rights of others, those ideas and expressions are protected under the First Amendment.⁵⁵

⁴⁴ See Jay, *supra* note 15, at 783.

⁴⁵ *Id.*

⁴⁶ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151-52; see also Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 13 (2011) (noting that “in colonial-era American law . . . largely accepted [Blackstone’s] view of the power to punish expression thought to be harmful.”).

⁴⁷ Jay, *supra* note 15, at 783.

⁴⁸ *Id.* at 784 (“Every state at the time of the First Amendment was adopted outlawed either blasphemy or profanity . . . [m]ore generally, speech that had ‘a bad tendency’ to cause crime, disorders or immoral acts could be punished.”).

⁴⁹ *Schenck v. United States*, 249 U.S. 47, 51 (1919).

⁵⁰ Jay, *supra* note 15, at 1018.

⁵¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); Rosenthal, *supra* note 46, at 6.

⁵² Jay, *supra* note 15, at 1018 (internal quotation marks omitted); see also *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

⁵³ *Id.* at 1018 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)) (internal quotation marks omitted).

⁵⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.”).

⁵⁵ *Id.* at 513–14.

III. AN EXAMINATION OF MODERN SOCIAL NETWORKS

Social networks are “interactive web sites that connect users based on common interests and that allow subscribers to personalize individual web sites.”⁵⁶ In more recent years, social networks have become a popular and highly recognized tool for the everyday Internet user.⁵⁷ These social networks allow individuals to express and interact with one another in a variety of ways, spanning from “aimless chatter to the exchange of offensive and obscene materials.”⁵⁸ In addition, social networks offer ways of “meaningful and important exchanges among diverse parties.”⁵⁹ For instance, continued popularity of these social media websites has attracted companies to use them to reach consumers.⁶⁰ Although users of these networks share information with others, they still want to maintain control over the information that is shared.⁶¹ A few of the more popular social networks and their privacy capabilities are discussed below.

A. Twitter

Twitter.com (“Twitter”) is a social network that provides information in real-time relating to ideas, opinions, and news about what the user finds interesting.⁶² Twitter enables users to find other accounts and follow those conversa-

⁵⁶ John S. Wilson, *Myspace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1204 (2007). There is no clear definition for social networks. Nathan Petrashek, *The Fourth Amendment and the Brave New World of Online Social Networking*, 93 MARQ. L. REV. 1495, 1498 (2010). However, the Western District of Texas has defined it as a website that “allows its members to create online ‘profiles,’ which are individual web pages on which members post photographs, videos, and information about their lives and interests. The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests.” *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 845–46 (W.D. Tex. 2007).

⁵⁷ Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 742, 749 (2008).

⁵⁸ *Id.* at 742. “Social networks include web-based sites such as Facebook, Google Buzz, MySpace, LinkedIn, and Twitter, which allow users to register with the service, create a profile, view and post content on other users’ pages, send messages, establish and join social groups, invite members to events, and search for other members using the same network and connect with those members.” Powell, *supra* note 14, at 690.

⁵⁹ Zarsky, *supra* note 57, at 742.

⁶⁰ *Id.* at 749; *see also* MICHAEL A. STELZNER, 2013 SOCIAL MEDIA MARKETING INDUSTRY REPORT: HOW MARKETERS ARE USING SOCIAL MEDIA TO GROW BUSINESS 17 (2013), available at <http://commcns.org/1n6GdaN>.

⁶¹ Powell, *supra* note 14, at 692; *see also* Bob Sullivan, *Facebook Users Want More Privacy, But Are Nudged Towards Less*, *Study Says*, NBC NEWS (Mar. 8, 2013), <http://commcns.org/1aUG8Hl>.

⁶² *About*, TWITTER, <http://commcns.org/1cLNZpC> (last visited Aug. 28, 2013).

tions as well.⁶³ When the user posts a message on Twitter, those bursts of information are called tweets, which are limited to 140 characters.⁶⁴ However, users are not limited to just posting ideas and opinions; they may also post photos and videos directly.⁶⁵

Twitter's privacy policy states "that its [s]ervices are primarily designed to help [users] share information with the world[,] while cautioning its users to [k]eep in mind that although [they] may consider certain information to be private, not all postings of such information may be a violation of this policy."⁶⁶ Although the default setting for a user's Twitter account is a publicly viewable setting, the user can change the settings "to make the information more private."⁶⁷

B. Facebook

Facebook.com ("Facebook") is an online social network where "[u]sers share personal information, pictures, and comments with their friends and followers and post status updates which provide up-to-the-minute details about their daily activity."⁶⁸ Similar to Twitter, this information can be seen by anyone depending on the privacy setting of the user's Facebook account.⁶⁹ Moreover, Facebook provides an option allowing "users to choose who can view their profile, find them in a search, or see their personal information."⁷⁰

C. Instagram

Instagram.com ("Instagram") is a picture-sharing social network,⁷¹ allowing users to alter pictures using different filters prior to sharing those pictures.⁷² To share a photo, a user need only take the photo with his or her mobile phone and then upload it.⁷³

⁶³ *Id.*; see also *Help Center: Finding People on Twitter*, TWITTER, <http://commens.org/1j4qKux> (last visited Sept. 15, 2013).

⁶⁴ TWITTER, *supra* note 62.

⁶⁵ *Id.*; see also Carrie-Ann Skinner, *How to Upload Images to Twitter*, PC ADVISOR (June 8, 2011), <http://commens.org/1aUGm17>.

⁶⁶ Powell, *supra* note 14, at 692-93.

⁶⁷ *Twitter Privacy Policy*, TWITTER, <http://commens.org/1aUGnCk> (last visited Aug. 22, 2013).

⁶⁸ Powell, *supra* note 20, 163.

⁶⁹ *Sharing and Finding You on Facebook*, FACEBOOK, <http://commens.org/1cLOjod> (last visited Aug. 27, 2013).

⁷⁰ Powell, *supra* note 20, at 165.

⁷¹ *FAQ*, INSTAGRAM, <http://commens.org/1cLOlfJ> (last visited Sept. 15, 2013).

⁷² Marie-Andrée Weiss, *Friends with Commercial Benefits: Social Media Users Do Not Want Their Likeness Used in Advertisements*, 16 J. INTERNET L. 1, 8 (2013).

⁷³ INSTAGRAM, *supra* note 71.

An Instagram user is also able to control his or her privacy settings.⁷⁴ When the user first joins the social network, all the photos are visible “to anyone using Instagram or on the Instagram.com website.”⁷⁵ However, the user may elect to make his or her account private.⁷⁶ When the account is private, the user must approve all “follow requests” of other individuals that wish to view the user’s account.⁷⁷ In addition, this privacy function allows only those people who follow the user on Instagram to see the user’s photos.⁷⁸ Therefore, when users set their account settings to private, thereby restricting public access,⁷⁹ they have evidenced an expectation that only those individuals allowed to “follow” them can see the contents of their Instagram account.

IV. PRIVACY AND EXPRESSION: ISSUES IN THE EDUCATIONAL SYSTEM

Social media networks often provoke controversy regarding the permissibility of students to share comments and photos on social media pages.⁸⁰ The Courts have already determined that students possess these rights;⁸¹ however, those rights can be limited in schools under certain circumstances.⁸² However,

⁷⁴ *Id.*; see also Larry Magid, *Teens and Tweens Flock to Instagram What Parents Need to Know (Updated)*, SAFEKIDS.COM, <http://commens.org/1ibcX1N> (last updated May 2013).

⁷⁵ INSTAGRAM, *supra* note 71; see also Magid, *supra* note 74.

⁷⁶ INSTAGRAM, *supra* note 71; see also Jam Kotenko, *Privacy Advocates Say Instagram Is Unsafe for Underage Users*, DIGITAL TRENDS (May 16, 2013), <http://www.digitaltrends.com/social-media/keep-our-underage-children-safe-instagram-concerned-parents/>.

⁷⁷ INSTAGRAM, *supra* note 71; see also Kotenko, *supra* note 76.

⁷⁸ INSTAGRAM, *supra* note 71; see *How Do I Set My Photos So That Only Approved Followers Can See Them?*, INSTAGRAM, <http://commens.org/1i1TWdI> (last visited Sept. 6, 2013).

⁷⁹ *Privacy Policy*, INSTAGRAM, <http://commens.org/LpZCHD> (last visited Aug. 23, 2013) (“Any information or content that you voluntarily disclose for posting to the Service, such as User Content, becomes available to the public, as controlled by any applicable privacy settings that you set.”).

⁸⁰ See, e.g., Alice Park, *Are Med-Student Tweets Breaching Patient Privacy?*, TIME, Sept. 23, 2009, available at <http://commens.org/1ejuDK3> (“Younger [medical] students were more likely than older staff members to believe that their thoughts and opinions were valid to post online, regardless of their potentially damaging or discriminatory impact on others.”); Jaime Sarrío & Emily Bazar, *Student’s Expulsion Feeds Debate On Online Rights*, USA TODAY (Feb. 3, 2010, 1:31 PM), <http://commens.org/1iIU3Gg> (“The expulsion of a high school basketball player who posted angry messages on Facebook highlights a growing debate over students’ privacy and free-speech rights online.”); Sarah Mui, *Cyberbullying Law Would Violate Students’ Free Speech, Opponents Say*, A.B.A. J. (Feb. 5, 2013), <http://commens.org/1j4rFva> (noting the constitutional concerns raised by an Indiana bill that gives school officials the ability to punish a student for that student’s online comments).

⁸¹ R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1143–44 (D. Minn. 2012).

⁸² *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (“It is evident that the school setting

the way schools and their social media policies have begun to thwart these constitutionally protected rights is troubling.⁸³

A. Secondary Schools

As seen in *R.S. ex rel. S.S.*, other public schools have been enforcing similar social media policies.⁸⁴ In some cases, school officials learn that a student may have inappropriate material on a social media site.⁸⁵ To avoid potential issues of “bullying and other possible ramifications at school,” school officials would call that student into their office and force the student to reveal his or her password; the student suspected of inappropriate material would be instructed to “log onto the site and show [the school officials] the questionable online content.”⁸⁶ If the student fails to cooperate with the school officials’ demand then he or she might be threatened with further discipline⁸⁷ or may be pressured into complying.⁸⁸

B. Postsecondary Schools

Forced consent policies do not end with primary and secondary schools. In addition, “forced consent” policies are also enforced by public universities and are a growing concern.⁸⁹ Some universities require college students to grant school officials access to their social media accounts;⁹⁰ more worrisome are those universities that force their students to turn over their login information to such accounts.⁹¹

requires some easing of the restrictions to which searches by public authorities are ordinarily subject.”)

⁸³ See *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1134 (discussing how school officials forced a student to log in to her social media account so they could monitor); see also Hudson, Jr., *supra* note 7, at 22 (observing that many universities require students to allow school officials to access their social media accounts).

⁸⁴ Hudson, Jr., *supra* note 7, at 22; Bob Sullivan, *School Officials’ Facebook Rummaging Prompts Mom’s Privacy Crusade*, NBC NEWS (May 18, 2012, 6:10 AM), <http://commcns.org/1lvX0Zw>.

⁸⁵ Hudson, Jr., *supra* note 7, at 22.

⁸⁶ *Id.*

⁸⁷ See *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1135 (“When [the student] hesitated and stated that she did not remember her passwords, the officials called her a liar and threatened her with detention if she did not give them her passwords.”)

⁸⁸ See Sullivan, *supra* note 84 (discussing how students are told that they could not leave the school official’s room until they revealed “their passwords or unlock their phones and allow school officials to browse their personal information”).

⁸⁹ Hudson, Jr., *supra* note 7, at 22.

⁹⁰ *Id.*

⁹¹ Alissa Del Riego et al., *Your Password Or Your Paycheck?: A Job Applicant’s Murky Right to Social Media Privacy*, 3 J. INTERNET L. 1, 18–19 (2012) (“Recently, there have

University athletic departments are particularly interested in monitoring their student-athletes. At some colleges, such as the University of North Carolina, school officials force their student-athletes to consent to the monitoring of their social network accounts by signing a social media policy.⁹² The social media policy at University of North Carolina states: “Each team must identify at least one coach or administrator who is responsible for having access to and regularly monitoring the content of team members’ social networking sites and posting.”⁹³ In addition, it states that “[t]he athletics department also reserves the right to have other staff members monitor athletes.”⁹⁴ When dealing with a social network such as Facebook, this policy requires a student to accept a friend request of “a coach or compliance officer, giving that person access to their ‘friends-only’ posts.”⁹⁵

However, University of North Carolina is not alone in its policies when dealing with student-athletes.⁹⁶ The University of Michigan also requires its student-athletes to sign a social media policy.⁹⁷ The policy identifies, for the student-athlete, what the University deems an appropriate use of social media accounts, as well as the disciplinary actions that a student will face, should the student’s account violate the policy.⁹⁸ The “severity of the discipline will be based on the seriousness of the infraction,” and range from “[a] conference with the student-athlete’s coach and/or sport administrator to discuss the infraction,” to the student’s removal from the team.⁹⁹ Other schools implement their social media policies in other ways such as banning student-athletes from using specific words on Twitter, or banning students from using Twitter altogether.¹⁰⁰ Some schools use social media monitoring companies for around the

been several reports of employers in the United States requesting [sic] job candidates for access to their Facebook accounts before making a hiring decision. Denial of this request can be tantamount to an application withdrawal, forcing candidates to decide between their privacy and their prospective employment.”); *see also* Sullivan, *supra* note 9; Hudson, Jr., *supra* note 7, at 22.

⁹² Hanner, *supra* note 23; *see also* Hudson, Jr., *supra* note 7, at 22. As noted above, this practice extends to job applicants. Michelle Singletary, *Would You Give Potential Employers Your Facebook Password*, WASH. POST (Mar. 29, 2012), <http://commens.org/1iUnov>.

⁹³ Sullivan, *supra* note 9.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES, Mar. 30, 2012, at D1, D5 (noting that other universities, like Oklahoma and Nebraska, also monitor their athletes’ online profiles).

⁹⁷ *University of Michigan: Athletics Social Media Policy*, THE ANN ARBOR NEWS (Oct. 9, 2012), available at <http://commens.org/1nGthvo> (“Student-athletes are required to notify the Athletics Department of any social media accounts they maintain.”).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Woodhouse, *supra* note 9.

clock surveillance.¹⁰¹

These practices are becoming more common in today's society generally,¹⁰² as even some employers utilize forced consent policies. For instance, some employers request that job seekers log in to their social media accounts during interviews and allow an interviewer to view their content while the applicant "clicks through wall posts, friends, photos and anything else that might be found behind the privacy wall."¹⁰³ Though these practices may be seen as voluntary, college applicants, similar to job seekers, only agree to these requests in hopes of a favorable outcome.¹⁰⁴ Just as a job seeker hopes to be employed, a college applicant similarly hopes to be accepted.¹⁰⁵

V. MODERN VIEWS ON PRIVACY RIGHTS OF SOCIAL MEDIA USAGE IN THE EDUCATIONAL SYSTEM

Social media policies that force students to disclose social network account information have their share of proponents and critics. Each side has concluded that its stance and concerns on the issue should be given more weight than the other.¹⁰⁶

A. Supporters of "Forced Consent" Policies

Although "forced consent" are unfavorable among students and their parents,¹⁰⁷ these policies still have strong advocates.¹⁰⁸ In secondary education in-

¹⁰¹ Jamie P. Hopkins et al., *Being Social: Why the NCAA Has Forced Universities to Monitor Student-Athletes' Social Media*, 13 U. PITT. J. TECH. L. & POL'Y 1, 39-40 (2013); see also Woodhouse, *supra* note 9; Catherine Ho, *Companies Tracking College Athletes' Tweets, Facebook Posts Go after Local Universities*, WASH. POST, Oct. 17, 2011, at A16; see also Sullivan, *supra* note 9 ("Schools are also turning to social media monitoring companies with names like UDilligence and Varsity Monitor for software packages that automate the task. The programs offer a 'reputation scoreboard' to coaches and send 'threat level' warnings about individual athletes to compliance officers.").

¹⁰² Joanna Stern, *Demanding Facebook Passwords May Break Law, Say Senators*, ABC NEWS (Mar. 26, 2012), <http://commens.org/MpDjma>.

¹⁰³ Sullivan, *supra* note 9.

¹⁰⁴ *Id.* ("While submitting to a Facebook review is voluntary, virtually all applicants agree to it out of a desire to score well in the interview.").

¹⁰⁵ See Riego et al., *supra* note 91, at 18-19 (discussing how employers "ask or obtain access" to a candidate's social media account). "Denial of this request can be tantamount to an application withdrawal, forcing candidates to decide between their privacy and their prospective employment." *Id.*

¹⁰⁶ Sullivan, *supra* note 9.

¹⁰⁷ Sullivan, *supra* note 84 (discussing a mother's disapproval and the effect of school conduct on her daughter).

¹⁰⁸ See Press Release, Kaplan Test Prep, Kaplan Test Prep Survey Finds That College Admissions Officers' Discovery of Online Material Damaging to Applicants Nearly Triples

stitutions, school officials argue that forcing students to provide them with their social network account information furthers a legitimate interest in maintaining discipline in the classroom.¹⁰⁹ Administrators argue that schools should monitor what students are doing at any point in time.¹¹⁰ Other concerns include bullying,¹¹¹ cyber-bullying,¹¹² and drug trafficking.¹¹³ Supporters also argue that in some cases, students volunteer to allow school officials to see the content of the students' social media accounts before the school official has even asked.¹¹⁴

School officials in postsecondary schools have concerns similar to employers who request applicants to allow them access to social media account profiles.¹¹⁵ Employers argue that they have a legitimate interest in obtaining as much information on the applicant as possible.¹¹⁶ In their view, a job applicant's poor reputation or questionable behavior may have a negative impact on the employer's reputation.¹¹⁷ Employers use the applicant's social media account profile to provide a picture of the applicant's personality and character.¹¹⁸ Just as employers take special interest in gaining insight into the character of an applicant "to assess whether contracting the applicant would be in the organization's best interest,"¹¹⁹ so do universities in deciding whether to accept a college applicant.¹²⁰

Supporters of "forced consent" in colleges rationalize the policy of monitoring the social media accounts of student-athletes with the ruling in *Vernonia School District 47J v. Acton*.¹²¹ In that case, the Supreme Court upheld a school district's policy requiring student-athletes to be subjected to drug testing in

in a Year (Oct. 4, 2012), available at <http://commcns.org/1ibex3A> (noting that in the field of college admissions, "the traditional application – the essays, the letters of recommendation – represent the polished version of an applicant, while often what's found online is a rawer version of that applicant," and discussing findings of essay plagiarism, vulgarities in blogs, alcohol consumption, and 'illegal activities.'")

¹⁰⁹ See R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1143 (D. Minn. 2012).

¹¹⁰ Hanner, *supra* note 23.

¹¹¹ Jamie P. Hopkins et al., *supra* note 105, at 30.

¹¹² See, e.g., Hudson, Jr., *supra* note 7, at 622 (citing an example definition of "bullying" to include actions taken by electronic means from LA. REV. STAT. ANN. tit. 17, § 416.13(C)(2) (2010) (West, Westlaw through 2012), amended by LA. REV. STAT. tit. 17, § 416.13(C)(1)(b) (2012)).

¹¹³ Sullivan, *supra* note 84.

¹¹⁴ *Id.*

¹¹⁵ Riego et al., *supra* note 91, at 18.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Kaplan Test Prep, *supra* note 108.

¹²¹ Hanner, *supra* note 23; see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

order to participate in school sports.¹²² Under *Vernonia*, supporters of these social media policies argue, “students are not obligated to join a college sports team and as such, can be asked to forfeit certain rights for the ‘privilege’ of playing.”¹²³ Additionally, universities argue that online monitoring practices ensure student-athletes “are not excessively trash-talking other teams or committing crimes that could reflect poorly on the institution.”¹²⁴

B. Opponents of “Forced Consent” Policies

Critics of these policies do not share the same understanding as the school officials that endorse them.¹²⁵ They argue that these administrative practices, in both secondary and postsecondary schools, requiring students to allow school officials to access or monitor their social media accounts violate the students’ right to privacy.¹²⁶ Simply put, they view these policies as a way of spying on students.¹²⁷ Opponents further argue that “forced consent” policies constitute an unreasonable search and therefore violate the students’ freedom of expression under the First and Fourth Amendments.¹²⁸ Although a student may voluntarily allow a school official to view his/her social media accounts in some circumstances, in other cases, the student is under duress from fear of disciplinary actions.¹²⁹

Regarding student-athletes in postsecondary schools, critics do not agree with the view that these social media policies should be treated similarly to drug testing, which the court has upheld in school athletics.¹³⁰ For instance, Bradley Shear, an attorney and adjunct professor at The George Washington University, makes a distinction between the two policies.¹³¹ Shear contends “[t]he difference between drug testing cases and [social media policies] is that in drug testing, a school is looking at illegal substances.”¹³² However, “[h]ere

¹²² *Vernonia Sch. Dist. 47J*, 515 U.S. at 664-65.

¹²³ Hanner, *supra* note 23.

¹²⁴ *Id.*

¹²⁵ Hudson, Jr., *supra* note 7, at 22 (noting lawmakers have introduced legislation to protect students’ First and Fourth Amendment rights).

¹²⁶ Hanner, *supra* note 23.

¹²⁷ Sullivan, *supra* note 9 (arguing that “schools are in the business of educating, not spying”).

¹²⁸ *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1133 (D. Minn. 2012) (plaintiffs in this action alleged violations of First and Fourth Amendment rights); U.S. CONST. amend. I; U.S. CONST. amend. IV.

¹²⁹ *See* Sullivan, *supra* note 84 (discussing how students are told that they cannot leave the school officials’ room until they have revealed their passwords or unlocked their phones for inspection).

¹³⁰ Hanner, *supra* note 23.

¹³¹ *Id.*

¹³² *Id.*

you're looking at inappropriate conduct. It's comparing apples to oranges."¹³³ Furthermore, there are concerns that if public universities have a right to access student-athletes private social media account posts, "then what will stop [public universities] from claiming a right to access and monitor private email accounts, voicemail messages, etc . . . and installing eavesdropping equipment into off-campus apartments?"¹³⁴

VI. POLICIES THAT FORCE STUDENTS TO CONSENT TO MONITORING OF THEIR STUDENT MEDIA ACCOUNTS ARE FLAWED

Despite the possible good intentions of practitioners of "forced consent" policies, these policies violate the First and Fourth Amendments of the United States Constitution.¹³⁵ Moreover, students have a protected interest in the contents of their social media accounts.

A. Violation of Students' Privacy Rights

The social media policies that make students consent to the access or monitoring of their social media accounts constitute an unreasonable search and seizure under the Fourth Amendment and are, therefore, unconstitutional.¹³⁶ A search under the Fourth Amendment is a governmental intrusion into a constitutionally protected area where one has a reasonable expectation of privacy with the intent to obtain information.¹³⁷ In public schools, school officials are agents of the State.¹³⁸ Thus, when public school officials demand a student to reveal his or her login information for their private social media accounts to allow school officials to access, monitor, and obtain information, those officials are conducting a search.¹³⁹

¹³³ *Id.*

¹³⁴ Bradley Shear, UNIV. OF NORTH CAROLINA'S STUDENT-ATHLETE SOCIAL MEDIA POLICY MAY BE UNCONSTITUTIONAL, SHEAR ON SOCIAL MEDIA LAW (Sept. 27, 2011), <http://commens.org/libeFA6>.

¹³⁵ See U.S. CONST. amend. I (noting a person's right to freedom of expression); U.S. CONST. amend. IV (noting a person's right to be free from unreasonable searches).

¹³⁶ R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012).

¹³⁷ *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983)).

¹³⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 503 (1969) (holding that school officials act as representatives of the State when carrying out searches).

¹³⁹ *Jones*, 132 S. Ct. at 952 (holding that because the action of the government do not consist of a physical trespass, the *Jones* analysis would not apply and the *Katz* test would be controlling); *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) (Nevertheless, Justice

The Fourth Amendment guarantees students a right to be free from unreasonable searches.¹⁴⁰ In other words, a search without a justifiable and legitimate government interest violates the Fourth Amendment.¹⁴¹ In determining whether a search is reasonable, the court must consider whether the person had a subjective expectation of privacy, and whether that expectation is one that society has recognized as reasonable.¹⁴² Therefore, in regard to social media content, it must be determined that the user has a reasonable expectation of privacy, and that the “expectation of privacy (or control by users of information freely disclosed) on social network sites” is one that “society is willing to recognize as reasonable.”¹⁴³ However, the *Katz* Court made clear that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁴⁴ Thus, not only must the student have a reasonable expectation of privacy in the content of their social media accounts, but they must also show that they sought to preserve such content as private.¹⁴⁵

In *Schneckloth v. Bustamonte*, the Supreme Court established that consent to an involuntary search constitutes an unreasonable search.¹⁴⁶ In *Schneckloth*, the court held that to justify a search on the basis of consent, the Fourth Amendment requires that the consent be voluntarily given.¹⁴⁷ “Voluntariness is a question of fact to be determined from the totality of the circumstances.”¹⁴⁸ Moreover, the court ruled that consent is not voluntary when it is “not the result of duress or coercion, express or implied.”¹⁴⁹

When school officials in secondary schools bring students down to their of-

Sotomayor opines: “[we] should not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disintegrated to Fourth Amendment protection.”)

¹⁴⁰ *T.L.O.*, 469 U.S. at 339.

¹⁴¹ *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)).

¹⁴² *United States v. Katz*, 389 U.S. 347, 361 (1967).

¹⁴³ Powell, *supra* note 14, at 700; Riego et al., *supra* note 91, at 18-19 (“The Applicant must claim both a subjective and objective expectation of privacy that society recognizes in [his or her] social media profile and its contents in order to maintain a claim against the prospective employer who surreptitiously or forcefully accessed her profile.”).

¹⁴⁴ *United States v. Katz*, 389 U.S. 347, 351 (1967); *Katz*, 389 U.S. at 351 (citing *Rios v. United States*, 364 U.S. 253, 260 (1960)).

¹⁴⁵ *Katz*, 389 U.S. at 351; Powell, *supra* note 14, at 699-700 (citing U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763-64 (1989)).

¹⁴⁶ *Schneckloth v. Bustamonte*, 412 U.S. 218, 220-28 (1973) (“The Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.”).

¹⁴⁷ *Id.* at 248.

¹⁴⁸ *Id.* at 248-49.

¹⁴⁹ *Id.* at 249.

fice and demand that the students log in to their social media accounts, it is sometimes done under the threat of disciplinary action.¹⁵⁰ The same can be considered for college applicants and student-athletes.¹⁵¹ If the student applicant or student-athlete fails to disclose their social network credentials, the school may penalize them by not accepting the student's application¹⁵² or not allowing the student to play on the team.¹⁵³ In these circumstances, the student's fear of disciplinary actions is what controls the consent; the consent is not voluntarily given.¹⁵⁴

Commentators have disputed whether users of social media networks and accounts have an expectation of privacy in the contents of their accounts.¹⁵⁵ As discussed previously,¹⁵⁶ the default setting for most social media accounts is set to public—meaning that when information is posted on the social media site, that information can be viewed by any other person who uses the same social media site.¹⁵⁷ However, many of these social media networks also have privacy settings where the user can control what information is disclosed to the public and which people can view the user's account information.¹⁵⁸ In those cases,

¹⁵⁰ See, e.g., *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist.* No. 2149, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012); see also, e.g., Sullivan, *supra* note 84.

¹⁵¹ See *University of Michigan: Athletics Social Media Policy*, *supra* note 101 (discussing disciplinary action taken against a student-athlete if found to be in violation of the University of Michigan's social media policy).

¹⁵² See Riego et al., *supra* note 91, at 19 (discussing how denying the interviewers request for access to the applicant's social media account could lead to the withdrawal of an application).

¹⁵³ See *University of Michigan: Athletics Social Media Policy*, *supra* note 101 ("In the event that a student-athlete's social media account is found to be in violation of the policy...the athletics department reserves the right to impose discipline which may include one or more of the following:...[r]emoving the student-athlete from the team.").

¹⁵⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (noting that consent is involuntary if the person has been coerced into giving the consent).

¹⁵⁵ Powell, *supra* note 20, at 175-78 ("One view is that privacy requires an attempt to maintain secrecy of the information,—once information is revealed to others, it is no longer private."). Under the network theory, a person may disclose information on his or her social media profile so long as there are parameters in place that limit the information that is shared. *Id.* at 177. Moreover, "a user maintains a privacy interest, even when personal information is disclosed on a network of users." *Id.* at 178.

¹⁵⁶ See discussion *supra* Part III.

¹⁵⁷ Powell, *supra* note 14, at 692-93 (citations omitted) (discussing how Twitter's services were designed to share information with the world); *Sharing and Finding You on Facebook*, FACEBOOK, <https://www.facebook.com/about/privacy/your-info-on-fb> (last visited Feb. 17, 2013) (discussing the public view default setting of Facebook); *FAQ*, INSTAGRAM, <http://instagram.com/about/faq/> (last visited Feb. 17, 2013) (discussing the public view default setting of Instagram). See also Part III of this Comment discussing the privacy settings of Facebook, Twitter, and Instagram.

¹⁵⁸ Powell, *supra* note 14, at 692-93 (citations omitted) (discussing the privacy settings for Twitter); Powell, *supra* note 20, at 165 (discussing the privacy settings for Facebook); *FAQ*, INSTAGRAM, <http://instagram.com/about/faq/> (discussing the privacy settings for Insta-

the user has intended to preserve the contents of their social media accounts as private.¹⁵⁹

Not only do people have an expectation of privacy in the use of social media accounts, it is an expectation that society has recognized as reasonable.¹⁶⁰ Although the public can view the information placed on social media accounts, “information should be deemed private if the information stays confined to the initial group to which it was disclosed, even if such a group is rather large.”¹⁶¹ Because users are capable of managing their privacy settings to limit who sees their information, the “use of controls provided by social network sites sets a reasonable expectation of privacy, albeit limited, for their users.”¹⁶²

B. Additional Privacy Rights Violation: How “Forced Consent” Policies Fit Within the Special Needs Doctrine

Although school officials have otherwise asserted,¹⁶³ schools do not have a legitimate interest in searching students’ social media accounts. In dealing with privacy interests of employees, the Supreme Court has held that “public employer intrusions on the constitutionally protected privacy interest of employees for non-investigatory, work-related purposes . . . should be judged by the standard of reasonableness under all circumstances.”¹⁶⁴ This “standard of reasonableness” has also been applied to public schools.¹⁶⁵

In *New Jersey v. T.L.O.*, the Court recognized that the school setting “requires some modification of the level of suspicion of illicit activity needed to justify a search.”¹⁶⁶ In doing so, the Court held that the warrant and probable

gram).

¹⁵⁹ *Katz v. United States*, 389 U.S. 347, 351-52 (1967). When users set their social media accounts to private, only the persons authorized by the user to view their profiles are able to view the profile contents. See Powell, *supra* note 20, at 165 (discussing the privacy capabilities of Facebook).

¹⁶⁰ Because the contents of a person’s social media account reveals the personal characteristics and lifestyle of the user, “[i]t is unlikely that a prospective employer’s generalized search of a job candidate’s [social media] profile to learn more about his personal characteristics and lifestyle would be deemed reasonable, given the search’s breadth in scope and tangential relation to the [school environment] in most circumstances.” See Riego et al., *supra* note 91, at 19.

¹⁶¹ Powell, *supra* note 14, at 704 (citing Lior Jacob Strahilevits, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 988 (2005)).

¹⁶² *Id.* at 704.

¹⁶³ See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (discussing the need for teachers and administrators to maintain discipline in the classroom and on school grounds).

¹⁶⁴ Riego et al., *supra* note 91, at 19 (citing *O’Connor v. Ortega*, 480 U.S. 709, 725-26 (1987)).

¹⁶⁵ See *T.L.O.*, 469 U.S. at 340-41.

¹⁶⁶ *Id.* at 340.

cause requirements do not apply to searches by public school officials.¹⁶⁷ In delivering the opinion of the Court, Justice White explained the warrant requirement is “unsuited to the school environment,” and requiring public school officials “to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”¹⁶⁸ Instead, the Court adopted the “special needs” doctrine.¹⁶⁹ Specifically, the Court has applied this doctrine in situations “[w]here a careful balancing of governmental and public interests suggest that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.”¹⁷⁰

Determining the reasonableness of these types of searches requires a twofold inquiry: “whether the . . . action was justified at its inception,” and “whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.”¹⁷¹ Applying this test to searches conducted by public school officials, the first prong is satisfied “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”¹⁷² The second prong, as the Court has ruled, is satisfied if, once initiated, the search is “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹⁷³

Forced consent policies employed by public school officials in secondary and postsecondary schools do not meet this test. Even though sometimes public school officials may suspect that viewing or monitoring a student’s social media content would turn up some evidence of wrongdoing,¹⁷⁴ the way the school officials go about obtaining this information is not justified and is ex-

¹⁶⁷ *See id.* (citation omitted) (“The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although ‘both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.’”).

¹⁶⁸ *Id.*

¹⁶⁹ *T.L.O.*, 469 U.S. at 353 (White, J., concurring) (“The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests.”).

¹⁷⁰ *Id.* at 341.

¹⁷¹ *Id.* (internal quotations omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

¹⁷² *Id.* at 342.

¹⁷³ *Id.*

¹⁷⁴ *See, e.g., id.* (discussing reasonable suspicion that the search will show evidence of a violation of the law or the rules of the school); *see also id.* (discussing how the monitoring of student-athletes helps ensure that the student-athletes are not saying or doing anything that could reflect poorly on the institution).

cessively intrusive.¹⁷⁵ In secondary institutions, when students are forced by a school official to login to their social media account in the presence of the school official and allow them to view its contents, what they are at most seeking to find is in no way interfering with the school environment and its ability to maintain order.¹⁷⁶ School officials, in these situations, are intruding upon what a student has deemed private in the sense that a student has a reasonable expectation of privacy in the content of their social media accounts.¹⁷⁷ In addition, the coercive nature of the school officials conduct, in making a student come down to an office or be threatened with disciplinary actions if he or she does not cooperate, is unreasonable, since the students' cooperation is done unwillingly and involuntarily.¹⁷⁸

In postsecondary schools, "forced consent" policies fail the reasonableness test in a different way. In those instances, the level of intrusion is excessive in light of the students' age.¹⁷⁹ When in college, a student has typically reached the age of majority and their expectation of privacy is fundamentally recognized.¹⁸⁰ Unreasonable searches for college students are also not justified.¹⁸¹ By requesting a college applicant for his or her login information, the school administrators cannot reasonably suspect that the search will turn up evidence that the candidate "has violated or is violating either the law or the rules of the school."¹⁸² This is due to the fact that since these individuals are only applicants, the school has no reason to know whether the prospective student engaged in some wrongdoing.¹⁸³ A similar argument can be made for student-athletes.¹⁸⁴ Unless the student has given an administrator reasonable grounds

¹⁷⁵ *T.L.O.*, 469 U.S. at 342.

¹⁷⁶ *Id.* at 339 (noting the substantial interest of public school officials in maintaining discipline in the classroom and on school grounds). Here, the contents of the students' social media accounts are located on the internet and in no way interfere in maintaining order. Moreover, since the content is placed on the students' social media account outside of school hours, schools have a far lesser claim to regulating this conduct. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1139 (D. Minn. 2012) (noting that out-of-school speech is subject to less stringent school regulation).

¹⁷⁷ Powell, *supra* note 14, at 704.

¹⁷⁸ *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

¹⁷⁹ *T.L.O.*, 469 U.S. at 342.

¹⁸⁰ *Id.* at 337-38 ("A search of a child's person or of a...bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.").

¹⁸¹ *Id.* at 342.

¹⁸² *Id.* Under these circumstances, college applicants are being subjected to these illegal searches based on conduct that the school administrators have no reasonable grounds for suspecting have even occurred.

¹⁸³ *Id.*

¹⁸⁴ A student-athlete gives school officials no more reason to suspect wrongdoing than any other student. Also, the Supreme Court pointed out that students "on the playing field, or on the campus . . . may express [their] opinions" so long as [they] do[] not "materially

for suspecting that the monitoring of their social media account will turn up incriminating evidence prior to the monitoring, then the monitoring should not be permissible. In this case, anything less than reasonable grounds for suspicion would simply be conjecture.¹⁸⁵

C. Violation of Students' First Amendment Right to Free Expression

In addition to violating the Fourth Amendment, “forced consent” policies infringe upon students’ right of free expression under the First Amendment. It has long been recognized since the Supreme Court’s holding in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, that students’ First Amendment rights are not waived when they enter the school.¹⁸⁶ Moreover, in *Tinker* the Court noted that:

School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.¹⁸⁷

Although it is true that the rights of students in public schools “are not automatically coextensive with the rights of adults in other settings,”¹⁸⁸ students indeed have a constitutional right of freedom of expression that “must be ‘applied in light of the special characteristics of the school environment.’”¹⁸⁹

In *Tinker*, the Court was ruling on the conduct of a school for punishing stu-

and substantially interfer[e] . . . with the . . . operation of the school” or “collid[e] with the rights of others.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Moreover, speculation without reasonable suspicion is a constitutionally insufficient reason to search a student’s social media posts. See *T.L.O.*, 469 U.S. at 346 (quoting *Hill v. Cal.*, 401 U.S. 797, 804 (1971)).

¹⁸⁵ A school administrator cannot go on a fishing expedition. In order to monitor a student’s social media posts, the administrator needs more than mere speculation that the search will turn up evidence of wrongdoing. A search must be “justified at its inception” and actually conducted in a way “reasonably related in scope to [that reason].” *T.L.O.*, 469 U.S. at 346 (quoting *Hill v. Cal.*, 401 U.S. 797, 804 (1971)). “Justified at its inception” requires that there be “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* at 341-42 (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

¹⁸⁶ *Tinker*, 393 U.S. at 503 (1969; *Minnewaska*, 894 F. Supp. 2d at 1138 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (“For more than forty years, the United States courts have recognized that students do not check their First Amendment rights at the schoolhouse door.”).

¹⁸⁷ *Tinker*, 393 U.S. at 511.

¹⁸⁸ *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

¹⁸⁹ *Id.* at 397 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

dents for wearing black armbands that symbolized their disdain for the Vietnam War.¹⁹⁰ The Court concluded that a school district could not punish the students for wearing the armbands because they did not “materially and substantially interfere with [the work and discipline of the school].”¹⁹¹ Furthermore, “[i]n our system, state-operated schools may not be enclaves of totalitarianism,” and students—in and out of school—have a fundamental right to freedom of expression of their views.¹⁹²

Similar to the facts in *Tinker*, school officials, through their “forced consent” policies, intend to monitor the students’ social media accounts and then penalize them if they refuse to comply or if they find inappropriate content.¹⁹³ Generally the content that students post on social networks does not substantially disrupt the work and discipline of the school,¹⁹⁴ and if school officials have no reason to believe otherwise, there is no legitimate interest in monitoring these activities.¹⁹⁵ School officials also lack a legitimate interest when the student is only an applicant and does not maintain any legal ties to the school.¹⁹⁶ In these circumstances, school officials have no just cause to believe that the applicant has violated school policy in any way or has made threats of

¹⁹⁰ *Tinker*, 393 U.S. at 504.

¹⁹¹ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

¹⁹² *Id.* at 511 (“Students are ‘persons’ under our Constitution . . . possessed of fundamental rights which the State must respect.”); *see also* *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1139 (D. Minn. 2012) (citing *Morse v. Frederick*, 551 U.S. 393, 405 (2007)) (“Out-of-school speech by a student is subject to even less stringent school regulation than in-school speech.”).

¹⁹³ For example, in *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1134 (D. Minn. 2012), a school official threatened a student with disciplinary action if she refused to comply with the official’s demand to view the content of her social media account. *Id.* The University of Michigan requires its student-athletes to sign a social media policy agreement and disciplines violations. Woodhouse, *supra* note 9. Some colleges go much further than Michigan by forcing athletes to allow school officials access to their private accounts (such as Utah State University), banning players from using a long list of words on Twitter (such as University of Kentucky), or forbidding the student from using Twitter altogether. *Id.*

¹⁹⁴ Student speech on the Internet is regulated under the same “clearly established general principles which have governed schools for decades.” *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1139. Student speech is constitutionally protected expression—popular viewpoint or not—unless it would “materially and substantially interfere with the . . . operation of the school.” *See Tinker*, 393 U.S. at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

¹⁹⁵ School officials cannot peruse a student’s posts without “reason to believe that [they would find] evidence of illegal behavior or violations of school policy.” *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1143 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 339, 342 (1985)).

¹⁹⁶ For an analogous argument in the employment context, *see, e.g.*, Riego et al., *supra* note 91 (discussing the distinction between investigating potential misconduct in the workplace and searching merely to learn more about the personal characteristics and lifestyle of a job applicant).

physical violence, for which the First Amendment would offer no protection.¹⁹⁷ The same should be said for students in secondary schools and student-athletes.¹⁹⁸ Therefore, penalizing the student for not disclosing their social media account information violates the students' right to free expression under the First Amendment.¹⁹⁹

VII. HOW STUDENTS' RIGHTS TO PRIVACY AND FREE EXPRESSION CAN BE UPHELD

Because these "forced consent" policies are an issue in our educational system, counteractive solutions should exist in order to prevent these problems from reoccurring. Three possible solutions that would help battle against these social media policies are discussed below.

A. Legislative Enactments Prohibiting the Monitoring of Students Social Media Accounts

One solution that would remedy these forms of social media policies is for state legislators to enact statutes that expressly prohibit this conduct. On July 20, 2012, the Delaware state legislature passed the Education Privacy Act, "[prohibiting] university officials from forcing students to disclose digitally protected information."²⁰⁰ Specifically, this law addresses privacy concerns of students and offers protections for both "students and applicants" at post-

¹⁹⁷ *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1139.

¹⁹⁸ Whether a student "on the campus" or an athlete "on the playing field," he is free to express his opinion so long as he does not "'materially and substantially interfer[e] . . . with the . . . operation of the school'" or "collid[e] with the rights of others." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). "[S]chool officials may not simply 'reach out to discover, monitor, or punish any type of out of school speech.'" *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1139 (citing *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 765 (8th Cir. 2011)).

¹⁹⁹ "[S]tudents are 'persons' under our Constitution . . . possessed of fundamental rights . . . [and] may not be confined to [officially approved] expression[s]." *Tinker*, 393 U.S. at 511. Furthermore, all out-of-school statements "are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment *and* are so egregious as to pose a serious safety risk or other substantial disruption in that environment." *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d at 1140 (emphasis in original). Punishing students for not disclosing their social media account information without reasonable suspicion they have violated a law or school rule is akin to "school officials . . . 'reach[ing] out to discover, monitor, [and] punish any type of out of school speech.'" *Id.* at 1139.

²⁰⁰ Hudson, Jr., *supra* note 7, at 22; H.B. 309, 146th Gen. Assemb., Second Reg. Sess. (Del. 2012).

secondary educational institutions throughout the State.²⁰¹ The necessity for this protection stems from the “current trend” for Americans to engage in these forms of online communication.²⁰²

Delaware legislators have recognized that 75% of adults, ages eighteen to twenty-four, and 56% of adults, between the ages of twenty-five to thirty-four, have a social media account.²⁰³ In addition, the state legislature recognized that young Americans use these various social media accounts for personal use in “maintaining community contacts and content sharing [which] are currently more prevalent than professional uses.”²⁰⁴ Also, Delaware legislators recognize the tendency for youth to use social networks “as a primary vehicle for effecting positive social and political change . . . establish[ing] social networks as the new digital age ‘public square’ for important discourse.”²⁰⁵ Moreover, a person has a reasonable expectation of privacy in the content of their social media accounts.²⁰⁶ Other states have enacted similar legislation to protect the privacy rights of students.²⁰⁷ However, thus far, only Michigan has taken into consideration the privacy rights of students in secondary schools.²⁰⁸

Another solution would be for federal legislators to enact a statute to protect the privacy rights of students. Congressman Eliot Engel, Congresswoman Jan Schakowsky, and Congressman Michael Grimm have taken initial steps to achieve such a federal privacy statute.²⁰⁹ These members of congress have introduced the Social Networking Online Protection Act, (“SNOA”), that would protect users of social networking who are “employed or enrolled, and those seeking employment or admittance, or those facing disciplinary action, from being required to give passwords or other information used to access their [social media] accounts.”²¹⁰ In Congressman Engel’s view, it is erroneous to justify the conduct of institutions that demand private social media account

²⁰¹ H.B. 309, 146th Gen. Assemb., Second Reg. Sess. (Del. 2012).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* (alteration in original).

²⁰⁵ *Id.*

²⁰⁶ *Id.*; Salem, *supra* note 27.

²⁰⁷ Salem, *supra* note 27 (“[S]ix states [have enacted or] will enact the social media privacy acts.”).

²⁰⁸ See MICH. COMP. LAWS § 37.271-.2075, at 37.272(b) (2012) (“‘Educational institution’ . . . includes . . . secondary school . . . [and] shall be construed broadly to include public and private institutions of higher education to the greatest extent consistent with constitutional limitations.”).

²⁰⁹ See Reps. Engel, Schakowsky, Grimm Seek to Protect Online Content (Feb. 6, 2013), <http://commens.org/1fnw2vC>.

²¹⁰ See *id.* (alteration in original) (“The bill would prohibit current or potential employers or education institutions from requiring a username, password or other access to online content, or disciplining, discriminating, or denying employment to individuals, or punish them for refusing to volunteer such information.”).

information because the information was placed online.²¹¹ Besides, when laws are silent in “prohibiting institutions from requiring this information, it becomes a common practice.”²¹²

B. Proposed Model Statute for Education Privacy Laws

As a means of protecting students in both secondary and postsecondary educational institutions, this Comment proposes that state legislators either enact or amend their statutes, similar to the Delaware statute,²¹³ to prohibit public *and* private educational institutions,²¹⁴ “and their employees and representatives,” from requiring or requesting from “a student, prospective student, or student group to disclose their personal social media information.”²¹⁵ The statutes will also prohibit an academic institution from penalizing or refusing to admit an applicant as a result of the student or applicant’s refusal to disclose their social media information.²¹⁶

Any new statutes should also extend privacy rights to students in secondary schools because high school students are the primary users of these social media networks.²¹⁷ Currently, the Delaware statute defines “Academic institution” as a “public or nonpublic institution of higher education or institution of postsecondary education.”²¹⁸ However, this does not take into account that there is a large population of children ages 11 to 18 that also use social media sites to interact with friends and family.²¹⁹ By doing so, this will avoid vagueness and place institutions on notice that similar conduct is also prohibited. Further-

²¹¹ *See id.*

²¹² *See id.*

²¹³ DEL. CODE ANN. §§ 8102-104 (2012).

²¹⁴ Because private institutions are not state actors, they are typically not subject to claims regarding unconstitutional restrictions on students’ free speech. Jamie P. Hopkins et al. *supra* note 105, at 32.

²¹⁵ *See* CAL. EDUC. CODE § 99121 (2012); *see* DEL. CODE ANN. § 8103 (2012); Molly DiBianca, *NJ Passes Password-Protection Law for Employees and Students*, DELAWARE EMPLOYMENT LOG BLOG (Oct. 30, 2012), <http://commcns.org/1blNj9b>. As of February 16, 2013, there are only four states that prohibit school officials in postsecondary institutions from requiring students to disclose any social media account information. *See* Christina Farr, *Michigan Passes Internet Privacy Act to Protect Students and Employees*, VENTURE-BEAT (Dec. 30, 2012, 3:45 PM), <http://commcns.org/MQ2ZJp>; *see also* CAL. EDUC. CODE § 99121 (2013); DEL. CODE ANN. § 8103 (West 2012); MICH. COMP. LAWS ANN. §§ 37.271-.275 (2012); N.J. STAT. ANN. § 18A:3-30-18A:3-31 (2012).

²¹⁶ *See* DEL. CODE ANN. § 8104 (2012).

²¹⁷ However, in Delaware, the provision that protected students in secondary institutions was removed from the Higher Education Privacy Act over concerns that it would protect bullies. *See* Hudson, Jr., *supra* note 7, at 22.

²¹⁸ DEL. CODE ANN. § 8102 (2012).

²¹⁹ Lauren Fisher, *SIMPLY ZESTY* (Sept. 23, 2011), <http://commcns.org/1kBBjDI> (86% of children use social media to build their personal brand.).

more, by enacting these new statutes, it will prohibit school officials from asserting qualified immunity to avoid liability for this conduct.²²⁰

C. Ruling from the Judicial System

The District Courts are split in deciding whether a person has a reasonable expectation of privacy in their use of social media accounts.²²¹ In *United States v. Meregildo*, the district court noted that “[w]hen a social media user disseminates his postings and information to the public, they are not protected by the Fourth Amendment.”²²² However, the *Meregildo* court also recognized that when a person uses a more secure privacy setting, it shows “the user’s intent to preserve information as private” and *may* be protected under the Fourth Amendment.²²³

In *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, the district court also held that a person has a reasonable expectation of privacy in his or her social media content.²²⁴ In this case, the court dealt with a school official’s demands for access to a student’s social media accounts to show inappropriate conduct.²²⁵ Furthermore, the court found that the school official’s conduct violated the student’s right to privacy.²²⁶ In addition, the court found that the school official’s conduct violated the student’s right to free expression because the school officials sought to penalize the student for the content of her social media account.²²⁷

Without a statute enacted by a state or the federal legislature, the only way to prohibit the conduct of school officials in secondary and postsecondary institutions from requesting the social media account information from its students is for the United States Supreme Court to make a ruling on the constitu-

²²⁰ Hudson, Jr., *supra* note 7, at 22.

²²¹ “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

²²² *United States v. Meregildo*, 883 F. Supp. 2d 523, 525 (2012) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)). In this case, the Government learned that the defendant posted messages on Facebook regarding prior acts of violence, threatened new violence to rival gang members, and sought allegiance from his fellow gang members. *Id.* at 526. Law enforcement officers accessed the defendant’s profile through a person who was a “friend” to the defendant’s profile page. *Id.*

²²³ *Id.* at 525 (citing *Katz v. United States*, 389 U.S. 347, 351-52 (1967)). The district court also determined that the Government does not violate the Fourth Amendment when the Government accesses the content through a cooperating witness who is a “friend.” *Id.* at 526.

²²⁴ *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012).

²²⁵ *Id.* at 1134.

²²⁶ *Id.* at 1142.

²²⁷ *Id.* at 1138-39.

tionality of these “forced consent” policies.²²⁸

VIII. CONCLUSION

Incidents like the one in Minnesota involving a twelve-year-old student have begun to arouse interest throughout the United States.²²⁹ As a result of this new found attention, state legislatures have begun to enact new laws that prohibit these “forced consent” policies from taking place in educational institutions and to protect the rights of students to be free from this governmental intrusion into their daily lives.²³⁰ Although there has been a small movement of states to ensure the privacy protections of students,²³¹ more states need to take action and pass legislation on their own accord. More importantly, these states need to expand upon the scope of these protections to include students from both secondary and postsecondary schools, private and public.²³²

It is critical to have uniform legislation prohibiting these forced consent policies because it will prevent situations where students are made to choose between cooperation and embarrassment,²³³ or between cooperation and penalization.²³⁴ It is not fair to subject young adults, let alone children, to restrictions and violations of their fundamental right to free expression,²³⁵ or their right to privacy.²³⁶ If these proposed amendments and enactments had been in place in Minnesota, then that twelve-year-old girl would not have suffered embarrassment and violations of her right to privacy.

²²⁸ Because there has only been one case in the United States district courts reviewing the constitutionality of conduct by school officials that demand the social media account information from its students under the threat of potential disciplinary action, the Supreme Court should determine whether these acts violate the student’s First and Fourth Amendment rights.

²²⁹ R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1139 (D. Minn. 2012).

²³⁰ CAL. EDUC. CODE § 99121 (2012); DiBianca, *supra* note 215.

²³¹ *See* Farr, *supra* note 215.

²³² Hudson, Jr., *supra* note 7, at 22 (discussing how Delaware legislators plan to reintroduce a provision of its Higher Education Privacy Act that protects students in secondary schools).

²³³ *Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1135 (D. Minn. 2012) (discussing how the student cried and felt depressed after returning home from school after being forced to give up social media account login information).

²³⁴ *Id.* at 1134 (discussing how school officials made threats that if the student did not allow them to search through her Facebook then she would be punished).

²³⁵ U.S. CONST. amend. I.

²³⁶ U.S. CONST. amend. IV.

APPENDIX I

Proposed Amendment to West's Delaware Code Annotated § 8102 Definitions

(a) "Academic institution" means public or nonpublic academic institution, and includes an institution of secondary education and an institution of higher education or institution of postsecondary education.

(b) "Applicant" means a prospective student applying for admission into the subject academic institution.

(c) "Electronic communication device" means a cell telephone, personal digital assistant, electronic device with mobile data access, laptop computer, pager, broadband personal communication device whether mobile or desktop, 2-way messaging device, electronic game, or portable computing device.

(d) "Social networking site" means an Internet-based, personalized, privacy-protected website or application whether free or commercial that allows users to construct a private or semi-private profile site within a bounded system, create a list of other system users who are granted reciprocal access to the individual's profile site, send and receive email, and share personal content, communications, and contacts.

(e) "Student" means a person whom, at all relevant times, is admitted into the academic institution.