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Mission Statement

The primary purpose of the *Illinois State Education Law and Policy Journal* (formerly *Illinois School Law Quarterly On-Line*) is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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HAVE YOU HEARD?

NCLB Not Working? The Class of 2011 was the first class to take the SAT to have been included in all NCLB testing. They were third graders when testing began, therefore being the youngest to start testing. If NCLB did what it was suppose to do, the achievement gap between white/affluent students and poorer minority test takers should be closing. Although recent data from ACT shows the gap to actually be widening, what do the SAT results say? The news is not good. In reality, it appears that NCLB had a negative effect of SAT-takers, since a comparison between the 2005–2006 scores and the 2010–2011 scores shows a two point drop in reading and math skills, and a five point drop in writing overall. But what about the achievement gap? Again, the results are not on NCLB's side. Students of Asian heritage gained an average of 36 points from 2006 to 2009, while all other groups declined. African American and Puerto Rican students fell 14 points, Native Americans fell 11 points, Hispanic scores dropped 8 points, and white students' scores fell two points. What was confirmed by the data, was that economic status does have a great deal of influence on educational attainment. For every \$20,000 increase in income, SAT scores increased. The higher the educational attainment of the students' parents, the higher the scores. Perhaps the influences outside of the classroom have more of an effect than anything that can be done in the classroom for the average students? High stakes testing appears not to be the answer.

School Consolidation. School consolidation in Illinois seems to be on the move. HB 1216 establishes a commission to review the fiscal realities of the state supporting the current 868 Illinois school district. The commission will be comprised of four members of the General Assembly (one selected by each of the four caucus leaders a'la the Debt Reduction Commission recently established at the federal level as a condition for raising the debt ceiling), and 14 individuals representing education management and unions in Chicago and statewide, a rural district, a suburban district, high school districts, the PTA, and the ROEs. Illinois State University's own Lynne Haeffele of the Center for the Study of Education Policy has been tapped to coordinate the research and final report. Recommendations are due by July 2012.

Teacher Drug Testing: It was only a matter of time after the Supreme Court stated in its decision in *Earls* that suspicionless drug testing of students was necessary to ensure a safe harbor within a drug infested society. In the *Earls* case, the Supreme Court, ignored its earlier ruling in *Vernonia v Acton* which required that showing of a drug use problem within the district before suspicionless drug testing of students would be allowed, deciding instead that the mere fact that schools had a duty to safe guard students from the ills of society. Carrying the Court's reasoning to its natural conclusion, the idea that safety also required suspicionless testing of teachers and school staff as well, was a natural extension of *Earls*. The Illini Bluffs School District teachers understand that line of reasoning. Although back in school after reaching an agreement without a drug testing clause, the opening of school was delayed while the teachers went out on strike. The school board at Illini Bluffs wanted to add a random drug testing of union members to the three-year bargained agreement. The teachers were shocked at the suggestion.

Waivers for NCLB: Arne Duncan has decided to unilaterally override the accountability provisions of NCLB. After finally coming to the realization that the 100% proficiency by 2014 is, and always was, unobtainable, AND that the NCLB was not going to be reauthorized with modifications in the near future, Duncan realized that he had no alternative by to start offering waivers.

He assured educators, however, that such waivers would only be available for those states which had already adopted their own testing and accountability programs. “This will not be a pass on accountability. There will be a high bar for states seeking flexibility within the law.” Last year 38,000 of 100,000 public schools failed to meet AYP. It is predicted 80,000 (80%) of the schools will fail this year. In Illinois, by 2010 64% of public schools failed to meet AYP. Rep. Kline, head of the House education committee, questioned whether Duncan had the legal authority to make such unilateral changes. He stated, “I remain concerned that temporary measures instituted by the department, such as conditional waivers, could undermine efforts of Congress.” For a waiver to be approved, states would need to show that they were adopting higher standards to make their students college- and career-ready at graduation, were working to improve teacher effectiveness, and institute teacher evaluations based on student performance on standardized tests.

Vouchers, Vouchers, Vouchers: Voucher legislation was on the legislative agenda of more than 25 state legislatures during this past year. Illinois was included in that number. Several have ended up in court (See Administrative Issues below.) Senate Bill 1932 allowing for vouchers in Chicago stalled for lack of votes. It almost appears as if “voucher-mania” has peaked in Illinois. One reason for this may be that recent research shows no concrete evidence that vouchers improve student learning. The argument by pro-voucher groups has now shifted away from learning and toward improved graduation rates and parental satisfaction.

Concussions: A bill was signed into law which requires student-athletes with concussions to obtain a medical release before being allowed back to practice and released to play. It also requires additional education for coaches, parents, referees, and players about concussions and the symptoms of concussions. School district must establish educational guidelines and materials.

EMPLOYEE RIGHTS

Johnson v Poway Unified Sch. Dist., No. 10-55445 (9th Cir. Sept. 13, 2011): For that past two decades, Poway teacher Johnson had displayed banners in his room stating “In God We Trust,” “One Nation Under God,” “God Bless America,” “God Shed His Grace on Thee,” and “All Men Are Created Equal, They Are Endowed By Their CREATOR.” Johnson claimed he had the right to do so under the district’s policy allowing teachers to display personal messages on classroom walls. Other teachers had displayed items such as rock band posters, posters of professional athletes, posters with Buddhist and Islamic messages, and Tibetan prayer flags. The district court had found in favor of Johnson, holding that with the district policy the district had created a limited open forum for teachers in classrooms, and to forbid Johnson’s messages was viewpoint discrimination. The Ninth Circuit reversed the lower court’s ruling, stating that applying a “forum analysis” was incorrect; that a employee-speech analysis was what should have been used. “Where the government acts as both sovereign and employer, this general forum-based analysis does not apply.” Consequently, the court used a Pickering five-step analysis. Under this analysis, the court found that (1) Johnson was speaking as an employee rather than a private citizen, because the speech was occurring in his classroom during class time; (2) the speech owed its existence to his position as a teacher: “Because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers necessarily act as teachers for purposed of a Pickering inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official...Johnson took advantage of his

position to press his particular views upon the impressionable and ‘captive’ minds before him.”; (3) the speech in the display was government speech; (4) the principal’s actions to remove the banners and avoid a potential Establishment Clause violation had a valid secular purpose and neither advanced nor inhibited religion; and (5) since the speech was government speech and not personal speech, Johnson’s equal protection rights were not implicated.

C.F. v Capistrano Unified Sch. Dist., No. 09-56689 (9th Cir. Aug. 19, 2011): C.F., a student in AP History, filed suit alleging a violation of the Establishment Clause after the instructor of the course made several comments which C.F. found to be hostile toward religion, such as referring to creationism as “superstitious nonsense.” The district court found a violation of the Establishment Clause by held that the teacher had qualified immunity. The Ninth Circuit affirmed the lower court’s ruling on qualified immunity. As to the finding of a violation of the Establishment Clause, however, the court vacated the ruling stating that it did not need to answer that question in order to determine whether the teacher had qualified immunity. When determining whether a state official has qualified immunity, the court must ask two questions: (1) whether, taking the facts in the light most favorable to the nonmoving party, the government official’s conduct violated a constitutional right; and (2) whether the right was clearly established at the time of the alleged misconduct. If the answer to either of the questions is “no” then qualified immunity attaches. Because the court was “aware of no prior case holding that a teacher violated the Establishment Clause by appearing critical of religion during class lectures, nor any case with sufficiently similar facts to give a teacher ‘fair warning’ that such conduct was unlawful,” the court concluded that the right was not clearly established. This was an answer of “no” to the second question, therefore qualified immunity attached.

STUDENTS’ RIGHTS

Doe v Elmbrook Sch. Dist., No. 10-2922 (7th Cir. Sept. 9, 2011): In 2009, Elmbrook Public School District announced its intention to hold graduation at Elmbrook Church. Parents request for a permanent injunction was denied by the district court, and summary judgment was entered for Elmbrook. The Seventh Circuit affirmed the lower court, finding no violation of the Establishment Clause. Addressing the issue of “coercion” because of being compelled to enter a “sacred space” and “viewing prominent religious iconography within” the majority found that “coerced engagement with religious iconography and messages might take on the nature of a religious exercise or forced inculcation of religion; but the Establishment clause does not shield citizens from encountering the beliefs or symbols of any faith to which they do not subscribe.... Graduates are not forced—even subtly—to participate in any religious exercise...or in any other way to subscribe to a particular religion or even to religion in general.” Without that compulsion to appear to be worshipping or embracing a religion to avoid exclusion or ostracism is necessary to meet the criteria of the Coercion Test established by the Supreme Court in the case of *Lee v Weissman*. Consequently, the court decided that the more appropriate test would be the Lemon Test, rather than the Coercion Test. Starting with the second “primary effects” prong of the Lemon Test, the court stated, “With respect to the effect prong, we ask, in the context of this case, ‘irrespective of government’s actual purpose, whether the practice under review in fact conveys a message of endorsement or disapproval.’” The court refused to ask the question in a general manner—whether graduation ceremonies held in churches are a violation of the Establishment Clause—stating that Establishment Clause precedent required fact-driven analysis using the specific circumstances of

the case at hand. Since the court could not find other instances where Elmbrook had in any way associated itself or endorsed the church, the court held that “there is no realistic endorsement of religion by the mere act of renting a building belonging to a religious group.”

Heyne v Metropolitan Nashville Pub. Sch., Nos. 09-6383/09-6464 (6th Cir. Aug. 26, 2011):

Heyne, a white football player, was suspended from school for accidentally running over the foot of an African-American football player with his car as the two were leaving practice. Heyne tried to apologize, but all he received was a death threat from the other student. When the incident was reported, the African-American student was not disciplined for his threat. This came after the high school staff had been told to be more lenient in enforcing the code of conduct against African-American students. Heyne’s punishment was much more severe. When Heyne’s appeal was denied by the school district, he filed suit alleging a violation of his procedural due process and equal protection. He also alleged that the defendants were not entitled to qualified immunity. The district court denied Heyne’s motion. The Sixth Circuit affirmed in part and reversed in part the district’s court decision. The court considered the issues of (1) qualified immunity; (2) procedural due process; and (3) equal protection. Regarding qualified immunity, the court found that Heyne’s had failed to produce sufficient evidence to show a conspiracy, so it considered the acts each defendant and resulting qualified immunity separately. As to a lack of the impartiality required under procedural due process, the court concluded that “Manuel’s [the principal] ability to impartially determine the appropriate discipline in relation to the incident had been manifestly compromised—by virtue of his knowledge of and expressed concern about student discipline statistics, his instructions to faculty and staff concerning discipline of African-American students, and his reaction to communications with the parents of D.A.” Manual had no qualified immunity. The court found Perry and Jones (other administrators instrumental in determining Heyne’s punishment) lacked qualified immunity for the same reasons of bias. Chambers and Thompson, higher level administrators, had come in after procedural due process requirements had been met and therefore were entitled to qualified immunity. As for his equal protection claim, the court found that the discipline did seem to vary based on race and that Heynes was arguably subjected to harsher punishment because of his race. All relevant issues were remanded for further review.

Wolfe v Fayetteville Sch. Dist., No. 10-2570 (8th Cir. Aug. 9, 2011): From 6th to 9th grade Wolfe was subjected to harassment by fellow students. He was called names like “faggot,” “queer bait,” and “and “homo.” Eventually Wolfe was homeschooled. While the school district did not deny the name calling occurred, the district stated that it was not sexual harassment but was bullying. Therefore, it was never reported to the Title IX coordinator by the school, but was dealt with under the school’s bullying policy. Wolfe disagreed and filed suit alleging Title IX peer sexual harassment. The district court found in favor of the school district. The Eighth Circuit affirmed the lower court, agreeing with the lower court that for a Title IX suit the harassers had to be motivated by the victim’s gender or failure to conform to the gender stereotypes in order to find liability. Citing the Supreme Court, the Eighth Circuit stated that “to be actionable, harassment taking place in the school environment must be ‘gender-oriented conduct’ amounting to more than ‘simply acts of teasing and name-calling among school children, even when these comments target differences in gender.’” The court went on to say that “acts of name-calling do not amount to sex-based harassment, even if the words used are gender-specific, unless the underlying motivation for the harassment is hostility toward the person’s gender.”

Cox v Warwick Valley Cent. Sch. Dist., No. 10-3633 (2d Cir. Aug. 17, 2011): Cox was a student who had frequent discipline problems including violent behavior. Upon writing a fairly detailed and violent essay for an English assignment, the principal removed him from class and placed him in an in-school suspension room while he assessed whether Cox posed a credible threat. When it was determined Cox was not an immediate threat, he was sent home. The next day the principal contacted Children and Family Services to report a suspected case of neglect. CFS investigated and concluded the concerns were unfounded. Cox's parents filed suit alleging a violation of his First Amendment right of free speech and of his substantive due process for filing a false report to CFS. The district court granted summary judgment to the school district. The circuit court affirmed. Regarding the report to CFS, since the principal was working within his confines of his job description he had qualified immunity. As for the allegation of a violation of Cox's freedom of speech, the court stated that an individual must show that his speech was protected, that an adverse action was taken against him, and that there was a causal connection between the two. The court never decided whether Cox's speech was protected because it found that there was not adverse action taken, regardless of the status of the speech. "Without more, the temporary removal of a student from regular school activities in response to speech exhibiting violent, disruptive, lewd, or otherwise harmful ideations is not an adverse action for purposes of the First Amendment absent a clear showing of intent to chill speech or punish it." As for the principal's report to CFS, the court stated, "Allowing such reports to generally constitute retaliation against the children would seriously undermine school administrators' ability to protect the children entrusted to them."

Doe v Covington County Sch. Dist., No. 09-60406 (5th Cir. Aug. 5, 2011): Nine year old Jane Doe was sexually abused on six occasions by Keyes, an individual who, although not listed as a person authorized to check her out of school, was allowed by the school to remove her from school. The school never asked Keyes for identification or for other proof that he was an authorized individual. Once he was arrested and convicted, Doe's guardian brought suit against the school district and school officials in their individual capacities. The basis of the suit was that the defendants were liable under the theory of municipal liability on the grounds that Doe's attendance at the school was compelled by state law, therefore a "special relationship" existed between Doe and the school. This special relationship created a specific duty to protect. The district court dismissed the suit on the grounds that the school owed no duty to protect Doe; that there was not special relationship created. The Fifth Circuit reversed in part and affirmed in part. It affirmed the lower court's finding of qualified immunity for all defendants, but stated that it only extended to those sued in their individual capacities. As for the issue of a "special relationship," the court framed the question as, "Are there circumstances under which a compulsory attendance, elementary public school has a 'special relationship' with its nine year old students such that it has a constitutional 'duty to protect' their personal security?" To answer the question, the court turned to the Supreme Court decision in *DeShaney v Winnebago County*, 489 U.S. 189 (1989), where the Court stated that, "the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraints of personal liberty – which constitutionally imposes on the State a duty to protect the restrained citizen from private violence." It decided that in order to determine whether a special relationship existed between Doe and the school it had to determine whether the school staff's conduct amounted to affirmative acts rather than simple inaction, and whether a deprivation of her liberty existed sufficient to create a duty to protect on the school. In a Fifth Circuit case,

Walton v Alexander, 44 F.3d 1297 (5th Cir. 1995), the court sitting en banc stated that a special relationship between a student and a public school “only arises when a person is involuntarily confined or otherwise restrained against his will pursuant to a governmental order or by the affirmative exercise of state power.” A school would create a special relationship “if it affirmatively acts to confine the student against his will, depriving him of his ability to defend himself.” In a second Fifth Circuit case, *Doe v Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997) the Fifth Circuit reiterated the three factors necessary to establish a special relationship between a public school and a student, those being “(1) that the student was very young, (2) is physically restrained by and unable to leave the school’s custody, and (3) is secluded or kept apart from teachers and other pupils who may witness and protest any instances of mistreatment.” As regarding a showing of deliberate indifference on the part of the school, the court concluded: “The School did act with deliberate indifference to Jane’s safety by checking her out to an unauthorized adult (whom they did not know) without verifying his identity to confirm that he was authorized by Jane’s legal guardian to check her out of school when they had actual knowledge of the substantial risk to Jane’s personal security created by this policy. The School’s deliberate indifference as exhibited in its maladministration of its own check-out policy, directly and actively created a known substantial risk to Jane’s safety – which tragically materialized into her repeated sexual abuse by Keyes.” In the end, however, the court found that a special relationship did exist between the school and the student creating a constitution duty of care.

***T.V. v Smith-Green Cmty. Sch. Corp.*, No. 09-290 (N.D. Ind. Aug. 10, 2011):** Two high school students were suspended from extra-curricular activities for a year because of behavior they engaged in during the summer break. During that time, while at a “sleepover” of campus, they posed with phallic lollipops and then posted the photos on-line. Under the school’s “Extracurricular/Co-Curricular Code of Conduct and Athletic Code of Conduct” the students could be held accountable for their activities at all times for conduct which could “discredit or dishonor” the school, even off-season and during the summer. The students filed suit alleging a violation of their freedom of speech. The district court granted the students’ motion for summary judgment, stating that the policy was overbroad and vague; since it was not clear exactly what speech was responsible for the discipline the policy had a chilling effect impermissible under the Constitution. Because the “speech” took place off campus, the district court found that *Bethel v Fraser*, 478 U.S. 675 (1986) did not apply. *Editors Note: To my knowledge this is one of the few, if not the only case, that provided the same analysis to suspension from extra-curricular activities that is normally reserved for suspension from the educational program. Normally, extra-curricular activities can hold students to a higher standard and the location of the speech or activity is immaterial.*

***D.J.M. v Hannibal Pub. Sch. Dist.*, No. 10-1428 (8th Cir. Aug. 1, 2011):** Statements which arise to the level of a “true threat” are not protected speech under the First Amendment, regardless of the location from which those threats were made. A student at Hannibal High school sent an instant message from his home computer to the home computer of another student, in which he told her that he was going to get a gun and kill students which he specified by name. Being concerned, she contacted school authorities who then contacted local law enforcement. Ultimately D.J.M., who was the student who sent the message, was sent for psychiatric treatment by the juvenile court and was suspended from school. He filed suit alleging a violation of his First Amendment right to free speech.

The federal district court found D.J.M. to have made a “true threat,” therefore his speech was not protected by the First Amendment. The court went on to say that even if the speech had been protected, under the “material and substantial disruption” test laid out in the Supreme Court case of *Tinker v Des Moines*, 393 U.S. 503 (1969), D.J.M.’s speech had materially and substantially disrupted the educational environment because in the aftermath numerous parents had contacted the school and threatened to remove the children because they fear for their safety. Also as a result, the school district had been forced to drastically increase security. The court stated, “Several courts of appeal, including this circuit, have applied ‘school speech’ law to cases where the communications occurred off of school grounds but their effects reverberated to the classroom.”

On appeal to the 8th Circuit, in affirming the lower court’s decision, the circuit court noted that none of the Supreme Court’s decisions regarding student speech, *Tinker*, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick*, 551 U.S. 393, 397 (2007), occurred off of school grounds or included true threats of violence. This issue, however, had been before the court before in the case of *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002) (en banc). In *Doe*, the 8th Circuit had defined a true threat as “a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.” The court also turned to another 8th Circuit case, *Riehm v Engelking*, 538 F.3d 952 (8th Cir. 2008) as a case which also included a threat with essentially the same level of specificity and detail as to the intended violence.

As regarding the ability of the school to discipline D.J.M. for the speech based on *Tinker*, the court looked to a 2nd Circuit case, *Wisniewski v Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007) which also involved off-campus instant messaging of threats of violence. The court stated that school officials could control off-campus speech if they “might reasonably forecast substantial disruption of or material interference with school activities,” and that such instant messages did contain this foreseeability by their very nature. “The Supreme Court has not yet had occasion to deal with a school case involving student threats or one requiring it to decide what degree of foreseeability or disruption to the school environment must be shown to limit speech by students. These cases present difficult issues for courts required to protect First Amendment values while they must also be sensitive to the need for a safe school environment.”

***Alpha Delta Chi-Delta Chapter v Reed*, No. 09-55299 (9th Cir. Aug. 2, 2011):** Recognized student groups at San Diego State University receive various benefits including university funding, the use of the university name and logo, access to campus office space and meeting rooms, free publicity in school publications, and participation in various special university events. Numerous fraternity and sorority chapters are recognized as student groups. Alpha Delta Chi, a Christian sorority, and Alpha Gamma Omega, a Christian fraternity applied for recognition as a student group. They were denied recognition because the by-laws of both groups require their members and officers to profess their belief in Christianity. This requirement conflicted with SDSU nondiscrimination policy. The organizations filed suit against SDSU alleging that the nondiscrimination policy violated their rights of freedom of speech, freedom of association, and free exercise of religion under the First Amendment and their right to equal protection under the Fourteenth Amendment. The district court granted summary judgment to SDSU on all counts. On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded the case to the district court for further proceedings. Whether the nondiscrimination policy was constitutional on its face was a question that even the Supreme Court declined to address in the recent case

of Christian Legal Society, a case with no discernible difference than the instant case. Consequently, the court decided to employ the same limit-public forum doctrine analysis applied by the Supreme Court. Using that analysis, SDSU's policy would pass constitutional muster if (1) it was reasonable in light of the purpose of the forum; and (2) it was viewpoint neutral.

Regarding reasonableness, the court looked to the stated purpose of the student organization program. In the Student Organization Handbook it found that purpose to be "one of the intended purposes of the San Diego State's student organization program is to promote diversity and non-discrimination." Given that stated purpose, the court found that "requiring student groups to adhere to a nondiscrimination policy is reasonable in light of San Diego State's intended purpose." As for viewpoint neutrality, the court concluded "the policy is viewpoint neutral as written, but that there are triable issues of fact as to whether SDSU has selectively enforced its nondiscrimination policy." For that reason, the court remanded the case to the lower court to determine if the enforcement of institutional policy was done in a viewpoint neutral manner."

ADMINISTRATIVE ISSUES

***Nampa Classical Academy v Goesling*, No. 10-35542 (9th Cir. Aug. 15, 2011):** The Nampa Classical Academy (NCA) is a public charter school, formed under the laws of the state of Idaho. Its curriculum is structured around a "classical liberal arts format." Therefore, it employs primary sources as the main teaching material rather than text books. Both secular and religious primary sources, including religious texts are used. Upon learning of the use of religious texts, the Idaho Public Charter School Commission told NCA that it was in violation of the state constitution and must cease using them for instruction. A suit was filed against the Commission alleging violation of the First and Fourteenth Amendments. The district court dismissed the claims of the NCA for lack of standing. The claims of the remaining plaintiffs (parents and students) were dismissed on the grounds that the members of the Commission had qualified immunity. On appeal, the Ninth Circuit affirmed the lower court. The court agreed, that as a political subdivision itself, NCA lacked the ability to bring suit. The teacher, however, did have standing as he was asserting that his First Amendment rights as a teacher were valid. The court went on to state that the speech of the teacher, parent, and student were government speech, not personal speech, and therefore not protected under the First Amendment. "A public school's curriculum, no less than its bulletin boards, is 'an example of the government opening up its own mouth,' because the message is communicated by employees working at institutions that are state-funded, state-authorized, and extensively state-regulated."

***Indiana State Teachers Ass'n v Indiana Dep't of Education*, No. 49D03-1107-028585 (Super. Ct. Ind. Aug. 17, 2011):** In July 2011 the Indiana Department of Education told school districts in the state that they were all to start using a teacher contract form provided by the IDE pursuant to state law. The law stated that the districts must use the contract without any changes. The ISTA filed suit challenging the uniform teacher's contract on the grounds that it violated both common law principles of contract law generally and statutory principles of contract specifically. The Superior Court found for the ISTA and granted a preliminary injunction. The court found that the uniform contract provided by the IDE failed to satisfy general principles of contract law because it allowed unilateral amendment by the school district of terms of employment for the teachers regarding number of hours and days worked. The contract, therefore, failed to "state a specific duration or ascertainable term of employment" thus was unenforceable. It "converts a

teacher's employment with a school to an at-will employment relationship, which is impermissible under Indiana law."

***Doe v Indian River Sch. Dist.*, No. 10-1819 (3rd Cir. Aug. 5, 2011):** Though many would think this an issue settled many years ago, opening a school board meeting with a prayer violates the Establishment Clause. The Indian River School District had a practice of including prayer at school functions – school board meetings, athletic events, banquets, and graduation ceremonies. A Jewish family alleged in a law suit that this practice created "an environment of religious exclusion." In 2005 the federal district court found that the board members as individuals had immunity from suit, and dismissed the case against them. In 2008 all claims except those relating to prayer were settled, the remaining claims being voluntarily dismissed after the suing family moved outside the district. In 2010 the district court granted a summary judgment in favor of the school district, finding that opening board meetings with a prayer did not violate the Establishment Clause because, as a statutorily-created deliberative body it fell within those types of groups which may open its session with a prayer. The Third Circuit reversed the lower court, concluding that the line of school prayer cases starting with *Lee* were controlling, not *Marsh* and its progeny. The court found that school board meetings, because of potential student involvement more closely simulated the graduation ceremonies of *Lee*, and the football games of Santa Fe; a concern about coercion existed in all. Additionally, the court found that the "narrow historic context" of *Marsh* and its statement about deliberative body distinguished it from the instant case. Quoting from *Edwards v Aguillard*, 482 U.S. 578 (1987) regarding the historical approach used in *Marsh*, "[it] is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." Consequently, applying both the Lemon and the Endorsement Test, the court found that the primary effect and excessive entanglement prongs were both violated, "Given that the prayers recited are nearly exclusively Christian in nature, including explicit references to God or Jesus Christ or the Lord, we find it difficult to accept the proposition that a "reasonable person" would not find that the primary effect of the Prayer Policy was to advance religion." As to excessive entanglement, it failed on various levels: (1) it was sanctioned through the Board's institutional authority and enacted through a vote; (2) prayers are recited in official meetings that are completely controlled by the state; and (3) the Board recites the prayer. Prayer at school board meetings is unconstitutional.

***Joyner v Forsyth County*, No. 10-1232 (4th Cir. Ju. 29, 2011):** Forsyth County had a past practice of inviting local clergy to offer an invocation at the beginning of Board of Commissioner Meetings. There was no written policy and the county did not dictate the content of the invocation, although they were overwhelmingly Christian. Three residents of Forsyth County filed suit over this practice, to which the county responded by adopting policy which codified the past practice. The policy stated that the prayers were "not intended, and shall not be implemented or construed in any way, to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination." The stated goal of the policy was to "acknowledge and express the Board's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Forsyth County." The district court found that the policy violated the Establishment Clause and issued an injunction against its implementation. Upon appeal, the Fourth Circuit affirmed the lower court. The court noted the stated neutrality in the policy, but it also took notice of the overwhelmingly Christian nature of the prayers offered. Moreover, it was

not the that the policy was neutral on its face that determined its constitutionality, but its primary effect. “It is not enough to contend, that the policy was neutral and proactively inclusive when the County was not in any way proactive in discouraging sectarian prayer in public settings... [policies] that do not discourage sectarian prayer will inevitably favor the majoritarian faith in the community at the expense of religious minorities living therein.”

Meredith v Daniels, No. 49D07-1107 –PL-025402 (Super. Ct. Aug. 15, 2011): A coalition of taxpayers, educators, clergy and parents filed suit to challenge the Choice Scholarship Program (CSP) on three state constitutional grounds: (1) it violates the requirement that the state provide a system of schools which shall be free and open to all; (2) it violates the constitutional prohibition of the state preferring one religion over another or compelling a person to worship against his or her consent; and (3) violates the prohibition of direct government support for religion through the use of public funds for the benefit of any religious or theological institution. The court denied the motion for a preliminary injunction. As regarding the state’s duty to provide free public schools, the court stated that the “Indiana Supreme Court has long understood the ‘all suitable means’ clause to permit the General Assembly, not the courts, taxpayers or school corporations, to decide what ‘means’ are ‘suitable’...even if the legislature goes beyond creating a ‘general and uniform system of common schools.’” As has been decided earlier in Illinois, education is a legislative issue, not a judicial issue. As regarding forced worship, the court found the purpose of the provisions was intended to protect citizens from being forced to tithe or similarly coerced to support churches. Because the CSP was religion neutral, the money went directly to families and not religious institutions, enrollment was ultimately a private choice and did not run afoul for the Indiana Constitution.

Larue v Colorado Bd. of Educ., Nos. 11-4424/11-4427 (Dist. Ct. Colo. Aug. 12, 2011): This is yet another voucher case, wherein taxpayers, students, and parents asked the court to enjoin a state enacted voucher program, the Choice Scholarship Program (CSP). Unlike the outcome in Indiana, however, the Colorado District Court did issue a permanent injunction prohibiting the Douglas County School District from implement that CSP. The court found no merit in the argument that the religion provisions in the Colorado Constitution imposed no greater restriction than the federal Establishment Clause “because it is premised on the idea that the framers of the Colorado Constitution must have debated, drafted, and ratified these provisions without purpose... ignoring the detailed language of Colorado’s religious constitutional provisions.” The court went on to emphasize that, while the Supreme Court has found certain voucher programs to not violate the Establishment Clause, such decisions did not mandate or require a state to participate in such funding; this court was not prepared to mandate that the taxpayers of Colorado foot the bill for private religious education. “Because the scholarship aid is available to students attending elementary and secondary institutions, and because the religious Private School Partners infuse religious tenets into their educational curriculum, any funds provided to the schools, even if strictly limited to the cost of education, will result in the impermissible aid to Private School Partners to further their missions of religious indoctrination to purportedly ‘public’ school students.” Under the Colorado Constitution, the court found: “Specifically, public school students participating in the Scholarship Program should not be subject to: (1) religious qualifications for admission; or (2) compelled attendance at religious services and mandatory religious instruction.”

Schmidt v Des Moines Pub. Sch., No. 10-3411 (8th Cir. Sept. 14, 2011): Lisa and Michael Schmidt shared joint custody of their three children, but Michael had primary physical custody.

Lisa had a set visitation schedule when she could see the children. Additional visitation could occur “as mutually agreed to by and between the parties so as not to interfere with the health, education, and welfare of the parties’ minor children.” The problem started to arise when Lisa attempted, without Michael’s knowledge or agreement, tried to visit the children at school. The school’s policy was that it would obey court orders, and it was the responsibility of the custodial parent to provide documentation of any restrictions. On advice of district counsel, the school denied Lisa’s request to see the children during school unless Michael had notified that district that he had agreed to such visitation. Lisa filed suit, but summary judgment was granted to the school district because the court found that the school district had not violated the non-custodial parent’s rights. The lower court was unanimously affirmed by the Eighth Circuit. Regardless of the non-custodial parent’s theoretical liberty interest in association with her children, such interest was not fundamental and could be, and was, limited by the divorce decree.

SPECIAL EDUCATION

F.D. v Newburyport Pub. Sch., Nos. 10-1241/10-1251 (1st Cir. Aug. 19, 2011): The parents of E.D. unilaterally placed E.D. in a private school in Connecticut. They filed for reimbursement of tuition. The Massachusetts Bureau of Special Education Appeals (MBSEA), while agreeing that the placement chosen by Newburyport to be inappropriate, denied reimbursement ordering instead that the parents consider other nearby public schools rather than the out-of-state private school. Prior to the start of the next school year, but after filing the claim, the parents moved to Connecticut. From Connecticut the parents appealed the decision of the MBSEA and also requested payment of attorney’s fees as allowed under the IDEA. The district court found in favor of Newburyport, stating that the parent’s move to another state rendered the case moot. “As the parents no longer reside in Newburyport, the Newburyport Public Schools are under no obligation to provide any educational or special educational facilities.” The First Circuit reversed and remanded, holding that the parent’s move did not make the action moot. The parent’s claim for tuition reimbursement was for the school year during which they continued to reside in the Newburyport district. “The fact that the Does later moved owing to financial straits as NPS denied reimbursement and the proceedings dragged on does not on its face moot these claims.” The court determined that the suit was not prospective, but was based on failures occurring when the parents were residents of the district.

Payne v Peninsula Sch. Dist., No. 07-35115 (9th Cir. Jul. 29, 2011): D.P., a special education student with an IEP, was in a self-contained special education classroom in the elementary school. In attempts to address his behavioral issues, one method used was placing him in a “safe room” for a time-out. The use of this method of discipline became a problem with his parents; they saw it as aversive therapy and requested that it not be used. The issue was mediated and, while D.P. was to be moved to another school, the methods of behavior modification to be used were never discussed. Ultimately D.P. was withdrawn from school and home schooled. The mother filed suit. Her claims were based on the use of the “safe room.” The district court dismissed for lack of subject matter jurisdiction for failure to exhaust administrative remedies available under the IDEA. In its original ruling, the Ninth Circuit affirmed the decision of the lower court. Upon a rehearing en banc, the Ninth Circuit affirmed in part and reversed in part, the decision of the lower court. The basic issue with which the court wrestled was whether, through the wording of the IDEA, failure to exhaust administrative remedies limited the court’s

subject matter jurisdiction. “The provision is written as a restriction on the rights of plaintiffs to bring suit, rather than as a limitation on the power of the federal courts to hear the suit... Nothing in the relevant jurisdictional statutes requires exhaustion under the IDEA.” The court concluded that the IDEA provided sufficient flexibility to allow subject matter jurisdiction to pass to the federal court. As to whether the IDEA exhaustion requirement applies to claims for relief that are available under the IDEA, the court stated, “non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA.” Consequently, it was decided that non-IDEA claims should not be dismissed on exhaustion grounds. Did that mean, then, that IDEA exhaustion requirements can be circumvented by limiting claims to money damages? The court found that the IDEA requires exhaustion of administrative remedies in three instances: (1) when a plaintiff seeks an IDEA remedy or its functional equivalent; (2) where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student; or (3) where a plaintiff is seeking to enforce rights that arise as a result of a denial of FAPE.

Online Social Networks: Have K-12 Students Lost their Privacy or Given it Up?

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I. Introduction

Over 50,000 photos were taken of students, without their knowledge, while in their own homes by a school district that provided them laptops with webcams.¹ The Lower Merion School District in Massachusetts wanted to give its students access to school resources “24/7.”² Blake Robbins, a student at Harrington High School in the Lower Merion School District, took his laptop home one day, like all the other students had, including his eighteen-year old sister.³ Blake’s favorite candy is Mike and Ikes and he ate them so much his mother even said he was addicted to them.⁴ On November 11, 2009, Blake’s Vice-Principal called Blake into his office.⁵ The Vice-Principal reprimanded Blake for “improper behavior in his home.”⁶

The Vice-Principal had thought Blake was taking and dealing drugs.⁷ The evidence the Vice-Principal had was pictures of Blake eating Mike and Ikes taken in his home from a webcam on his school-provided laptop.⁸ The webcam had taken the pictures and remotely transmitted them to a school official.⁹

Society has become more technologically advanced than ever before, allowing government officials to see more information about each person. The Founding Fathers knew of the abuses of the English Crown who used “general warrants” to search homes without cause or reason.¹⁰ To combat the idea of general warrants the Fourth Amendment was created and unequivocally stated that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...”¹¹ K–12 institutions have been demanded to hand over their private passwords to social networking sites or face punishment.¹² A Florida high school student, frustrated by his school’s poor academic performance, created a Facebook group critical of the school’s academic standing and was unanimously expelled by a group of teacher’s from the school honors society.¹³ It has long been recognized by the United States Supreme Court that “students do not shed...their constitutional rights at the schoolhouse gate.”¹⁴ The Supreme Court has applied both the Fourth Amendment¹⁵ and the First Amendment¹⁶ to students in school settings.

This note will examine why students in K–12 settings, who restrict their online social network profiles, are protected under the Fourth Amendment because by limiting their profiles they have created a legitimate expectation of privacy protected by the Fourth Amendment. The note, while applicable to any online social network, primarily focuses on Facebook since it is the largest, and fastest growing, social network.¹⁷ Part II elaborates on how social networking sites work with brief summaries of the technology. Part III will discuss the Fourth Amendment and how it has been interpreted by the Courts and protections given to modern technologies by the Fourth Amendment. Part IV will describe how students who have limited the people who can view their online social networking pages have a legitimate expectation of privacy and are thus protected by the Fourth Amendment. The fourth section will conclude with suggestions on how schools can develop policies that are not violative of the Fourth Amendment.

II. Defining Social Networks

Facebook is the most popular of all social networks with over 1.9 billion views to its website in January 2009.¹⁸ Facebook has 400 million active users with fifty percent of those logging onto Facebook in a given day.¹⁹ Facebook was created in 2004 by Mark Zuckerberg, at the time allowing only a select few students at certain colleges to sign up.²⁰ In September 2005, Facebook allowed high school students to register with the site.²¹ One year later Facebook opened its registration to anyone, regardless of school affiliation or lack thereof.²² Once an e-mail address, name, and optionally a high school or college affiliation are provided one is then permitted to create a profile and to locate real life friends who are also registered with the site.²³ Upon completing the initial registration one must then create a profile.²⁴

A profile is one's presence on the specific social network and on Facebook contains basic information, such as name, birthday, hometown, etc. along with more intimate information such as address, educational background, favorite quotes, etc.²⁵ At this point one would be able to submit a picture of him or herself that could be seen by the entire Facebook community.²⁶ Facebook allows a person to include as much, or as little, information about him or herself as they desire.²⁷ Once a profile has been created one can then search for friends, submit photos, and keep their profile up-to-date.²⁸ Facebook allows users to upload photos of themselves or their friends to Facebook and "tag" those photos with the names of the people in them.²⁹ A "tag" can be undone by the person who is tagged but a photo may only be removed by the person who originally uploaded the photo, thus while a tag may be removed by the person who is tagged, the photo itself remains on Facebook without the tag, unless removed by the original poster of the photo.³⁰ Uploading a photo can be done from a cellular phone, provided that the phone has a camera on it.³¹

Facebook distinguishes between information that is publicly available and information that is not publicly available.³² Publicly available information is information from one's profile that is accessible to anyone in the Facebook community, whether one is friends with them or not.³³ The information includes one's name, profile picture, gender, and current city among other basic information.³⁴ Facebook allows you to control specifically what information you want the public to be able to see and what information you want only your friends to be able to see.³⁵ Facebook allows you to determine which friends, or which group of friends, can see specified information in your profile, thus creating what is called a limited profile.³⁶ Facebook's privacy policy permits the company to share your information with government entities if they have a "good faith belief" that they are required to do so.³⁷

III. The Fourth Amendment and Social Networks

This part will focus on three sections regarding the application of Fourth Amendment law and will start with A) defining what is protected and not protected by the Fourth Amendment, B) the traditional exceptions to the Fourth Amendment, C) the application of the Fourth Amendment to students in K-12 settings, and D) the application of the Fourth Amendment to the internet.

A. Defining What is Protected and Not Protected by the Fourth Amendment: The Two Prong Test

In 1967, in *Katz v. U.S.*, the Supreme Court held that "the Fourth Amendment protects people, not places."³⁸ The Court went on to say that if a person exposes something to the public such is

not protected by the Fourth Amendment, even if the very things exposed were in one's home or office.³⁹ However, the Court elaborated by proclaiming that "...what [a person] seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected" (emphasis added).⁴⁰ The *Katz* Court went against a narrow interpretation of the Constitution when it upheld a phone booth as a constitutionally protected area, because to interpret the Constitution "more narrowly is to ignore the vital role that the public telephone has come to play in *private communication* (emphasis added)."⁴¹ The Court recognized the "vital role" the telephone booth became in society, but in 1998 there were 2.1 million payphones, which diminished to about 1 million in 2006.⁴²

In Justice Harlan's concurring opinion in *Katz* he stated that a two prong test would be used to determine whether a person had a legitimate expectation of privacy in regards to a specific place or area and if either prong failed then no such expectation existed and no search, in the constitutional sense, occurred.⁴³ This was a "forward-thinking" approach by the Supreme Court because it would help the Court in assessing future Fourth Amendment applications to ever changing societal conditions and evolving issues of privacy.⁴⁴ Justice Harlan's concurrence was subsequently affirmed by the United States Supreme Court as the "touchstone of [Fourth Amendment] analysis."⁴⁵

The first prong looks to whether the person in question exhibited an actual, subjective, expectation of privacy with regards to the area in question.⁴⁶ The Supreme Court has held that there is no expectation of privacy in information one voluntarily gives to a third party, even if that person subsequently gives the information to the police.⁴⁷

Information voluntarily handed over to a third party is no longer protected by the Fourth Amendment and the third party can choose to give such information to any party it chooses, including the government.⁴⁸ In 1976, in *U.S. v. Miller*, the Supreme Court held that bank records were not protected by the Fourth Amendment because by choosing to transact business with a bank the customer was voluntarily handing over their information to a third-party.⁴⁹ Although *Miller* never mentioned any application toward non-bank business records, it has been interpreted to mean there is no expectation of privacy in all business records handed over to third parties.⁵⁰ Congress, subsequent to the *Miller* decision, enacted legislation superseding *Miller* and requiring law enforcement personnel to issue a summons to the person whose records they are requesting while also requiring the police have a "legitimate law enforcement inquiry."⁵¹ Furthermore, many state courts have rejected the Court's narrow *Miller* analysis through more expansive privacy rights found in their state constitutions.⁵² The Court decided *Miller* in 1976—long before the wide acceptance and use of the internet.⁵³

The second prong of the *Katz* test applied an objective standard and looked to whether society was prepared to recognize the expectation as reasonable.⁵⁴ The Supreme Court has given three considerations to be considered to determine whether an expectation of privacy is objectively reasonable—first, whether the expectation is one based upon tradition or recognized by statute, second, the way in which the area in question may be used, and third, whether the person claiming Fourth Amendment protection "manifested that interest to the public in a way that most people would understand and respect."⁵⁵ In dicta the Court discussed normal considerations under this prong may not be applicable to non-spatial or non-physical spaces.⁵⁶

B. Traditional Exceptions to the Fourth Amendment

Searches conducted without a warrant, and thus without judicial oversight, are considered "per se unreasonable."⁵⁷⁵⁸ However, there are some traditional exceptions to the warrant requirement, despite whether a specific area passes the *Katz* test.⁵⁹ Consent to search, plain view, and

open fields are some traditional exceptions.⁶⁰ The plain view exception allows the police to seize evidence without a warrant if—the police officer is “lawfully located” in an area where he can see the incriminating evidence, the “incriminating character” of the evidence the officer sees is “immediately apparent,” and the officer may legally access “the object itself.”⁶¹ Consent is another exception to the warrant requirement, but such consent must be voluntarily given.⁶² Third party consent may also be given to search another person’s property if the property itself is subject to joint access and control for most purposes by the third party and the party in question.⁶³ The Supreme Court in *Matlock* limited third party consent by justifying the authority of such consent, not upon traditional ideas of property law and ownership, but upon the:

mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.⁶⁴

In differentiating traditional property ownership from “mutual use” the Supreme Court has held that a hotel clerk did not have joint access and control to consent to the search of a guest’s room.⁶⁵ The “Open Fields” doctrine states that a person has no expectation of privacy in activities conducted outdoors.⁶⁶

C. The Application of the Fourth Amendment to Students in K–12 Settings

This section will begin by examining the standards of evidence required under the Fourth Amendment to constitutionally search a protected area and will then discuss how the Fourth Amendment applies in K–12 settings.

1. The Two Standards of Fourth Amendment Searches and Seizures: Probable Cause and Reasonable Suspicion

There are two standards of the level of suspicion required with regards to constitutional searches and seizures.⁶⁷ The first standard is probable cause which

[E]xists where ‘the facts and circumstances within [an officer’s] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed,’ . . . and that evidence bearing on that offense will be found in the place to be searched.⁶⁸

Probable cause is required in order for a state actor, such as law enforcement, to search a constitutionally protected area.⁶⁹ Reasonable suspicion is a lower standard than probable cause but requires more than a “mere hunch.”⁷⁰ When determining reasonable suspicion, one must look to the “particularized and objective” facts involved in any particular situation while examining the “totality of the circumstances” when assessing whether reasonable suspicion actually exists.⁷¹ Reasonable suspicion requires “considerably less” evidence than a preponderance of the evidence standard.⁷² Generally, the probable cause standard is substituted for reasonable suspicion, a lower standard, “where a careful balancing of governmental and private interests suggests that the public interest is best served by” the use of the lower reasonable suspicion standard.⁷³

2. The Fourth Amendment Standards that are Applied in the K–12 Setting

Teachers and school administrators, in public schools, are considered state actors and subject to constitutional safeguards.⁷⁴ In the school setting, the reasonable suspicion standard is ap-

plied to searches of students conducted by school administrators and a search is constitutionally reasonable if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁷⁵ The landmark case of *N.J. v. T.L.O.* established that K–12 students are protected from unreasonable searches and seizures and teachers are agents of the state.⁷⁶ Furthermore, the Court held that a warrant was not required in the school setting for searches of students, but that reasonable suspicion, not probable cause, was sufficient for a search to be reasonable.⁷⁷

With regards to searches of students, the Supreme Court maintained the use of a “twofold inquiry” in determining whether a search of a student is reasonable—whether the search was “justified at its inception” and whether the search was “reasonably related in scope” to what is being searched for.⁷⁸ A search is “justified at inception” if reasonable suspicion that evidence that the student violated a school rule or the law will be discovered by the search.⁷⁹ The scope is reasonable when the search is “reasonably related” to what is being sought and “not excessively intrusive” while keeping in mind the “age and sex of the student and the nature of the infraction.”⁸⁰

The Supreme Court has yet to conclusively decide the rights of students off school property, but various courts have held that schools may punish students for off-campus activities that have a “direct and immediate effect on the discipline or general welfare of the school.”⁸¹ Federal courts have generally sided with schools in imposing punishment on students for non-school related conduct committed off campus.⁸² Schools have been given broad authority to punish pupils for off campus activities when such activities ridicule the school or teachers to an extent that it impairs their authority.⁸³ While off campus discipline is related to the topic of this note it will not be addressed specifically.

D. The Application of the Fourth Amendment to the Internet

The United States Court of Appeals for the Armed Forces held in *U.S. v. Maxwell* that there was an expectation of privacy in e-mails sent to another person and stored on an internet service provider’s servers.⁸⁴ The Supreme Court has not spoken directly on email transmissions with regards to the Fourth Amendment.⁸⁵ In 2009, 90 trillion e-mails were sent online averaging 247 billion messages a day.⁸⁶ In comparison, the United States Postal Service handles 212 billion pieces of mail per year.⁸⁷ The *Maxwell* Court compared internet communications, such as e-mails, to physical letters, thus entitling the internet communications to the same level of privacy and Fourth Amendment protection, even if stored on a remote internet service provider’s servers.⁸⁸ The Court also held that a message sent to the public at large, such as a chat room, or an e-mail sent to many people may lose its expectation of privacy.⁸⁹ The Sixth Circuit has held that no legitimate expectation of privacy existed when a user of an online bulletin board sent an e-mail to all the members of that bulletin board.⁹⁰ Generally, employees have no legitimate expectation of privacy on their employer’s computers, but the use of a password may suggest that the employee had a legitimate expectation of privacy to files on that computer.⁹¹

IV. Students Who Limit Who Can View Their Profiles Have a Legitimate Expectation of Privacy in Their Limited Profiles

This section will address the application of the *Katz* test to social networks. First, the first prong of the *Katz* test—whether students “exhibited an actual expectation of privacy”—will be discussed and applied to limited profiles. Second, the second prong of the *Katz* test—whether

students' expectations or privacy on limited profiles are "expectation[s] society is prepared to accept as reasonable"—will be discussed and applied to limited profiles. Third, the traditional exceptions to the warrant requirement of the Fourth Amendment will be discussed in the context of limited Facebook profiles. Finally, the appropriate standard of suspicion required for investigating limited student profiles will be assessed.

A. Students Using Limited Profiles Exhibit an Actual Subjective Expectation of Privacy

Students satisfy the first prong of the *Katz* test if they properly limit their profiles from view from school administrators. The first prong of the *Katz* test requires that the person in question exhibit an actual, subjective expectation of privacy of the area in question.⁹² When students create a limited profile on Facebook these students are expressing their desire to make information they put on their profiles private, or limited to only certain people. By limiting a profile to specific people, usually friends, there is little question that students who do so have an actual, subjective expectation that the privacy settings will keep their information private or limited to whom they choose.

It may be contended that Facebook profiles are not protected by the Fourth Amendment because the user has voluntarily handed over his or her information to a third party, Facebook. In *Guest v. Leis*, the Sixth Circuit Court held that subscriber information on an online bulletin board was not protected by the Fourth Amendment because the user had voluntarily handed over such information to a third party, the bulletin board operator.⁹³ In *Guest*, the users argued that their subscriber information such as their names, addresses, and passwords was protected, because their message postings, which were the target of a criminal investigation, were publicly posted.⁹⁴ Since the postings were publicly posted they would not have been entitled to protection under the two-prong test, since the users failed to exhibit even a subjective expectation of privacy, thus the argument was not over the posts but the subscriber information that was not publicly posted. However, there is no argument that a Facebook profile with no privacy limits on it would have no expectation of privacy, nor is it argued that law enforcement could request subscriber information from Facebook, since that is voluntarily given to Facebook.

Limited Facebook profiles, unlike the public postings on the bulletin board in *Guest*, are not visible, and not public, to anyone who is not allowed to see them, thus creating a subjective expectation of privacy in those profiles. Undeniably users of an online bulletin board system, in which their messages are to be sent to any user registered with the bulletin board, would have no subjective expectation of privacy because the sender has demonstrated no desire to keep his or her transmission private. However, were the bulletin board system to be limited to friends of the person sending the message then a subjective expectation of privacy would have existed because the sender of any message would intend his messages to go only to his or her friends.

A Facebook profile is not a record maintained by a business, but similar to a virtual safety deposit box and thus a user has a legitimate expectation of privacy with regards to his or her profile. The Sixth Circuit Court of Appeals has held that one does have a legitimate expectation of privacy in a safety deposit box in a bank.⁹⁵ The Supreme Court held in *Miller* that there is no legitimate expectation of privacy in one's bank records because the information was voluntarily handed over to a third party.⁹⁶ Thus, one could contend that information, such as a Facebook profile, is voluntarily handed over to Facebook thus vitiating any subjective expectation of privacy in one's limited profile.

The contention that an online profile is a record voluntarily handed over to Facebook is disingenuous because it places emphasis on a Facebook profile being equivalent to a record such as

a phone number dialed or a bank record. In *Miller*, the Supreme Court held that a person has no legitimate expectation of privacy in bank records because the information, primarily checks and transactions, was voluntarily handed over to the bank and a person could expect a bank to examine their records in the regular course of business.⁹⁷ However, bank records are business records and when one turns over information to a business it is expected that business would have to track such information. Furthermore, the *Miller* Court held that no expectation of privacy existed because one could expect a bank employee to see the checks and deposit slips in the regular course of business, such as by cashing the check for the customer.⁹⁸

Facebook profiles are not business records in the traditional sense because they are personal profiles with personal information, not containing any business-like attributes. Furthermore, Facebook employees are not expected, in the regular course of their business, to examine every change to a user's profile – a user does not submit his or her profile updates, and wait for approval as a bank check must, but rather submits an update which takes immediate effect. A Facebook profile is analogous to a safety deposit box in a bank—while a third party has physical control over the box one is paying for that box to be kept secret. Arguably, *Miller* would likely have been decided differently had the government requested the bank to hand over the contents of a safety deposit box. On Facebook, while one does not actually pay Facebook for hosting their profiles one “pays” Facebook by allowing ads to be generated alongside the site.⁹⁹

Information generated by Facebook regarding a user's number of log ins, number of friends, or who the person was friends with could all arguably be considered similar to the records in *Miller* and not subject to Fourth Amendment protections. Finally, it is conceded that a student who is a friend with another student that sees a picture depicting illegal conduct who then hands that picture over to the school would have been a third party conveyed information by the user and that third party would be allowed to turn over anything he or she could see to the police or school, since the student whose profile was being searched allowed that person to see it.¹⁰⁰

A limited profile, simply because it is visible to many people, does not vitiate the subjective, actual expectation of privacy a user may have because the person, by limiting the profile to only friends, is effectively forbidding all others from viewing it and not reasonably expecting the forbidden persons to view it. Facebook profiles, when limited to friends only, would be substantially equivalent to an online bulletin board limited to only friends of each member. In *People v. Torres*, the Illinois Court of Appeals held that the fact that an area is in public, or viewable by many people, does not necessarily mean there is no Fourth Amendment protection if the person shows a desire to keep something private.¹⁰¹

Similarly, simply because many people can view a limited profile does not mean that a person did not demonstrate a desire to keep that profile private from all other people. A limited profile is analogous to a bulletin board locked behind a door in which friends are given keys to. There would be no question that such a physical bulletin board, hidden behind a locked door, would be subject to Fourth Amendment protections thus limited Facebook profiles must be subject to the same protections. Thus, there is no less privacy in a limited profile than a person would have in his home to which many friends had keys to—it is not the number of people who may access the area in question, but whether the person asserting a Fourth Amendment right had a subjective expectation of privacy.

A student exhibits a subjective expectation of privacy in a limited profile by the very act of limiting his or her profile from others and by taking steps designed to ensure only those people her or she desires may see it. A limited Facebook profile, since it can be accessed by password only

or by those friends allowed access, is similar to a locked area in which multiple people have keys to. In *Truloch v. Freeh*, the Fourth Circuit Court of Virginia held that a computer, locked with a password, was considered an area protected by the Fourth Amendment not because of the password itself, but because by creating a password the defendant “intended to exclude...others from his personal files” and thus took affirmative steps to keep his information private.¹⁰² The password itself was not the reason the court held that an expectation of privacy existed, but the user’s act of using a password to prevent others from accessing it. Similarly, the user of a limited Facebook profile must adjust his or her privacy settings to allow only his friends, whom he or she approves, to see his or her profile thus taking affirmative steps to prevent others from seeing his or her profile.

The United States Court of Appeals for the Armed Services held in *U.S. v. Maxwell* that privacy expectations diminish depending upon the “type of e-mail” and the “intended recipient.”¹⁰³ The Court held that messages sent to large audiences or the public at large, like chat rooms, would certainly have no expectation of privacy.¹⁰⁴ Facebook, however, is different. There are no messages in the traditional sense—only updates or changes to one’s profile, including additional pictures.

Thus, a Facebook profile is not analogous to a mass e-mail or open chat room because only a select number of people can view the profile. Furthermore, the profile itself is a single “message,” not one being sent to hundreds of people, but one message viewed by many. It would be similar to a physical bulletin board under lock and key in which multiple people visit. Therefore, a student taking affirmative steps to limit his or her profile has espoused an actual, subjective expectation of privacy.

B. Expectations of Privacy Regarding Limited Profiles on Social Networks are Expectations that Society is Prepared to Accept as Reasonable

A student’s expectation of privacy in a limited profile on a social network is an expectation that society is prepared to accept as reasonable. The second-prong of the *Katz* analysis is whether the expectation of privacy is one in which society is prepared to accept as reasonable.¹⁰⁵ There are three traditional considerations espoused by the Supreme Court that must be considered to determine whether the expectation is reasonable—first, whether the expectation is one based upon tradition or recognized by statute, second, the way in which the area in question may be used, and third, whether the person claiming Fourth Amendment protection “manifested that interest to the public in a way that most people would understand and respect.”¹⁰⁶ These considerations are not completely helpful in a modern, virtual setting and the Supreme Court stated in dicta that such considerations may not be applicable to non-spatial or non-physical spaces.¹⁰⁷ Virtual settings, such as Facebook, are arguably non-spatial and thus the traditional test for whether an expectation is one which society is prepared to accept is not applicable. Thus, when dealing with virtual online social profiles, the courts should look to, in determining whether an expectation of privacy is one which society is prepared to accept as reasonable, several different factors. First, whether a person’s actions in making their information private were reasonable. Second, whether that person “manifested that interest to the public in a way that most people would understand and respect.”¹⁰⁸

The reasonableness of one’s actions should be determined by looking to whether that person could take any further actions to accomplish his or her privacy goals and whether a reasonable person would have taken further action to ensure those privacy goals. This would be an objective test and it would not be necessary for a student to exhaust his or her privacy settings to ensure maximum privacy to an extent no reasonable person would take (this would be self-defeating since the ultimate way to ensure privacy would be to delete one’s profile), but only that the extent to which

they made their profile private was reasonable and no further reasonable steps could be taken. Furthermore, the standard, since it is part of the second-prong of the *Katz* test, is an objective one.

A student making his or her online profile limited to only his or her friends by adjusting his or her privacy settings, thereby prohibiting all others from seeing his or her profile, has taken reasonable actions to make their information private. The action is reasonable because, in virtual media, there is no other way to prevent others from seeing information one has posted. Arguably, one could refrain from posting that information in the first place, or take it down, but the test should not focus on what actions the student failed to do, but what actions the student actually did. Furthermore, the student, by making his or her profile limited, would “manifest that interest in a way that most people would understand...” because by limiting a profile from view from others most people would understand that, if they are the excluded parties, they are not allowed to view that profile. Therefore, a limited profile meets the new standard for online social networks and thus limited profiles would be areas in which an expectation of privacy is one that society is prepared to accept as reasonable.

C. The Traditional Exceptions to the Warrant Requirement of the Fourth Amendment Do Not Apply to Social Profiles That Are Limited

The traditional exceptions to *Katz*—items in plain view, consent, and open fields—are not applicable to limited profiles on social networking sites. The “open fields” doctrine is not apt in comparison to a limited profile. Open fields have, under the common law, never been subject to Fourth Amendment protection.¹⁰⁹ The Supreme Court has stated that the open fields exception applies so long as the public can see or physically access the field.¹¹⁰ Limited profiles do not share the same characteristics of the “open fields” doctrine because profiles are not areas of land in which one can physically walk. On the contrary, limited Facebook profiles may not even be viewed by persons not allowed to do so, whereas an open field could be viewed by the public. Furthermore, unlike open fields, which can be viewed by the public, limited profiles by definition cannot be viewed by the public and are restricted.

Another traditional exception that is not applicable is consent, more specifically third party consent which requires joint access and control for most purposes of the area in question.¹¹¹ Joint access and control for most purposes of a specific area, such as husband and wife in their home, allows a third party to give consent to search an area of “mutual use.”¹¹²

Even though Facebook may have physical possession of profiles on their servers such evidence is not sufficient to satisfy joint access and control for most purposes. The Supreme Court has held that hotel owners have no right to consent to a search of a guest’s room¹¹³ and landlords have no right to consent to search of tenant’s room.¹¹⁴ The foundation of these holdings was “mutual use” (or lack thereof) of the property, not technical ownership of it. There was no dispute in either cases that the property owners owned the property and that the tenant or guest did not, but the court looked to the “mutual use” of the property, not its ownership.¹¹⁵ The *Matlock* Court held that to determine “mutual use” one must look to the relationship between the parties—the third party and the other party—or whether the third party had “common authority” over the place to be searched.¹¹⁶ Furthermore, the *Matlock* Court required that third party consent be reasonable and that the actual property owner could reasonably know that the third party might inspect the property in his own right.¹¹⁷ Since joint access and control for most purposes is not based on traditional property rights, but on “mutual use”, it is unequivocal that Facebook does not mutually use Facebook profiles and thus lacks the ability to consent to a search.

Facebook's privacy page states, "You own all of the content and information you post on Facebook..." and further states Facebook will only utilize photos and content on one's profile "subject to your...privacy settings."¹¹⁸ Joint access and control for most purposes is not premised on traditional property rights, but upon "mutual use" of the actual object or area in question.¹¹⁹ Facebook's privacy policy clearly states that the user owns his or her own profile information, not Facebook.¹²⁰ A user would not reasonably expect, based upon Facebook's own privacy policy, that Facebook would alter a profile or access one's profile in the same way the user does. Facebook is analogous to a landlord-tenant relationship rather than a roommate or joint-tenant because there is no relationship between the user and Facebook in the way the *Matlock* Court envisioned, such as husband and wife, roommates, etc., only that Facebook physically stores the user's profile on its servers. Therefore, Facebook lacks the "mutual use" required to give it joint access and control for most purposes over the user's profile and thus cannot consent to a search of that profile.

Even if one believes Facebook may have joint access and control for most purposes the Supreme Court has held in *Ga. v. Randolph* that one co-tenant's consent cannot override the objection the other co-tenant.¹²¹ Arguably, Facebook and the user would, at the minimum, be "co-tenants" of the user's profile and by creating a limited profile the user has impliedly objected to it being given to authorities, thus disallowing any consent given by Facebook. While *Matlock* technically required the objecting tenant to be physically present for his objection to be valid, it would be perverse to require the user to be physically present to object since there is no physical location at all thus the user's implied objection, by limiting his or her profile, should be sufficient to invalidate any third party consent. Therefore, Facebook does not have joint access and control for most purposes as to allow it to give consent to search a user's limited profile.

The final exception that is inapplicable to limited profiles on social networks is plain view. In *Horton v. Cal.*, the Supreme Court espoused three criteria in order for the plain view exception to come into play.¹²² First, plain view requires first that the state actor did not violate the Fourth Amendment in the first place in order to arrive at the place in which any item may be in plain view.¹²³ This might be possible if limited Facebook profiles lacked a legitimate expectation of privacy, but since limited profiles have an expectation of privacy there is no way a state actor can see the profile without violating the Fourth Amendment. Secondly, the "incriminating character" of the evidence must be readily observable by the state actor.¹²⁴

Even if a state actor could satisfy the first requirement, evidence such as photos of a person on his or her profile is not readily available on the main page of one's profile. The state actor would be required to click a link within one's profile to access those photos, thus the incriminating nature of photos would not be readily observable. Finally, the state actor must have lawful access to the area where the evidence to be seized is located.¹²⁵ It is conceded that if the state actor met the first condition that he would likely meet the final one, but if a profile is actually limited from view from state actors then there is no lawful way a state actor can access the area in which the evidence, the limited profile or pictures in it, is available. Thus, the plain view exception to the Fourth Amendment does not apply to limited profiles because they are not in plain view.

D. The T.L.O. Reasonable Suspicion Standard should be Adopted for School Administrators Wishing to Examine Limited Profiles

The Courts should apply the *T.L.O.* required level of suspicion to Facebook profiles and require that school administrators have reasonable suspicion of wrongdoing in order to look at a student's limited profile. Facebook profiles are made and stored on Facebook servers and thus

any searches would not, at the moment, be subject to the lesser *T.L.O.* standard of reasonable suspicion because the search would not be of a student on school property.¹²⁶ If limited profiles have a legitimate expectation of privacy then, without applying the *T.L.O.* standard, they could only be searched with probable cause that evidence of wrongdoing existed on them and would require a warrant. The *T.L.O.* standard thus properly balances the interests of the school as well as the privacy interests of the student.

Recognizing the unique nature of the school environment, along with the growing need for administrators to ensure school safety, a reasonable suspicion standard, as the Supreme Court has espoused in *T.L.O.* would be sufficient to protect K–12 students' privacy interests. If a school official has reasonable suspicion, along with individualized suspicion, that the student has committed illegal acts or school code violations on campus then the official should not be required to have any further proof of wrongdoing in order to examine limited profiles of students. This would strike the appropriate balance between the privacy interests of students using limited profiles along with the need for the school to ensure the general welfare of students. If a student foregoes any privacy limits on his or her profile, or does not use sufficient privacy limitations as to prevent any member of the public from seeing his or her profile, then the student's profile is not protected by the Fourth Amendment.¹²⁷

V. Conclusion

Students, in a K–12 setting, have a legitimate expectation of privacy in regards to their Facebook profiles if they properly limit their profiles from view. This expectation of privacy exists because students exhibit an actual (subjective) expectation of privacy by limiting their profiles. Furthermore, expectations of privacy regarding limited profiles on social networks are expectations in which society is prepared to accept as reasonable. Schools should adopt policies in line with student and teacher use of social networks. Schools should promulgate straightforward policies regarding social networks. These policies should be in clear and plain language and should be issued and reissued to students on an annual basis. Schools should not attempt to obtain waivers of any Fourth Amendment rights from students, regardless of a student's participation in school activities.¹²⁸ An example of such a policy is as follows:

Students are not to "friend," message, or interact with teachers or school administration on Facebook, or any social networking site, except in the case of a bona fide emergency justifying such use. Similarly, teachers and administrators shall refrain from the same, except in the case of a bona fide emergency justifying such use. If a school official has articulable facts, specific to the individual student in question, that that student has evidence of a crime or school code violation committed on school property (if schools wish to punish students for off campus activities then include the following instead—or has committed a crime off school property that directly affects the general welfare of the school or is a substantial violation of school code) on their limited social networking profile then such administrator may request access to a student's profile. Anonymous tips should be examined with suspicion unless there is evidence obtained elsewhere that corroborates the anonymous tip. Students should limit who may view their profiles to persons they find acceptable to view their profile.

Societal, and potentially even technological, changes were exactly what the Supreme Court anticipated when it announced the *Katz* two-prong test for what is protected by the Fourth Amendment.¹²⁹ The test anticipated changes in society because it did not lock the places protected

by the Fourth Amendment into rigid, bright line areas and the court adamantly proclaimed that the Fourth Amendment “protects *people*, not places” (emphasis added).¹³⁰ The Court could not foresee the proliferation of the internet, in which nearly 230,000 Americans, or 74 percent of Americans, would have access to.¹³¹ The Supreme Court’s two-part test from *Katz*, however, is still applicable and limited profiles on social networks readily fit within the *Katz* framework and should be considered places in which a legitimate expectation of privacy for K–12 students exists.

¹ Chris Weiss, *Lower Merion School District Took over 50,000 Pictures of Students in their homes*, April 10, 2010, <http://gadgetcrave.com/lower-merion-school-district-took-over-50000-pictures-of-students-in-their-homes/6632>.

² Dana DeFilippo, *Lower Merion School District sued for cyber spying on students*, Feb. 18, 2010, <http://www.philly.com/dailynews/breaking/news/84715297.html>.

³ See CNN, *Transcripts*, Feb. 22, 2010 <http://transcripts.cnn.com/TRANSCRIPTS/1002/22/cnr.04.html> (Go to middle of the page, whole page is not relevant); CNN, *Transcripts*, Feb. 23, 2010, <http://archives.cnn.com/TRANSCRIPTS/1002/23/ltn.01.html> (A little past middle of the page; look for “Holly Robins”).

⁴ CNN, *Transcripts*, Feb. 23, 2010, <http://archives.cnn.com/TRANSCRIPTS/1002/23/ltn.01.html> (A little past middle of the page; look for “Holly Robins”).

⁵ Dana DeFilippo, *Lower Merion School District sued for cyber spying on students*, Feb. 18, 2010, <http://www.philly.com/dailynews/breaking/news/84715297.html>

⁶ *Id.*

⁷ CNN, *Transcripts*, Feb. 22, 2010 <http://transcripts.cnn.com/TRANSCRIPTS/1002/22/cnr.04.html> (Go to middle of the page, whole page is not relevant).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ U.S. Const. amend. IV.

¹² Jennifer Van Grove, *Abuse of Power: High School Admins Coerce Cheerleader for Facebook Password*, <http://mashable.com/2009/07/29/cheerleader-lawsuit>.

¹³ FoxNews.com, *Florida Student Reportedly Kicked Out of Honor Society over Facebook Page*, Feb. 4, 2010, http://www.foxnews.com/us/2010/02/04/florida-student-reportedly-kicked-honor-society-facebook-page/?loomia_ow=t0:s0:a16:g2:r5:c0.205148:b30271334:z0.

¹⁴ See *N.J. v. T. L. O.*, 469 U.S. 325, 348 (1985), paraphrasing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁵ *T. L. O.*, 469 U.S.

¹⁶ *Tinker*, 393 U.S.

¹⁷ AccuraCast, *Facebook Largest Social Network and Fastest Growing*, Aug. 15, 2008, <http://www accuracast.com/search-daily-news/social-media-7471/facebook-largest-social-network-and-fastest-growing>.

¹⁸ Caroline McCarthy, *Whee! New Numbers on Social Network Usage*, Feb. 10, 2009, http://news.cnet.com/8301-13577_3-10160850-36.html.

¹⁹ Facebook, <http://www.facebook.com/press/info.php?statistics> (last visited April 24, 2010).

²⁰ Facebook, <http://www.facebook.com/press/info.php?timeline> (last visited April 3, 2010).

²¹ *Id.*

²² *Id.*

²³ Facebook, http://www.facebook.com/r.php?locale=en_US (last visited April 3, 2010).

- ²⁴ Facebook, http://www.facebook.com/help/?guide=set_up_profile (last visited April 3, 2010).
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ *Id.*
- ²⁸ Facebook, http://www.facebook.com/help/?guide=explore_facebook (last visited April 3, 2010).
- ²⁹ Facebook, <http://www.facebook.com/help/?page=830> (last visited April 3, 2010).
- ³⁰ *Id.*
- ³¹ Facebook, <http://www.facebook.com/help/?page=830#!/help/?page=822> (last visited April 3, 2010).
- ³² Facebook, <http://www.facebook.com/help/?page=927> (last visited April 3, 2010).
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ Facebook, http://www.facebook.com/help/?guide=set_up_profile (last visited April 3, 2010).
- ³⁶ *Id.*
- ³⁷ Facebook http://www.facebook.com/policy.php#INFO_SHARE_THIRD (last visited April 3, 2010).
- ³⁸ *Katz v. U.S.*, 389 U.S. 347, 351 (1967).
- ³⁹ *Id.* at 352.
- ⁴⁰ *Id.* at 351.
- ⁴¹ *Id.* at 352.
- ⁴² Candace Braun, *Last Call: Pay Phones are On the Way Out Mainly Because of Popularity of Cell Phones*, July 20, 2008, <http://www.naplesnews.com/news/2008/jul/20/last-call-pay-phones-are-way-out-mainly-because-po>.
- ⁴³ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
- ⁴⁴ Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*, 31 S. Ill. U. L. J. 95, 112 (2006).
- ⁴⁵ Matthew J. Hodge, *supra*, at 100 citing *Cal. v. Ciraolo*, 476 U.S. 207, 211 (1986).
- ⁴⁶ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
- ⁴⁷ Matthew J. Hodge, *supra*, at 112, quoting *U.S. v. Matlock*, 415 U.S. 164 (1974).
- ⁴⁸ *Hoffa v. U.S.*, 385 U.S. 293, 303 (1966).
- ⁴⁹ Matthew J. Hodge, *supra*, at 103, quoting *U.S. v. Miller*, 425 U.S. 435, 446 (1976).
- ⁵⁰ James X. Dempsey, *Communications Privacy in the Digital Age: Revitalizing the Federal Wiretap Laws to Enhance Privacy*, 8 Alb. L.J. Sci. & Tech. 65, 87 (1997).
- ⁵¹ Matthew J. Hodge, *supra* note 44, at 104, citing 12 U.S.C. § 3405.
- ⁵² Francis A. Gilligan & Edward J. Imwinkelried, *Cyberspace: The Newest Challenge for Traditional Legal Doctrine*, 24 Rutgers Computer & Tech. L.J. 305, 331.
- ⁵³ See Matthew J. Hodge, *supra* note 44, at 103, quoting *Miller*, 425 U.S.
- ⁵⁴ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
- ⁵⁵ *Oliver v. U.S.*, 466 U.S. 170, 189 (1984).
- ⁵⁶ *Id.*
- ⁵⁷ Matthew J. Hodge, *supra* note 44, citing *Katz*, 389 U.S. at 357.
- ⁵⁸ There are many exceptions to the warrant requirement not discussed here as they are beyond the scope of the paper; furthermore this section addresses traditional exceptions, not newer ones such as searches of students which are addressed later

⁵⁹ *Id.*

⁶⁰ See *Id.* at 108; *Matlock*, 415 U.S. at 172.

⁶¹ 1-2 Fed. Criminal Trials, *Warrantless Searches*, § 2-5 (2009), citing *Horton v. Cal.*, 496 U.S. 128 (1990).

⁶² 1-3 Crim. Const. Law, *Search and Seizure: Exceptions to the Warrant Requirement*, § 3.01 (2009), citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

⁶³ *Search and Seizure: Exceptions to the Warrant Requirement*, *supra*, at § 3.01, citing *Matlock*, 415 U.S. at 172.

⁶⁴ *Id.*

⁶⁵ *Matlock*, 415 U.S. at 172, citing *Stoner v. Cal.*, 376 U.S. 483 (1964).

⁶⁶ *Oliver*, 466 U.S. at 178.

⁶⁷ See *T. L. O.*, 469 U.S. at 340.

⁶⁸ *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2639 (U.S. 2009) quoting *Brinegar v. U.S.*, 338 U.S. 160, 175-176 (1949), quoting *Carroll v. U.S.*, 267 U.S. 132, 162 (1925).

⁶⁹ *Safford*, 129 S. Ct. at 2639.

⁷⁰ *Id.* quoting *U.S. v. Arvizu*, 534 U.S. 266, 274 (2002).

⁷¹ *Id.* at 2647.

⁷² *Id.*

⁷³ *T. L. O.*, 469 U.S. at 341.

⁷⁴ *T. L. O.*, 469 U.S. at 336.

⁷⁵ *Safford*, 129 S. Ct. at 2648, quoting *T. L. O.*, 469 U.S. at 337.

⁷⁶ *T. L. O.*, 469 U.S. at 337.

⁷⁷ *Id.* at 340-341.

⁷⁸ *Id.*

⁷⁹ *Id.* at 341.

⁸⁰ *Id.* at 342.

⁸¹ Daniel E. Feld, Annotation, *Right to discipline pupil for conduct away from school grounds or not immediately connected with school activities*, 53 A.L.R.3d 1124, 3 (1965).

⁸² *Id.* citing *Pollnow v. Glennon*, 594 F. Supp. 220, 224 (S.D.N.Y. 1984).

⁸³ *Id.* at 3 citing *Baker v. Downey City Board of Educ.*, 307 F. Supp. 517, 520 (C.D. Cal. 1969).

⁸⁴ Matthew J. Hodge, *supra* note 44, at 104 citing *U.S. v. Maxwell*, 45 M.J. 406, 416 (C.A.A.F. 1996).

⁸⁵ *Id.*

⁸⁶ Royal Pingdom, *Internet 2009 in Numbers*, Jan. 22, 2010, <http://royal.pingdom.com/2010/01/22/internet-2009-in-numbers>

⁸⁷ Life's Little Mysteries, *How Much Mail is Sent Each Day?*, March 22, 2010, http://www.livescience.com/mysteries/070705_llm_mail.html.

⁸⁸ *Id.*

⁸⁹ Matthew J. Hodge, *supra* note 44, at 104 citing *Maxwell*, 45 M.J. at 418.

⁹⁰ Am. Jur. 2d *Computers and the Internet* § 22 (2010), citing *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001).

⁹¹ Am. Jur. 2d *Computers and the Internet* § 22 (2010), citing *U.S. v. Bailey*, 272 F. Supp. 2d 822, 835 (D. Neb. 2003).

⁹² *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

⁹³ Am. Jur. 2d *Computers and the Internet* § 22 (2010), citing *Guest*, 255 F.3d at 333.

⁹⁴ See *Id.*

⁹⁵ *U.S. v. Thomas*, 878 F.2d 383, *6 (6th Cir. 1989).

⁹⁶ *Miller*, 425 U.S. at 442.

⁹⁷ See *Id.*

⁹⁸ See *Id.*

⁹⁹ Facebook, <http://www.facebook.com/policy.php> (last visited April 24, 2010).

¹⁰⁰ This footnote will not examine whether schools may compel students to give up their passwords to such sites and thus vitiating the Fourth Amendment protection

¹⁰¹ Diana C. Busch & Russell Savory, *Ill. Jur. Crim. Law and Procedure*, § 8.03 (2007), citing *People v. Torres*, 144 Ill. App. 3d 187, 190 (App. Ct. 4th Dist. 1986).

¹⁰² *Truloch v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001).

¹⁰³ Matthew J. Hodge, *supra* note 44, at 104 citing *Maxwell*, 45 M.J. at 418.

¹⁰⁴ *Id.*

¹⁰⁵ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

¹⁰⁶ *Oliver*, 466 U.S. at 189.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Oliver*, 466 U.S. at 179.

¹¹⁰ *Id.*

¹¹¹ *Matlock*, 415 U.S. at 172.

¹¹² See *Id.*

¹¹³ *Id.*, citing *Chapman v. U.S.*, 365 U.S. 610 (1961).

¹¹⁴ *Id.*, citing *Stoner*, 376 U.S.

¹¹⁵ See *Id.*; *Stoner*, 376 U.S.

¹¹⁶ *Matlock*, 415 U.S. at 172.

¹¹⁷ *Id.*

¹¹⁸ Facebook, <http://www.facebook.com/policy.php#!/terms.php> (last visited April 24, 2010).

¹¹⁹ See *Matlock*, 415 U.S. at 172.

¹²⁰ Facebook, <http://www.facebook.com/policy.php#!/terms.php> (last visited April 24, 2010).

¹²¹ *Ga. v. Randolph*, 547 U.S. 103, 114 (2006).

¹²² *Horton*, 496 U.S. at 137.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *T. L. O.*, 469 U.S. at 340.

¹²⁷ Whether a student who allows many persons whom he or she does not know to be his or her “friends” while maintaining a limited profile has any Fourth Amendment protections is not discussed here

¹²⁸ The validity of a minor’s waiver of Constitutional rights is suspect, but not addressed here; furthermore these are merely recommendations since this note did not address the issue directly

¹²⁹ See Matthew J. Hodge, *supra* note 44, at 120.

¹³⁰ *Katz*, 389 U.S. at 351.

¹³¹ Internetworldstats.com, *United States Internet Usage, Broadband, and Telecommunications Report*, <http://www.internetworldstats.com/am/us.htm> (last visited April 25, 2010).