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## Every Click You Make: How the Proposed Disclosure of Law Students' Online Identities Violates Their First Amendment Right to Free Association

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# **EVERY CLICK YOU MAKE: HOW THE PROPOSED DISCLOSURE OF LAW STUDENTS' ONLINE IDENTITIES VIOLATES THEIR FIRST AMENDMENT RIGHT TO FREE ASSOCIATION**

*Jonathan Sabin\**

[W]hen a state attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.<sup>1</sup>

You already have zero privacy. Get over it.<sup>2</sup>

## INTRODUCTION

In the hyper-connected world of online communication, we are all just a few clicks away from Internet infamy.<sup>3</sup> Law students are

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\* Brooklyn Law School Class of 2010; M.A. (Journalism) New York University, 2002; B.A. Tufts University, 1999. Thanks to my mother, father, and sister for all their love and support. Special thanks to Hila, whose constant encouragement, enduring patience, and sense of humor got me through law school.

<sup>1</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971).

<sup>2</sup> DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 105 (2007) (quoting Scott McNealy, CEO Sun Microsystems).

<sup>3</sup> See Rachel Abramowitz, *Hollywood Brief: Christian Bale's Call of Contrition*, L.A. TIMES, Feb. 7, 2009, at E1 (reporting that Batman star Christian Bale publicly apologized after a "profanity-ridden audiotape of [him] ranting at the director of photography on the set of [a movie] hit the Internet . . .").

no exception.<sup>4</sup> Armed with laptops, unlimited bandwidth, and an inclination for procrastination, aspiring attorneys have proven particularly susceptible to online misbehavior.<sup>5</sup> For example, after a Brooklyn Law School student posed naked for an online Playboy video in 2006, a link to the video was forwarded to the student's classmates, professors, and prospective employers.<sup>6</sup> Meanwhile, on Autoadmit.com, one of the largest and bawdiest message boards for current and prospective law students,<sup>7</sup> several anonymous law students posted sexually offensive and humiliating comments about their colleagues at Yale Law School.<sup>8</sup>

To make matters worse, this Internet misconduct is increasingly finding its way to the inboxes of potential employers.<sup>9</sup> According to a survey from the online job site Careerbuilder.com,

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<sup>4</sup> For example, in an email to Brooklyn Law School students, Dean Joan Wexler noted that "[o]ver the last few years we have seen instances, both here at our law school and at law schools across the country, where individuals have been the victims of discussions on blogs, mostly anonymous, that go beyond the bounds of civilized discourse." E-mail from Joan Wexler, Dean, Brooklyn Law School & Beryl Jones-Woodin, Associate Dean for Student Affairs, Brooklyn Law School, to Brooklyn Law School Community (Sept. 17, 2008) (on file with author).

<sup>5</sup> See Katherine Mangan, *Etiquette for the Bar*, CHRON. HIGHER EDUC., Jan. 12, 2007, at 31 (noting that law students at Drake University had set up inflammatory Facebook groups called "I Hate Legal Writing" and "Drake Law Drunks").

<sup>6</sup> Veronika Belenkaya, *It's Juris-Imprudence: Holy Torts! Law Student in Erotic Vid*, N.Y. DAILY NEWS, Apr. 10, 2007, at 3.

<sup>7</sup> Autoadmit.com boasts around one million unique visitors a month. See Ellen Nakashima, *Harsh Words Die Hard on the Web: Law Students Feel Lasting Effects of Anonymous Attacks*, WASH. POST, Mar. 7, 2007, at A01.

<sup>8</sup> *Id.* See also David Margolick, *Slimed Online*, PORTFOLIO MAG., Mar. 2009 (reporting that the anonymous users falsely claimed that certain Yale students had herpes, bribed their way into Yale, and that one of them "exchanged oral sex with Yale Law School's dean for a passing grade in civil procedure").

<sup>9</sup> See Alan Finder, *When a Risque Online Persona Undermines a Chance for a Job*, N.Y. TIMES, Jun. 11, 2006, at Nat'l Desk 1 ("[S]ome recruiters are looking up applicants on social networking sites like Facebook, MySpace, Xanga and Friendster, where college students often post risqué or teasing photographs and provocative comments about drinking, recreational drug use and sexual exploits in what some mistakenly believe is relative privacy.").

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over twenty-five percent of hiring managers perform Internet searches when vetting job applicants.<sup>10</sup> At Georgetown University, a law firm interviewer reportedly confronted a law student with pictures from his Facebook page showing him flipping his middle finger.<sup>11</sup>

Michelle Morris, a lecturer in law at the University of Virginia Law School, believes that Internet misbehavior among law students has gotten out of control:

Many law students are enjoying an “extended adolescence” marked by inappropriate and immature behavior. From a law student flashing traffic and then taunting police, to Facebook.com profiles that openly celebrate law students’ illegal, immoral or unwise behavior, a visible population openly prioritizes “fun today” over preparation for tomorrow. . . . Millennial generation law students in particular tend to compound this lack of judgment with a propensity for posting every detail of their lives online, creating a potentially permanent record of every unwise choice they might make. They seem to believe that what is “online” is not “real” and cannot impact the physical world. Only friends are supposed to see the photos they post of themselves drunken and half-dressed. Only fellow jokesters on your message board will read your juvenile threats, and they will relish your savage sense of humor.<sup>12</sup>

To combat this scourge of Internet malfeasance, Morris proposes that law schools require all applicants to disclose their

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<sup>10</sup> Press Release, Careerbuilder.com (Oct. 26, 2006), *available at* <http://careerbuilder.com> (follow “About Us” hyperlink; then follow “Press Release Archive 2006” hyperlink; then follow “10/26/06” hyperlink). Twelve percent of the hiring managers surveyed searched social networking sites when screening applicants. *Id.*

<sup>11</sup> Sheila Marikar, *After Years of Telling All, 20-Somethings Start to Clam Up*, ABCNEWS.COM, Mar. 1, 2007, *available at* <http://abcnews.go.com/US/Technology/Story?id=2912364&page=1>. The interviewer allegedly asked the student how he planned to represent the law firm in light of the obscene gesture in the photograph. *Id.*

<sup>12</sup> Michelle Morris, *The Legal Profession, Personal Responsibility, and the Internet*, 117 YALE L.J. 53, 56 (Pocket Part 2007).

online identities before enrolling in law school.<sup>13</sup> In her opinion, “aspiring lawyers need to understand that Internet activity is public behavior and conduct themselves accordingly.”<sup>14</sup> Under the “Morris Plan,” law school applicants would have to divulge a three-year history of “e-mail addresses, IP addresses, blogs, and social networking profile information.”<sup>15</sup> Morris argues that this would deter inappropriate online behavior while enabling law schools to tie “bad behavior to particular people.”<sup>16</sup> Finally, it would send a message to law students: “Clean up your act. We’re watching.”<sup>17</sup>

Despite its admirable intentions, the “Morris Plan,” as applied to state law schools, is poor public policy that runs afoul of the First Amendment right to free association.<sup>18</sup> The Supreme Court

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<sup>13</sup> *Id.* at 58. Morris also proposes that the American Bar Association (ABA) institute the same disclosure policy as part of their “Good Moral Character” requirement. However, this Note focuses only on the disclosure requirement for law school applicants. For a detailed discussion of the ABA’s “Good Moral Character” requirement, see Aaron M. Clemens, *Facing the Klieg Lights: Understanding the “Good Moral Character” Examination for Bar Applicants*, 40 AKRON L. REV. 255 (2007); Elizabeth Gepford McCulley, *School of Sharks? Bar Fitness Requirements of Good Moral Character and the Role of Law Schools*, 14 GEO. J. LEGAL ETHICS 839 (2001).

<sup>14</sup> Morris, *supra* note 12, at 58.

<sup>15</sup> *Id.* at 58. It is not clear whether Morris intends for this identifying information to be used only for admission purposes, or whether it would be retained (and possibly accessed) for the duration of the law student’s enrollment. For information about Internet protocol (IP) addresses, see *infra* note 34.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> As “state actors,” state law schools are bound by the Constitution. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (noting that the race-based admissions policy at the University of Michigan Law School triggered strict scrutiny under the Fourteenth Amendment). For this reason, this Note focuses on the constitutionality of the Morris Plan as applied by state law schools. However, private law schools may also be considered “state actors.” See, e.g., *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295 (2001) (“[S]tate action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). For a detailed examination of the “state action” doctrine, see, for example, Michael L. Wells, *Private Parties as*

has described the freedom of association as the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>19</sup> In addition, the Court has consistently held that mandatory disclosure of membership lists that might have a chilling effect on an individual’s exercise of his or her associational freedoms violates the First Amendment.<sup>20</sup> Thus, the Morris Plan fails to recognize that the right to free association protects all types of association, whether they occur in a boardroom or in the blogosphere.<sup>21</sup>

This Note examines the faults with the Morris Plan and offers alternative ways to promote ethical online conduct at public law schools that would not run afoul of the Constitution. Part I of this Note explores the social, political, and cultural aspects of Internet use among law students. Part II reviews freedom of association case law up through *Boy Scouts of America v. Dale*,<sup>22</sup> the Supreme Court’s most recent examination of the issue. Part III argues that (1) blogs and social-networking activity, conducted with online aliases, email and IP addresses, are “expressive associations”<sup>23</sup> that are entitled to First Amendment protection; (2) mandatory disclosure of online associations by state law schools would have a chilling effect on student association;<sup>24</sup> and (3) the disclosure

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*Defendants in Civil Rights Litigation: Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99 (2004).

<sup>19</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

<sup>20</sup> *See, e.g., Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958).

<sup>21</sup> *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) (“[T]he *First Amendment* protects the Boy Scouts’ *method* of expression.”) (second emphasis added).

<sup>22</sup> *Dale*, 530 U.S. 640.

<sup>23</sup> *See Jaycees*, 468 U.S. at 618.

<sup>24</sup> This Note does not consider the Morris Plan’s potential infringement on student free speech. For a detailed discussion of student free speech on college campuses, see, for example, Karyl Roberts Martin, Note, *Demoted to High School: Are College Students’ Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173 (2003); Chris Sanders, Commentary, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at*

requirement ultimately violates the First Amendment because while it may address compelling state interests, those interests may be achieved by means significantly less restrictive of associational freedoms. Finally, Part IV offers several alternative measures law schools might enact to promote ethical online conduct while preserving associational freedoms.

#### I. ONLINE ACTIVITY: AMBIENTLY AWARE OR PORNOGRAPHIC LITTLE LOONS?

According to Morris, the Internet enables “tech-savvy”<sup>25</sup> law students to embarrass themselves, other students, and the law school by hurling insults from behind a veil of anonymity.<sup>26</sup> Law schools, she argues, have an obligation to stem the tide of online misconduct “[t]o avoid further injury to the reputation of our law schools and the legal profession.”<sup>27</sup> Morris’ characterization of Internet use among law students, however, is overly broad and general.<sup>28</sup> By failing to fully examine the breadth and complexity

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*Colleges and Universities*, 58 ALA. L. REV. 159 (2006). For a close examination of student free speech on the Internet, see Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835 (2008); Kara D. Williams, *Public Schools vs. Myspace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707 (2008).

<sup>25</sup> Morris, *supra* note 12, at 53.

<sup>26</sup> *Id.* at 58–59 (explaining that the disclosure requirement would “make[] clear to anonymous abusers that their behavior is relevant whether or not conducted in their own names”). On Autoadmit.com, for example, users can create an anonymous “Login Name.” Autoadmit.com homepage, <http://autoadmit.com> (follow “Register” hyperlink) (last visited Dec. 1, 2008). And according to one survey, twenty percent of bloggers who self-identified on their blog use a variant of their real name. SOLOVE, *supra* note 2, at 59 (quoting Fernanda B. Viégas, *Bloggers’ Expectations of Privacy and Accountability: An Initial Survey*, J. COMPUTER-MEDIATED COMM., vol. 10, issue 3 (2005), available at <http://jcmc.indiana.edu/vol10/issue3/viegas.html>).

<sup>27</sup> Morris, *supra* note 12, at 53. There is some precedent to Morris’ call for action: the University of New Mexico temporarily banned access to Facebook.com. Cristian Lupsa, *Facebook: A Campus Fad Becomes a Campus Fact*, CHRISTIAN SCI. MONITOR, Dec. 13, 2006, at 13.

<sup>28</sup> See Morris, *supra* note 12, at 56 (“From a law student flashing traffic and

of law student online expression, Morris misidentifies the problem that her plan seeks to remedy.<sup>29</sup>

Contrary to Morris' dismissive portrayal, the Internet has emerged as the modern public commons—a space where young people freely and frequently engage in a variety of social and political discourse.<sup>30</sup> But modern Internet expression is not easily reduced.<sup>31</sup> Rather, it is infinitely diverse and complex.<sup>32</sup> Platforms for Internet self-expression and communication include e-mail, weblogs, wikis, social networking sites, peer-to-peer technology, open source software, and social “tagging” applications.<sup>33</sup> The Morris Plan, however, is indiscriminate: it implicates all of these online entities because it requires disclosure of student IP addresses.<sup>34</sup> Disclosure of one's IP address means, at least

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then taunting police, to Facebook.com profiles that openly celebrate law students' illegal, immoral or unwise behavior, a visible population openly prioritizes ‘fun today’ over preparation for tomorrow.”) (citations omitted).

<sup>29</sup> Morris may also overstate the problem: nearly ninety-five percent of Facebook users use their real name. Zeynep Tufekci, *Can You See Me Now? Audience and Disclosure Regulation in Online Social Network Sites*, 28 BULL. SCI., TECH. & SOC'Y 20, 26 (2008).

<sup>30</sup> See, e.g., Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 749–50 (2008) (“The Internet, embodied in the World Wide Web, email, listserves, chat rooms, weblogs, and instant messaging, has revolutionized the organization of grassroots political movements.”).

<sup>31</sup> See, e.g., Michael J. Madison, *W(h)ither the Middleman: The Role and Future of Intermediaries in the Information Age: Social Software, Groups, and Governance*, 2006 MICH. ST. L. REV. 153, 156 (2006) (arguing that “[c]omputer users are using technology collaboratively, explicitly, and in a multiplicity of ways that we can see for the first time”).

<sup>32</sup> See SOLOVE, *supra* note 2, at 17 (“The Internet allows information to flow more freely than ever before. We can communicate and share ideas in unprecedented ways. These developments are revolutionizing our self-expression and enhancing our freedom.”).

<sup>33</sup> See Madison, *supra* note 31, at 157–64.

<sup>34</sup> Effectively all Internet activity falls under the Morris Plan since it requires disclosure of student IP addresses. See SOLOVE, *supra* note 2, at 143, 147 (explaining that an IP address is “a unique number that is assigned to every computer connected to the Web . . . and that [w]henver a user communicates over the Internet, her IP address is logged”).



potentially, the disclosure of everything one is doing with that IP address.<sup>35</sup>

This Note focuses on two of the largest and most popular vehicles for online expression targeted by the Morris Plan: blogs and social networking sites.<sup>36</sup> Although the mandatory disclosure of student e-mail addresses is particularly troubling, Morris seems interested in e-mail addresses only in so far as they are used to engage in unethical online conduct at websites and blogs like Facebook and Autoadmit.<sup>37</sup> For this reason, this Note focuses on the associational aspects of blogs and social-networking sites.

#### *A. Blogs and Social-Networking Sites: The Basics*

As of 2009, forty-three percent of people age eighteen to thirty-two read blogs; twenty percent created one.<sup>38</sup> Blogs come in several varieties.<sup>39</sup> Some resemble personal online diaries<sup>40</sup> where the blogger confesses everything from what he or she ate for lunch<sup>41</sup> to his or her latest sexual escapade.<sup>42</sup> Other blogs resemble

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<sup>35</sup> Once the school administrator gained access to a law student's IP address, he or she would have to take affirmative steps to then locate the particular websites the student had visited.

<sup>36</sup> Not only are blogs and social-networking sites large and popular, but Morris seems particularly concerned about their misuse. The entire introduction to Morris's article focuses on blog misconduct and she singles-out the social-networking site Facebook as enabling students to "openly celebrate law students' illegal, immoral, or unwise behavior." Morris, *supra* note 12, at 53-56 (citations omitted).

<sup>37</sup> *Id.* at 58.

<sup>38</sup> Sydney Jones & Susannah Fox, *Generations Online in 2009*, in PEW INTERNET AND AMERICAN LIFE PROJECT 5 (2009), <http://www.pewinternet.org/> (follow "Generations Online in 2009" hyperlink) (last visited Feb. 28, 2009).

<sup>39</sup> See <http://en.wikipedia.org/wiki/Blog> (last visited Feb. 7, 2009).

<sup>40</sup> See SOLOVE, *supra* note 2, at 49 ("Blogs . . . enable people to express themselves like they've never been able to before. They encourage people to share their lives with strangers, to open up their diaries to the world.").

<sup>41</sup> See Lunch in a Box, <http://lunchinbox.net> (last visited, Feb. 28, 2009).

<sup>42</sup> For example, an entry on the personal blog of a then twenty-six-year-old bartender from New York reads: "My period is way late, and I haven't been laid in months, so I don't know what the fuck is up." Emily Nussbaum, *Say Everything*, N.Y. MAG. Feb. 12, 2007, available at <http://nymag.com>.

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traditional web sites that disseminate news and information on specific subjects like celebrity gossip,<sup>43</sup> real estate,<sup>44</sup> politics,<sup>45</sup> and the law.<sup>46</sup> Many of these “news” blogs have supplanted traditional media outlets as major sources for news and information.<sup>47</sup>

Whether blogs are personal or more professional in nature, they are nevertheless dynamic platforms where groups of individuals exchange thoughts and ideas.<sup>48</sup> Once the blogger creates the original content, blog readers augment that content by posting responses and comments.<sup>49</sup> Thus, blogs are “more akin to an ongoing conversation than to a mainstream media publication or broadcast.”<sup>50</sup>

Similarly, social-networking sites allow “friends and acquaintances . . . [to] interlink their profiles, share personal information, and communicate with each other.”<sup>51</sup> Over eighty-five

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com/news/features/27341/.

<sup>43</sup> See, e.g., Gawker.com homepage, <http://www.gawker.com>.

<sup>44</sup> See, e.g., Curbed.com homepage, <http://www.curbed.com>.

<sup>45</sup> See, e.g., Huffingtonpost.com homepage, <http://www.huffingtonpost.com>.

<sup>46</sup> Lawyers have become prolific bloggers. For example, Abovethelaw.com, which was started by a former Assistant U.S. Attorney from Newark, New Jersey, has emerged as required reading for law students and lawyers thirsting for inside information regarding law firm salaries, hiring, and firing. See Jonathan Miller, *He Fought The Law. They Both Won*, N.Y. TIMES, Jan. 22, 2006, at 14NJ1. Meanwhile, Blawg.com is a directory of over 2,000 legal blogs, many of which are authored by law professors. Blawg.com homepage, <http://www.blawg.com> (follow “About” hyperlink) (last visited Feb. 28, 2009).

<sup>47</sup> For example, the political blog Talkingpointsmemo.com is largely credited with publicizing then Senate majority leader Trent Lott’s controversial comments regarding Senator Strom Thurmond. See Paul Krugman, *The Other Face*, N.Y. TIMES, Dec. 13, 2002, at A39.

<sup>48</sup> See SOLOVE, *supra* note 2, at 49 (“Blogging allows people to exchange experiences . . . . Blogging represents the very best that communication has to offer.”).

<sup>49</sup> See Blogger.com (follow “Quick Tour” hyperlink) (“In simple terms, a blog is a web site, where you write stuff on an ongoing basis. New stuff shows up at the top, so your visitors can read what’s new. Then they comment on it or link to it or email you. Or not.”).

<sup>50</sup> SOLOVE, *supra* note 2, at 9.

<sup>51</sup> *Id.* at 26.

percent of college students have a social networking profile,<sup>52</sup> while Facebook alone claims more members (roughly 100 million)<sup>53</sup> than the population of Germany (roughly eighty-two million).<sup>54</sup> On Facebook,<sup>55</sup> users can “tag” photographs from last night’s party, link to an article on CNN.com, and wish a friend good luck on her torts exam by writing on her “Wall.”<sup>56</sup> Additionally, Facebook users can maintain an ongoing commentary about their own emotional and psychological state by constantly updating their Facebook “status.”<sup>57</sup> Lastly, users can limit access to their Facebook profile to specific individuals or groups.<sup>58</sup>

While Morris believes that blogs and social-networking sites merely allow students to enjoy an “extended adolescence,”<sup>59</sup> the

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<sup>52</sup> Tufekci, *supra* note 29, at 25.

<sup>53</sup> Blog Posting of Mark Zuckerberg, CEO, Facebook, to The Facebook Blog, [http://blog.facebook.com/blog.php?blog\\_id=company](http://blog.facebook.com/blog.php?blog_id=company) (Aug. 26, 2008, 12:21 EST).

<sup>54</sup> See Central Intelligence Agency, The World Fact Book, <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> (last visited Feb. 23, 2009). The Boy Scouts of America, meanwhile, claims only around four million members. Boy Scouts of America National Council, available at <http://www.scouting.org> (follow “Fact Sheets” hyperlink; then follow “BSA at a Glance” hyperlink) (last visited Mar. 21, 2009).

<sup>55</sup> Other popular social networking sites include Myspace, Xanga, and Livejournal. See SOLOVE, *supra* note 2, at 24.

<sup>56</sup> The “Wall” feature on a Facebook profile is like a digital bulletin board where friends can post short messages. See “Facebook” Wikipedia page, <http://en.wikipedia.org/wiki/Facebook> (describing the “wall” as “a space on every user’s profile page that allows friends to post messages for the user to see”) (last visited Feb. 28, 2009).

<sup>57</sup> Facebook provides users with a “status” space on their profile where they can write a short message describing what they are doing, thinking, or feeling at any particular moment. Status updates tend towards the witty, clever, and mundane.

<sup>58</sup> See <http://www.facebook.com> (follow “Privacy” hyperlink) (last visited Feb. 23, 2009). Users can control who has access to their photographs, personal information, and status updates. See <http://www.facebook.com> (follow “Click here to go to Privacy Settings” hyperlink) (membership required) (last visited Feb. 28, 2009).

<sup>59</sup> Morris, *supra* note 12, at 56.

overwhelming evidence suggests otherwise.<sup>60</sup> In fact, studies indicate that perpetual online chatter may actually enhance our social, technological, literacy, and interpersonal skills.<sup>61</sup>

*B. How Incessant Online Activity Makes Us Better*

It is easy to dismiss much of this online chatter as exhibitionist, narcissistic, and mindless.<sup>62</sup> People over the age of thirty often belittle the young and wired as “pornographic little loons who post their diaries, their phone numbers . . . [and] their stupid poetry” and yet “have zero attention span, flitting like hummingbirds from one virtual stage to another.”<sup>63</sup> Morris similarly dismisses Internet activity, lampooning law students as enjoying an “‘extended adolescence’ marked by inappropriate and immature behavior.”<sup>64</sup> This response, however, fails to consider the complex political, social, and cultural implications of perpetual online communication.<sup>65</sup>

First, constantly communicating the often-banal details of one’s life through blogs or Facebook may actually foster, rather than erode, interpersonal relationships.<sup>66</sup> By allowing individuals

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<sup>60</sup> See Tamar Lewin, *Study Finds Teenagers’ Internet Socializing Isn’t Such a Bad Thing*, N.Y. TIMES, Nov. 20, 2008, at A20.

<sup>61</sup> *Id.*

<sup>62</sup> See Claire Suddath, *25 Things I Didn’t Want to Know About You*, TIME.COM, Feb. 5, 2009, available at <http://www.time.com/time/arts/article/0,8599,1877187,00.html>.

<sup>63</sup> Nussbaum, *supra* note 42, at 3.

<sup>64</sup> Morris, *supra* note 12, at 56.

<sup>65</sup> See Nicole Ellison, Charles Steinfield & Cliff Lampe, *The Benefits of Facebook “Friends:” Social Capital and College Students’ Use of Online Social Network Sites*, 12 J. COMPUTER-MEDIATED COMM. (2007).

<sup>66</sup> See Lewin, *supra* note 60 (“It may look as though kids are wasting a lot of time hanging out with new media, whether it’s on MySpace or sending instant messages . . . [b]ut their participation is giving them the technological skills and literacy they need to succeed in the contemporary world. They’re learning how to get along with others.”) (quoting Mizuko Ito, lead researcher of the MacArthur Foundation study, available at <http://www.macfound.org/>) (follow “New Study Shows Time Spent Online Important for Teen Development” hyperlink).

to share small, seemingly irrelevant bits of personal information, blogs and social networking sites increase emotional awareness.<sup>67</sup> For example, a person would probably not call his friend at ten P.M. to tell her that he had just stubbed his toe. But on Facebook, he can post the infuriating toe-stubbing incident in his status bar. His friends can then learn about it at their leisure. Over time, the mundane details add up: a toe-stubbing today, bad sushi tomorrow night, a difficult day at the office on Friday. Social scientists call it “ambient awareness.”<sup>68</sup> Technology journalist Clive Thompson explains that “[e]ach little update—each individual bit of social information—is insignificant on its own, even supremely mundane. But taken together, over time, the little snippets coalesce into a surprisingly sophisticated portrait of your friends’ and family members’ lives, like thousands of dots making a pointillist painting.”<sup>69</sup>

In addition to “ambient awareness,” blogs and social-networking sites promote collective action and group cohesion.<sup>70</sup> In the political realm, for instance, both 2008 presidential candidates used blogs and social-networking sites to raise millions of dollars in small online donations.<sup>71</sup> President Obama recruited and organized thousands of volunteers through his Facebook network and even released photographs of his election night celebration on the photo-sharing website Flickr.com.<sup>72</sup> The

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<sup>67</sup> See Lewin, *supra* note 60.

<sup>68</sup> See Clive Thompson, *The Brave New World of Digital Intimacy*, N.Y. TIMES MAG., Sept. 7, 2008, at 2, available at <http://www.nytimes.com/2008/09/07/magazine/07awareness-t.html>.

<sup>69</sup> *Id.* at 3. And the information shared on blogs and social-networking sites is not always mundane. According to one study of undergraduate social networking profiles, forty-six percent revealed their political views, seventy-two percent their sexual orientation, and roughly forty-five percent their religion. Tufekci, *supra* note 29, at 28.

<sup>70</sup> See Madison, *supra* note 31, at 154 (The Internet “is about people, not merely about information. Computing builds connections, networks, and pathways for information and activity, channels that . . . enable the group.”).

<sup>71</sup> See Michael Luo, *Obama’s September Success Recasts the Campaign Fund-Raising Landscape*, N.Y. TIMES, Oct. 20, 2008, at A21.

<sup>72</sup> See Damien Cave, *Generation O Gets its Hopes Up*, N.Y. TIMES, Nov. 9, 2008, at ST1. Obama also has a Twitter account with over 300,000 followers.

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political influence of blogs and social-networks, however, is not limited to traditional political parties.<sup>73</sup> Moveon.org, the progressive online advocacy group with over 3.2 million members,<sup>74</sup> is largely credited with delivering the House of Representatives to the Democrats in 2006.<sup>75</sup> In addition, Jewsvote.org attracted over two million viewers to The Great Schlep, an online video where comedian Sarah Silverman urged Jewish voters to convince their grandparents in Florida to vote for Obama.<sup>76</sup>

Blogs and social-networking sites have also democratized the nature of knowledge and information.<sup>77</sup> In his book *The Wisdom of Crowds*,<sup>78</sup> James Surowiecki argues that large, diverse, and decentralized groups are often more effective than individuals at solving problems.<sup>79</sup> Consider Wikipedia,<sup>80</sup> the open-source, online

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Barack Obama Twitter Page, <http://twitter.com/BarackObama> (last visited Feb. 23, 2009) (registration required).

<sup>73</sup> See Jose Antonio Vargas, *Moveon Grows Up*, WASH. POST, Oct. 9, 2008, at C01.

<sup>74</sup> See Moveon.org, <http://www.moveon.org/> (follow “About” hyperlink) (last visited Nov. 18, 2008).

<sup>75</sup> See Vargas, *supra* note 73. Moveon.org spent \$28 million promoting Democratic candidates in 2006. The National Rifle Association, meanwhile, spent \$11 million. Moveon.org uses blogging technology and email blasts to raise money from its online faithful, get out the vote on Election Day, and pressure representatives through online petitions. *Id.*

<sup>76</sup> Patrick Oppmann, “Great Schlep” Pitches Obama to Florida Jews, CNN.COM, Oct. 14, 2008, <http://www.cnn.com/2008/POLITICS/10/13/great.schlep/index.html>. The Great Schlep also has a Facebook group with over 24,000 “schleppers.” The Great Schlep Home Page, <http://www.thegreatschlep.com> (follow “the Great Schlep” hyperlink).

<sup>77</sup> See, e.g., JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (Doubleday 2004).

<sup>78</sup> *Id.*

<sup>79</sup> See Madison, *supra* note 31, at 171–72 (arguing that technology allows users to form “cognitive groups” that are better able to solve problems than individuals acting alone).

<sup>80</sup> Technically, Wikipedia is a “wiki” rather than a blog. See “Wiki” Wikipedia page, <http://en.wikipedia.org/wiki/Wiki> (describing a “wiki” as “a page or collection of Web pages designed to enable anyone who accesses it to contribute or modify content, using a simplified markup language”) (last visited

encyclopedia of, from, and by the people.<sup>81</sup> With over ten million articles<sup>82</sup> on everything from Justin Timberlake's discography<sup>83</sup> to Derridean deconstruction,<sup>84</sup> Wikipedia has become the preferred destination for students, journalists, and laymen to confirm and create historical fact.<sup>85</sup> And despite the seeming unreliability of thousands of people cobbling together a history of the world, Wikipedia has proven surprisingly accurate: according to a 2005 *Nature* study, its science articles are just as accurate as those in Encyclopedia Britannica.<sup>86</sup>

Meanwhile, other individuals directly tap into their social-networks to solve problems through a process known as "microsharing."<sup>87</sup> For example, when Laura Fitton, a social-media consultant, asked the 5,000 or so people following her Twitter posts<sup>88</sup> for help after her accountant made a mistake on her tax return, she received several lawyer referrals within minutes.<sup>89</sup>

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Dec. 1, 2008).

<sup>81</sup> Wikipedia claims over 75,000 contributors and 684 million visitors a year. Wikipedia Page, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Oct. 18, 2008).

<sup>82</sup> Press Release, Wikipedia Foundation, Wikipedia Hits Milestone of Ten Million Articles Across 250 Languages (Mar. 28, 2008), available at <http://wikimediafoundation.org> (follow "Press Room" hyperlink; then follow "28 March 2008" press release hyperlink).

<sup>83</sup> "Justin Timberlake Discography" Wikipedia page, [http://en.wikipedia.org/wiki/Justin\\_Timberlake\\_discography](http://en.wikipedia.org/wiki/Justin_Timberlake_discography) (last visited Oct. 18, 2008).

<sup>84</sup> "Jacques Derrida" Wikipedia page, <http://en.wikipedia.org/wiki/Derrida> (last visited Oct. 18, 2008).

<sup>85</sup> See Brock Read, *Can Wikipedia Ever Make the Grade?*, CHRON. HIGHER EDUC., Oct. 27, 2006, at 31.

<sup>86</sup> See *Wikipedia Survives Research Test*, BBC NEWS, Dec. 15, 2005, available at <http://news.bbc.co.uk/1/hi/technology/4530930.stm>.

<sup>87</sup> See Pistachio Consulting homepage, <http://pistachioconsulting.com> (follow "Microsharing" hyperlink) ("[M]icrosharing fosters collaboration, communication, professional development, finding answers and resources and other well-demonstrated effects that can optimize business performance.").

<sup>88</sup> Twitter is a "real-time short messaging service" that users can access via the web or cell phone. See Twitter homepage, <http://twitter.com/> (follow "About Us" hyperlink). Twitter posts, or "tweets," work in much the same way as Facebook "status updates."

<sup>89</sup> Thompson, *supra* note 68, at 6.

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Fitton says that she “can solve any problem on Twitter in six minutes.”<sup>90</sup> Meanwhile, according to *New York Times* technology journalist David Pogue, a judge on a grant proposal committee asked his Twitter followers if a certain proposal had been tried before.<sup>91</sup> Pogue reported that “in 15 seconds, his followers replied with Web links to the information he needed. No e-mail message, phone call or Web Site could have achieved the same effect.”<sup>92</sup> Individuals are increasingly engaging in this sort of “microsharing” through Facebook, Twitter, and Flickr for everything from emotional support to professional guidance.<sup>93</sup>

By increasing interpersonal connections and promoting the formation of dynamic groups, the Internet has fundamentally transformed the way that law students relate to the world.<sup>94</sup> This is not to say that the Internet is not also a vehicle for procrastination, mischief, and mindless fun.<sup>95</sup> Rather, the point is simply that Internet use among law students is not nearly as monolithic as Morris suggests.<sup>96</sup> Given the breadth and scope of Internet activity, any proposal to infringe on that activity—let alone one as broad and sweeping as the Morris Plan—should be examined with exacting scrutiny to ensure that the plan does not violate individual constitutional rights.

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<sup>90</sup> *Id.*

<sup>91</sup> David Pogue, *Twitter? It's What You Make It*, N.Y. TIMES, Feb. 12, 2009, at B1.

<sup>92</sup> *Id.*

<sup>93</sup> See Microsharing, *supra* note 87 (“Microsharing reduces the emotional and intellectual distance between people and helps them become more engaged, connected, effective and collaborative.”).

<sup>94</sup> This is admittedly a cursory and incomplete examination of the Internet’s social and cultural effects. Entire books have been written about the subject. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

<sup>95</sup> For example, the “Kitten Cannon” computer game provides hours of neuron-depleting fun. Addicting Games, <http://www.addictinggames.com/kittencannon.html> (last visited Dec. 1, 2008).

<sup>96</sup> See Morris, *supra* note 12, at 56.



## II. THE FIRST AMENDMENT AND FREEDOM OF ASSOCIATION

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . .”<sup>97</sup> Although “freedom of association” is not explicitly mentioned in the Constitution, the Supreme Court has consistently found such a freedom inherent in the First Amendment’s protection of free speech and free assembly.<sup>98</sup> The First Amendment protects all associational content<sup>99</sup> from both direct and indirect attacks.<sup>100</sup> Group association, the Court has held, enables “[e]ffective advocacy of both public and private points of view, particularly controversial ones.”<sup>101</sup> Thus, the right of free association “lies at the foundation of a free society.”<sup>102</sup>

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<sup>97</sup> U.S. CONST. amend. I.

<sup>98</sup> See *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the . . . Due Process clause of the Fourteenth Amendment, which embraces freedom of speech.”). See also *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (“[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”); Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 636 (2004) (“The right [of free association] is not freestanding, but exists only in order to enable the exercise of other constitutional rights.”).

<sup>99</sup> See *NAACP*, 357 U.S. at 460–61 (“[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.”).

<sup>100</sup> For example, regulations that merely “chill” the exercise of free association are still subject to the “closest scrutiny” under the First Amendment. *Id.* at 461. See also *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963) (“Freedoms such as [free association] are protected not only against heavy-handed frontal attack, but also from being stifled from more subtle governmental interference.”) (quoting *Bates v. Little Rock*, 361 U.S. 516, 523 (1960)).

<sup>101</sup> *NAACP*, 357 U.S. at 460.

<sup>102</sup> *Shelton v. Tucker*, 364 U.S. 479, 485–86 (1960).

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The right to free association, however, is not absolute.<sup>103</sup> The First Amendment protects only those associations that are “expressive” in nature.<sup>104</sup> The Court has construed “expressive association” broadly,<sup>105</sup> noting that “[a]n association must merely engage in expressive activity that could be impaired in order to be entitled to protection.”<sup>106</sup> Also, the government may limit associational freedoms if the limitation serves “compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through a means significantly less restrictive of associational freedoms.”<sup>107</sup>

Freedom of association cases have evolved along two separate but related lines.<sup>108</sup> First, there are cases in which the right to free association has been indirectly infringed, or “chilled,” by government regulation.<sup>109</sup> The second line of cases involves direct infringement of associational freedoms by government regulations prohibiting organizations from excluding certain individuals.<sup>110</sup>

*A. Indirect Attack: Disclosure of Membership Lists*

The Supreme Court has consistently held that the “freedom to engage in association for the advancement of beliefs and ideas” is

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<sup>103</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

<sup>104</sup> *Id.* (“To determine whether a group is protected by the First Amendment’s expressive associational right, we must determine whether the group engages in ‘expressive association.’”).

<sup>105</sup> *See Strandburg, supra* note 30, at 784 (“The Court’s definition of an ‘expressive association’ deserving protection is broad . . .”).

<sup>106</sup> *Dale*, 530 U.S. at 655. While an expressive association must have some degree of organization, it does not have to disseminate a specific message, express itself through a particular “method,” or have unanimity of opinion among its members. *Id.* at 655.

<sup>107</sup> *Id.* at 648 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

<sup>108</sup> *See, e.g., NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958) (indirect infringement); *Dale*, 530 U.S. 640 (direct infringement).

<sup>109</sup> Cases involving indirect infringement are typically ones requiring membership disclosure. *See, e.g., NAACP*, 357 U.S. 449.

<sup>110</sup> *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Bd. of Dirs. v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Dale*, 530 U.S. 640.

protected under the First Amendment.<sup>111</sup> Indirect infringements on associational freedoms are generally prohibited,<sup>112</sup> and will only be upheld if substantially related to compelling state interests.<sup>113</sup> Most indirect infringements on associational freedoms have occurred through state attempts to compel disclosure of organizations' membership lists.<sup>114</sup>

In *NAACP v. Alabama*, the Court found that the mandatory disclosure of NAACP membership lists violated the First Amendment because the privacy of group membership was "so related to the rights of the [NAACP] members to . . . associate freely with others."<sup>115</sup> The Court struck down the disclosure requirement because it did not have a "substantial bearing" on a substantial state interest.<sup>116</sup> Similarly, the disclosure requirement in *Shelton v. Tucker*<sup>117</sup> was also invalidated because the inquiries into public teachers' past associational ties "impair[ed] that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free

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<sup>111</sup> *NAACP*, 357 U.S. at 460.

<sup>112</sup> See *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963).

<sup>113</sup> See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("[E]ven though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

<sup>114</sup> See, e.g., *NAACP*, 357 U.S. 449; *Shelton*, 364 U.S. 479; *Gibson*, 372 U.S. 539.

<sup>115</sup> *NAACP*, 357 U.S. at 466. The Court dismissed Alabama's contention that any suppression of free association resulting from the disclosure of membership lists would come from private actors and not the state. *Id.* at 463 ("[I]t is only after the initial exertion of state power represented by the production order that private action takes hold.").

<sup>116</sup> *Id.* at 464 ("Whether there was 'justification' in this instance turns solely on the substantiality of Alabama's interest in obtaining membership lists."). The Court found that there was no substantial bearing between disclosure of NAACP membership lists and the state's interest in enforcing its business registration policies, but the Court was silent as to whether the state's business registration policy was itself a "substantial interest." *Id.* at 464–65.

<sup>117</sup> 364 U.S. 479. The case involved an Arkansas statute requiring every public school teacher to annually file an affidavit disclosing every organization to which she had belonged, or contributed, within the previous five years.

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society.”<sup>118</sup> The Court found that even though the state had a legitimate interest in inquiring into teachers’ past association activities, the “unlimited and indiscriminate”<sup>119</sup> means to serve that interest excessively burdened associational freedoms.<sup>120</sup> Likewise, the Court struck down the Arizona State Bar’s requirement that applicants disclose membership in the Communist Party, holding that Arizona had a “legitimate interest” in evaluating the character and fitness of individuals seeking to practice law in the state, but that that interest was not served by requiring disclosure of Communist Party membership.<sup>121</sup>

On the other hand, the Court found that the surveillance of political activity by the U.S. Army did not violate individuals’ right to free association in *Laird v. Tatum*.<sup>122</sup> There, the Court found that the alleged chilling effect on associational freedoms was merely speculative,<sup>123</sup> and that there was no claim of a “specific

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<sup>118</sup> *Id.* at 485–86.

<sup>119</sup> *Id.* at 490.

<sup>120</sup> *Id.* at 488 (“[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”). *See also*, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963). There, the Court struck down Florida’s mandatory disclosure of NAACP membership in order to identify its Communist members. The Court suggested that while the state may have had a compelling interest in uncovering members of the Communist Party, the disclosure requirement was not substantially related to that interest. *Id.* at 547–48 (“[T]he Communist party is not an ordinary or legitimate political party, as known in this country, and . . . because of its particular nature, membership therein is *itself* a permissible subject of regulation and legislative scrutiny.”). Presumably, if there *was* evidence of Communist activity by NAACP members, infringement of their associational freedoms would pass judicial scrutiny.

<sup>121</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7 (1971). In particular, the Court found that Arizona had ample basis to evaluate the petitioner’s character and fitness because she had already disclosed organizations to which she belonged since the age of sixteen. *Id.* at 7.

<sup>122</sup> 408 U.S. 1 (1972).

<sup>123</sup> *Id.* at 13 (noting that the respondents’ claims arose from a “speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to the respondents”).

present objective harm or threat of specific future harm.”<sup>124</sup>

In sum, state actions such as mandatory disclosure of membership lists that indirectly “chill” free association violate the First Amendment unless substantially related to compelling state interests.<sup>125</sup> The same holds true for direct infringements on associational freedoms.<sup>126</sup>

### *B. Direct Attack: Prohibitions on Associational Exclusion*

Government attempts to directly prohibit or restrict an association’s membership will only be upheld if they “serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>127</sup> In *Roberts v. United States Jaycees*, for example, the United States Jaycees, a nonprofit civic organization for men,<sup>128</sup> challenged a Minnesota statute prohibiting gender discrimination in places of public accommodation.<sup>129</sup> The

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<sup>124</sup> *Id.* at 14.

<sup>125</sup> See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>126</sup> See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

<sup>127</sup> *Id.* at 623. This strict scrutiny standard of review mirrors the standard of review for indirect infringements on free association but with several important differences. First, the Court suggests that regulations are “narrowly drawn” when they are the “least restrictive on associational freedoms.” *Id.* Second, the Court adds the additional requirement that government infringements on free association must be “unrelated to the suppression of ideas.” *Id.* Although the Court does not articulate a specific standard of review for governmental infringements on “intimate associations,” its language suggests that they would be subject to at least strict scrutiny, if not something more stringent. See *id.* at 620 (“[T]he Constitution undoubtedly imposes constraints on the State’s power to control the selection of one’s spouse that would not apply to regulations affecting the choice of one’s fellow employees.”).

<sup>128</sup> Women could only become “associate” members, which meant that they could not vote, hold national or local office, or participate in various leadership programs. *Id.* at 613.

<sup>129</sup> *Id.* at 614–15. The Act also prohibited discrimination on the basis of race, color, creed, religion, disability and national origin. *Id.* at 615. The Act defined “places of public accommodation” broadly to include businesses, accommodations, refreshments, entertainment, recreation and transportation facilities that are made available to the public. *Id.*

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Court upheld the statute, holding that “Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”<sup>130</sup> In *Boy Scouts of America v. Dale*,<sup>131</sup> however, the Court invalidated a seemingly similar New Jersey public accommodations law, which prohibited discrimination on the basis of, among other things, sexual orientation.<sup>132</sup> The Court held that New Jersey’s public accommodations law imposed a significant burden on the Boy Scouts’ associational freedoms.<sup>133</sup> The Court was notably silent on whether New Jersey had a compelling interest to eradicate discrimination based on sexual orientation.<sup>134</sup>

In this line of cases, the Court has also indicated that the right to free association is available only to associations that are either

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<sup>130</sup> *Id.* at 623. Specifically, the Court found that the Jaycees “failed to demonstrate that the Act impose[d] any serious burdens on the male members’ freedom of expressive association.” *Id.* at 626–27. *See also* Bd. of Dirs. v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (holding that a California statute prohibiting the Rotary Club and other civic organizations from excluding women did not violate the First Amendment because it served the compelling state interest of eliminating discrimination against women and imposed no significant infringements on the Rotary Club members’ associational freedoms).

<sup>131</sup> 530 U.S. 640 (2000).

<sup>132</sup> *Id.* James Dale successfully sued the Boy Scouts in New Jersey state court for violation of the law after they expelled him for being homosexual. *Id.* at 646–47. The New Jersey Supreme Court found that the public accommodations law did not violate the Boy Scouts’ right to free association because New Jersey had a compelling interest in eradicating discrimination and the law did not significantly burden the Boy Scouts’ associational freedoms. *Id.* at 647.

<sup>133</sup> *Id.* at 656. The Court concluded that the Boy Scouts were burdened by the law because the organization believed that “homosexual conduct [was] inconsistent with the values it [sought] to instill in its youth members . . . .” *Id.* at 654. The Court based this finding on its inspection of the Boy Scout Oath and Law, position statements, and public pronouncements. *Id.* at 649–53.

<sup>134</sup> *Id.* at 657 (recognizing that “in cases such as *Roberts* . . . [s]tates have a compelling interest in eliminating discrimination against women in public accommodations,” but refusing to say whether states have a similar interest in eliminating discrimination against homosexuals in public accommodations).

“intimate” or “expressive.”<sup>135</sup> “Intimate associations” are “intimate human relationships” such as marriage, childrearing, and cohabitation with one’s relatives.<sup>136</sup> “Expressive associations,” meanwhile, are larger and more attenuated relationships, which are an “indispensable means of preserving other individual liberties” protected by the First Amendment.<sup>137</sup> The Jaycees<sup>138</sup> and Boy Scouts<sup>139</sup> were both considered “expressive associations” for free association purposes because they are “collective effort[s] on behalf of shared goals” that are “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”<sup>140</sup> In *City of Dallas v. Stanglin*,<sup>141</sup> however, the Court upheld a Dallas city ordinance restricting admission in certain dance halls to people between the ages of fourteen and eighteen<sup>142</sup> because “chance encounters in dance halls” are not “expressive association[s].”<sup>143</sup> In upholding the statute, the Court emphasized that the dance club did not constitute an expressive association in large part because its admission policy was not selective, the teenagers had no real relation to each other, and they did not “take positions on public

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<sup>135</sup> See *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984).

<sup>136</sup> *Id.* at 617, 619.

<sup>137</sup> *Id.* at 618.

<sup>138</sup> *Id.* at 622 (“In view of the various protected activities in which the Jaycees engages . . . that right [to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends] is plainly implicated in this case.”).

<sup>139</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000) (“It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.”).

<sup>140</sup> *Jaycees*, 468 U.S. at 622. The Court noted that expressive associations may be political, social, economic, educational, religious, or cultural in nature. *Id.*

<sup>141</sup> 490 U.S. 19 (1989).

<sup>142</sup> *Id.* at 20.

<sup>143</sup> *Id.* at 25 (“We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment. Thus this activity qualifies neither as a form of ‘intimate association’ nor as a form of ‘expressive association’ as those terms were described in [*Jaycees*].”).

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questions”<sup>144</sup> or perform any of the other similar activities described in *Duarte*.<sup>145</sup>

In sum, the First Amendment right to free association is violated when: (1) the association is expressive or intimate in nature; (2) associational freedoms have been directly or indirectly infringed; and (3) the infringement is not narrowly tailored to a compelling state interest.<sup>146</sup>

### III. THE MORRIS PLAN: INDIRECT ATTACK ON FREE ASSOCIATION

The Morris Plan seeks to regulate a wide range of Internet activities by requiring disclosure of “online aliases, e-mail addresses, IP addresses, blogs, and social networking site profile information.”<sup>147</sup> By doing so, the Morris Plan would unlawfully infringe on law students’ right to free association.<sup>148</sup> First, the Internet activities targeted for disclosure are expressive in nature.<sup>149</sup> Second, the disclosure requirement, like the disclosure requirements in *NAACP*<sup>150</sup> and *Shelton*,<sup>151</sup> has an objective “chilling effect” on law students’ associational freedoms.<sup>152</sup> Finally, although states may have a compelling interest to ensure the character and fitness of future lawyers, the disclosure

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<sup>144</sup> *Id.*

<sup>145</sup> Those activities included “humanitarian service, high ethical standards in all vocations, good will, and peace.” *Bd. Of Dirs. v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

<sup>146</sup> *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

<sup>147</sup> *Morris*, *supra* note 12, at 58. Presumably, when *Morris* says that “blogs” should be disclosed, she means that individuals who operate or contribute to a blog must reveal the name of the blog and/or the alias used in making blog posts.

<sup>148</sup> *Morris* acknowledges that the disclosure requirement would deter students from engaging in certain online activities. *See id.* (“The more salient effect [of the disclosure requirement] is the *in terrorem* signal to the applicant that online identity is a relevant part of character to be evaluated by authorities.”).

<sup>149</sup> *See infra* pp. 722–25.

<sup>150</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

<sup>151</sup> *Shelton v. Tucker*, 364 U.S. 479 (1960).

<sup>152</sup> *See Morris*, *supra* note 12, at 58.



requirement is not narrowly drawn to serve that interest.

### A. Expressive Association

As a threshold matter, the Internet activities targeted by the Morris Plan are entitled to First Amendment protection only if they are “expressive associations.”<sup>153</sup> This requires a fact-specific inquiry into the “size, purpose, policies, [and] selectivity” of a particular activity.<sup>154</sup> The problem is that the Morris Plan implicates virtually *all* Internet activities.<sup>155</sup> While online aliases and IP addresses are not themselves “expressive associations,” they are vital tools with which individuals engage in “expressive association” online. IP addresses, for example, are essential to every online activity from web browsing to email.<sup>156</sup> Similarly, “online aliases” include screen names and user names for message boards, commercial websites, and instant messaging applications.<sup>157</sup> This Note focuses on the expressive nature of the online associations specifically mentioned by Morris: blogs and social-networking sites.<sup>158</sup>

#### 1. Blogs

Blog creators and contributors are members of expressive associations.<sup>159</sup> First, blogs are organized.<sup>160</sup> Blog creators and

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<sup>153</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“To determine whether a group is protected by the First Amendment’s expressive associational right, we must determine whether the group engages in ‘expressive association.’”).

<sup>154</sup> See *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

<sup>155</sup> See *Morris*, *supra* note 12, at 58.

<sup>156</sup> See *SOLOVE*, *supra* note 2, at 147 (“Whenever a user communicates over the Internet, her IP address is logged.”).

<sup>157</sup> For example, Facebook requires an email address and user name. Facebook Homepage, <http://www.facebook.com> (last visited Feb. 28, 2009). So does the Volokh Conspiracy, a popular legal blog. Volokh Conspiracy, <http://volokh.com> (last visited Feb. 28, 2009).

<sup>158</sup> *Morris*, *supra* note 12, at 58 (requiring disclosure of “blog and social networking site profile information”).

<sup>159</sup> Blog readers, on the other hand, would probably not be considered

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contributors have the shared goal of creating, consuming, and disseminating news and information about a particular topic.<sup>161</sup> While a blog's community may be vast and largely anonymous, it is still organized around a central digital hub where ideas and opinions are expressed.<sup>162</sup> Second, blogs have a degree of selectivity.<sup>163</sup> Although blogs typically have no formal membership procedures, they screen users by requiring registration of a username and password before individuals can post comments or responses.<sup>164</sup> Finally, blog activity is distinctly expressive in a way that teenagers gathered at a dance hall are not.<sup>165</sup> Blogs are not merely places of "social association,"<sup>166</sup> but digital soapboxes where users "take positions on public questions."<sup>167</sup> Blogs have even acquired the reputation for advancing a pugnacious brand of punditry.<sup>168</sup> In sum, blogs are precisely the kind of "expressive

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members of an expressive association because merely reading material on a blog is not "expressive."

<sup>160</sup> See SOLOVE, *supra* note 2, at 20 (describing the mechanics and structure of blogging).

<sup>161</sup> The fact that blog contributors may not unanimously agree on everything or disseminate a specific message does not mean that it cannot still be an expressive association. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) ("The First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'").

<sup>162</sup> See SOLOVE, *supra* note 2, at 19 ("Blogging is the rage these days. We can all be pundits now, sharing our thoughts and pictures with a worldwide audience.").

<sup>163</sup> *Id.* at 20 (noting that users must set up an account, and sometimes pay a monthly fee, in order to create a blog).

<sup>164</sup> For example, Abovethelaw.com requires contributors to provide a username, email address, and password. Above the Law Sign Up, <http://abovethelaw.com/profile/signup> (last visited Nov. 21, 2008).

<sup>165</sup> See generally *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

<sup>166</sup> *Id.* at 23.

<sup>167</sup> *Id.* at 25.

<sup>168</sup> For example, after the 2008 presidential election, Vice-Presidential contender Sarah Palin dismissed many of her critics as "bloggers in their parents' basement just talking garbage." See David Hinckley, *Sarah on the Offense: Takes to the Media & Says She'll Plow Through The Door If There's An Opening*, N.Y. DAILY NEWS, Nov. 11, 2008, at 6.

association” that have been recognized by the Supreme Court because they are “collective effort[s] on behalf of shared goals” in which individuals “associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>169</sup>

## 2. Social Networking Sites

Social networking sites like Facebook are also expressive associations.<sup>170</sup> Facebook literally organizes groups of individuals according to educational, geographic, political, and religious categories.<sup>171</sup> In this sense, Facebook is the digital analog to traditional organizations such as the NAACP and Boy Scouts.<sup>172</sup> Also, like traditional organizations, Facebook has formalized membership procedures whereby individuals must create an elaborate user profile in order to join a particular network.<sup>173</sup> The Facebook community also exercises a degree of selectivity because users can restrict access to their profiles.<sup>174</sup> Finally, Facebook activity is distinctly “expressive” because members constantly “take positions on public questions”<sup>175</sup> through “Wall” posts,

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<sup>169</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

<sup>170</sup> Since the Morris Plan specifically identifies Facebook as an example of a social networking site, this Note uses Facebook as representative of all social networking sites. Morris, *supra* note 12, at 56 (discussing “Facebook.com profiles that openly celebrate law students’ illegal, immoral or unwise behavior”).

<sup>171</sup> This is not an exhaustive list. Facebook users can create network categories based on everything from favorite bands to favorite foods.

<sup>172</sup> In fact, both of those organizations have Facebook networks with thousands of members. See Facebook.com homepage, <http://www.facebook.com/> (search for NAACP and Boy Scouts) (registration required) (last visited Apr. 24, 2009).

<sup>173</sup> For example, only individuals with a Brooklyn Law School email address can join the Brooklyn Law School network on Facebook.

<sup>174</sup> See *supra* note 58 and accompanying text.

<sup>175</sup> The fact that those “public positions” might range from Brad Pitt’s new movie to Barack Obama’s cabinet selections has no bearing on Facebook’s status as an expressive association. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Of course, it is immaterial whether the beliefs

“Status Updates,” and personal notes.<sup>176</sup> Even if much Facebook chatter is personal and trivial, *Dale* makes clear that an association need not disseminate a specific “message” or advocate a particular position in order to be expressive.<sup>177</sup> Rather, the association must “merely engage in expressive activity that could be impaired in order to be entitled to protection.”<sup>178</sup>

*B. The Chilling Effect of Disclosure Under the Morris Plan*

Upon review of the expressive association nature of blogs and social networking sites, it is clear that the Morris Plan’s disclosure requirement indirectly infringes on law students’ right to free association by chilling the exercise of their associational freedoms.

The Morris Plan creates a chilling effect because its unlimited and indiscriminate scope would create “serious burdens”<sup>179</sup> on the associational freedoms of law students. In *Shelton*, the Court found that the disclosure of all associational activities within a five-year period chilled associational freedoms because it was “completely unlimited.”<sup>180</sup> The Morris Plan is similarly unlimited: it requires the disclosure of *all* blogging and Facebook activity within a three-year period.<sup>181</sup> The exhaustive reach of the disclosure requirement provides law students and prospective law students with no

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sought to be advanced by association pertain to political, economic, religious, or cultural matters.”).

<sup>176</sup> These highly personal Facebook connections might even qualify as “intimate associations.” See *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (describing “intimate associations” as involving “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life”).

<sup>177</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000). The Dale Court also noted that “[t]he First Amendment protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.” *Id.* at 648.

<sup>178</sup> *Id.* at 655.

<sup>179</sup> *Jaycees*, 468 U.S. at 626.

<sup>180</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>181</sup> See SOLOVE, *supra* note 2.

meaningful direction as to how to regulate their online activities.<sup>182</sup> Before typing every blog post or Facebook message, students would wonder whether they were being monitored by the school administration.<sup>183</sup> Thus, like the teachers in *Shelton*, the pressure upon a law student to “avoid any ties which might displease those who control his professional destiny would be constant and heavy.”<sup>184</sup> Forced to choose between exercising their First Amendment rights and obtaining a legal education, many students would likely choose the latter.<sup>185</sup>

Additionally, the chilling effect under the Morris plan would be “objective.”<sup>186</sup> Unlike the alleged chilling of associational freedoms in *Laird*, the chilling effect under the Morris Plan derives from a specific and known governmental regulation directed at specific individuals.<sup>187</sup> In *Laird*, the chilling effect was merely “subjective,” and thus unprotected by the First Amendment, because the petitioners did not know who or what the military was monitoring.<sup>188</sup> Under the Morris Plan, however, each individual

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<sup>182</sup> In fact, the disclosure requirement imposed on law students through the Morris Plan is virtually identical to the disclosure requirement imposed by President Barack Obama on applicants for positions within his cabinet. See Jackie Calmes, *For a Washington Job, Be Prepared to Tell All*, N.Y. TIMES, Nov. 13, 2008, at A1 (reporting that job applicants must reveal “blog posts and links to their Facebook pages,” in addition to “all aliases or ‘handles’ used to communicate on the Internet”).

<sup>183</sup> This is precisely the point of the Morris Plan. See Morris, *supra* note 12, at 58 (noting that the purpose of the disclosure requirement is to send the message: “Clean up your act. We’re watching.”).

<sup>184</sup> *Shelton*, 364 U.S. at 486.

<sup>185</sup> The overly broad scope and breadth of the Morris Plan is especially troubling within the educational context. As the Court in *Shelton* observed: “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Id.* at 487.

<sup>186</sup> *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

<sup>187</sup> Under the Morris Plan, each applicant would have to disclose her online identifying information. Thus, each applicant would know that she was being directly monitored. Morris, *supra* note 12, at 58.

<sup>188</sup> *Laird*, 408 U.S. at 11 (noting that the chilling effect arose “merely from the individual’s knowledge that a governmental agency was engaged in certain activities”). The Court’s distinction between subjective and objective “chilling effects” functions as a standing requirement limiting the extent to which the

student is required to disclose his or her online associational activities, thus giving rise to a “threat of specific future harm”<sup>189</sup>—namely, the threat of retaliation if the school disapproves of the student’s online activities.<sup>190</sup> This chill on associational freedoms is therefore objective, rather than speculative and subjective, and is protected under the First Amendment.

Since the Morris Plan imposes an “objective” chilling effect on law students’ expressive associations, it will only be upheld if it is narrowly drawn to a compelling state interest and “unrelated to the suppression of ideas.”<sup>191</sup>

### *C. Compelling State Interest?*

It is not immediately clear what state interest is served under the Morris Plan. On the one hand, Morris writes that the disclosure requirement is necessary “[t]o avoid further injury to the reputation of our law schools and our legal profession.”<sup>192</sup> This would not likely rise to the kind of substantial state interest recognized by the Court in its free association cases because it does not involve compliance with a state statute,<sup>193</sup> the competency of public employees,<sup>194</sup> or issues of domestic security.<sup>195</sup>

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Court will recognize an indirect infringement claim under the First Amendment.

<sup>189</sup> *Id.* at 14.

<sup>190</sup> See Morris, *supra* note 12, at 58 (noting that “online identity is a relevant part of character to be *evaluated by authorities*”) (emphasis added). It is not clear who exactly these “authorities” might be.

<sup>191</sup> Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

<sup>192</sup> Morris, *supra* note 12, at 53.

<sup>193</sup> See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

<sup>194</sup> See Shelton v. Tucker, 364 U.S. 479 (1960).

<sup>195</sup> See Laird v. Tatum, 408 U.S. 1 (1972). Reputational integrity involves highly subjective matters of public perception that may or may not implicate some other substantial state interest. For example, perhaps reputational integrity in public law schools is necessary to promote public confidence in its legal institutions. But Morris is silent as to what state interests might be served by maintaining the reputational integrity of state law schools. Thus, without further explanation, the state does not have a compelling interest in protecting the reputation of its law schools.

On the other hand, Morris suggests that the disclosure requirement is necessary to ensure the “character and fitness” of future lawyers.<sup>196</sup> This likely is a compelling state interest.<sup>197</sup> In *Baird*, the Court found that Arizona had “a legitimate interest in determining whether petitioner has the qualities of character and the professional competence requisite to the practice of law.”<sup>198</sup> Similarly, *Shelton* found that the state had a compelling interest to “investigate the competence and fitness of those whom it hires to teach in its schools.”<sup>199</sup> Thus, the state arguably has an analogous interest to ensure the fitness and competency of its law students, especially considering the public role they will have as future attorneys.

However, even if the Morris Plan does serve a compelling state interest, the disclosure requirement is directly related to the suppression of ideas and therefore violates the First Amendment.<sup>200</sup> Morris concedes that the purpose of the disclosure requirement is to “discourage” law students from engaging in anonymous and offensive online conduct.<sup>201</sup> Moreover, the Morris Plan uses veiled threats to ensure that offensive student online association<sup>202</sup> is sufficiently suppressed.<sup>203</sup> Thus, the stated purpose of the Morris Plan is to suppress the expression of those ideas that Morris, or the law school, deems offensive.<sup>204</sup> The Court has consistently held that such governmental infringements on free association cannot stand.<sup>205</sup>

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<sup>196</sup> Morris, *supra* note 12, at 57.

<sup>197</sup> See *Shelton*, 364 U.S. 479; *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971).

<sup>198</sup> *Baird*, 401 U.S. at 7.

<sup>199</sup> *Shelton*, 364 U.S. at 485.

<sup>200</sup> See Morris, *supra* note 12, at 58 (noting that the disclosure requirement “discourages” online behavior that is “anonymous” and “stupid”).

<sup>201</sup> *Id.* at 53, 58 (emphasis added).

<sup>202</sup> Morris neglects to define offensive online conduct, nor does she suggest how law schools might arrive at their own definition.

<sup>203</sup> Morris, *supra* note 12, at 58 (noting that law students must be “caught” and that online identities will be “evaluated by authorities”).

<sup>204</sup> See *id.* at 58.

<sup>205</sup> See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

*D. Least Restrictive on Associations' Freedoms*

The Morris Plan also fails strict scrutiny because the state interest to promote the character and fitness of future lawyers can be achieved “through a means significantly less restrictive of associational freedoms.”<sup>206</sup>

The Morris Plan is over inclusive because it does not discriminate between blogs with a history of user abuse, such as Autoadmit.com, and blogs with no such history of user abuse.<sup>207</sup> Also, the Morris Plan requires disclosure of *all* blogging and social-networking activity, rather than only those that might promote inappropriate behavior.<sup>208</sup> But the Supreme Court has rejected overreaching of this sort.<sup>209</sup> In *Gibson v. Florida Legislative Investigation Committee*,<sup>210</sup> for instance, the Supreme Court struck down the mandatory disclosure of NAACP membership lists because there was no “substantial connection” between the NAACP and the Communist Party.<sup>211</sup> Here, there is no substantial connection between many of the blogs targeted by the Morris Plan and harmful online conduct.<sup>212</sup> The mere fact that *some* students have used the Internet for illegitimate purposes does not establish a “substantial connection” between the Internet and illegitimate behavior that could justify the sweeping scope of the Morris Plan.<sup>213</sup>

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<sup>206</sup> *Dale*, 530 U.S. at 648.

<sup>207</sup> See Nakashima, *supra* note 7.

<sup>208</sup> See SOLOVE, *supra* note 2, at 147.

<sup>209</sup> See *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960).

<sup>210</sup> 372 U.S. 539 (1963).

<sup>211</sup> *Id.* at 548.

<sup>212</sup> If the Morris Plan were limited only to Autoadmit.com, it would come much closer to being narrowly tailored to a compelling state interest. But it is not, and Morris fails to show a substantial connection between other blogs or websites and harmful online conduct.

<sup>213</sup> Saying that there is a substantial connection between the Internet and harmful conduct would be like saying that there is a substantial connection between telephones and offensive language.



In short, the Morris Plan reaches too far.<sup>214</sup> Like the invalidated disclosure requirement in *Shelton*, the Morris Plan effectively requires students to disclose “every conceivable kind of associational tie” on the Internet.<sup>215</sup> It seeks to broadly regulate a medium that is a conduit for all kinds of expressive associations. Many of them are socially valuable,<sup>216</sup> and many of them are not.<sup>217</sup> However, the Supreme Court has explicitly found that the First Amendment protects expressive association, regardless of its content.<sup>218</sup> To withstand the strict scrutiny triggered by infringements on the right to free association, the Morris Plan must, at a minimum, exercise a greater degree of selectivity.<sup>219</sup>

#### IV. LESS RESTRICTIVE WAYS TO COMBAT INTERNET MISCONDUCT

There are several other less restrictive methods to curb inappropriate online activity among law students.<sup>220</sup> One alternative is for law schools to institute a policy of “traceable anonymity.”<sup>221</sup> Under such a policy, students would be free to engage in anonymous (or pseudo-anonymous) online activities so long as their true identity could be traced in the event of harmful online conduct.<sup>222</sup> With “traceable anonymity,” writes Daniel Solove, professor of law at Georgetown University Law School, “we preserve the right for people to speak anonymously, but in the

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<sup>214</sup> See *Morris*, *supra* note 12, at 58 (“Thus, my proposal: request a three-year history of online aliases, e-mail addresses, IP addresses, blogs, and social networking site profile information.”).

<sup>215</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>216</sup> See, e.g., WALL ST. J., Law Blog homepage, <http://blogs.wsj.com/law/> (last visited Feb. 28, 2009).

<sup>217</sup> See, e.g., PerezHilton.com homepage, <http://perezhilton.com> (last visited Feb. 28, 2009).

<sup>218</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (“The *First Amendment* protects expression, be it of the popular variety or not.”).

<sup>219</sup> See *id.* at 648 (noting that infringements on free association may be upheld if they serve compelling state interests “that cannot be achieved through means significantly less restrictive of associational freedoms”).

<sup>220</sup> See, e.g., SOLOVE, *supra* note 2, at 146.

<sup>221</sup> *Id.* at 146.

<sup>222</sup> See *id.* at 146–47.

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event that one causes harm to another we've preserved a way to trace who the culprit is."<sup>223</sup>

"Traceable anonymity" is wise public policy because it deters harmful online conduct without restraining associational freedoms.<sup>224</sup> Law students would be free to develop robust online associations without fear that the administration was "watching."<sup>225</sup> Furthermore, "traceable anonymity" already exists with most, if not all, of the online activities targeted by the Morris Plan<sup>226</sup> since both blog posts and Facebook profiles are tied to a user's IP address.<sup>227</sup> Thus, law school administration could track down the perpetrator of any online harm with relative ease.<sup>228</sup>

In addition, law schools could supplement "traceable anonymity" and give it some teeth with a "Technology Appropriate Use" policy.<sup>229</sup> These policies provide specific ethical and legal standards for students accessing the Internet on school computers or through school wireless networks.<sup>230</sup> Such a policy would provide students with clear standards and notice of the disciplinary consequences following violations of those standards.<sup>231</sup>

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<sup>223</sup> *Id.* at 146.

<sup>224</sup> *See id.* at 147.

<sup>225</sup> Morris, *supra* note 12, at 58.

<sup>226</sup> *See* SOLOVE, *supra* note 2, at 146 ("Traceable anonymity is for the most part what currently exists on the Internet.").

<sup>227</sup> *See id.* at 146–47 ("Whenever a user communicates over the Internet, her IP address is logged . . . . It is indeed possible to make yourself untraceable, but it involves significant care and know-how.").

<sup>228</sup> *See id.*

<sup>229</sup> Many, if not most, colleges and universities have some kind of "appropriate use" policy for Internet use. *See, e.g.*, Pace Law School, Appropriate Use Policy for Information Technology, [http://www.pace.edu/page.cfm?doc\\_id=27208](http://www.pace.edu/page.cfm?doc_id=27208) (last visited Feb. 28, 2009).

<sup>230</sup> For example, Yale University's "Information Technology Appropriate Use Policy" prohibits technology use that "impedes, interferes with, impairs, or otherwise causes harm to the activities of others." Yale University Technology Appropriate Use page, <http://www.yale.edu/policy/itaup.html> (last visited Feb. 28, 2009).

<sup>231</sup> *See id.*

Finally, law schools could implement information campaigns that educate students on the legal and ethical consequences of inappropriate online conduct.<sup>232</sup> As part of this effort, law schools could inform students of the limits of free speech within the school environment.<sup>233</sup> Furthermore, law schools should advise prospective employers of *their* online obligations.<sup>234</sup> For example, according to Facebook's Terms of Use, the website is available for "personal, *non commercial* use only."<sup>235</sup> Thus, use of Facebook by law firms to vet job applicants may be "commercial use" that violates Facebook's Terms of Use.<sup>236</sup>

These are but several methods by which law schools might decrease harmful and offensive online conduct without trampling on student associational freedoms. But there is no silver bullet. Rather, law school deans must exercise intelligence and creativity to create a safe learning environment in which students can go online freely without worrying that their every online move is being "evaluated by authorities."<sup>237</sup>

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<sup>232</sup> Morris acknowledges that schools should "reinforce" the disclosure requirement by "[cautioning] first-year law students about maintaining appropriate online personas." Morris, *supra* note 12, at 58. It is not clear, however, why this alone would not be sufficient to serve the compelling state interest to ensure the character and fitness of future lawyers.

<sup>233</sup> For example, language that constitutes a "true threat" or "fighting words" would not be protected under the First Amendment. *See, e.g.*, Roberts Martin, *supra* note 24; Sanders, *supra* note 24.

<sup>234</sup> *See* Carly Brandenburg, *The Newest Way to Screen Job Applicants: A Social Networker's Nightmare*, 60 FED. COMM. L.J. 597 (2008).

<sup>235</sup> Facebook, Terms of Use, User Conduct, <http://www.facebook.com/home.php#/terms.php?ref=pf> (last visited Mar. 16, 2009) (emphasis added).

<sup>236</sup> There may be recent precedent for this type of violation. In November 2008, a jury convicted a California mother for computer fraud because she violated the MySpace user agreement by creating a false MySpace profile. The woman used the fraudulent profile to harass a teenage girl who ultimately committed suicide. *See* Jennifer Steinhauer, *Woman Found Guilty in Web Fraud Tied to Suicide*, N.Y. TIMES, Nov. 27, 2008, at A25. For a detailed discussion of how employers use social-networking sites to vet job applications, and how such use may violate the law, see Brandenburg, *supra* note 234.

<sup>237</sup> Morris, *supra* note 12, at 58.

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## CONCLUSION

Harmful and offensive online conduct among law students is a serious problem.<sup>238</sup> Its remedy, however, requires a nuanced approach that minimizes infringement of associational freedoms while deterring and detecting online abuse. The Morris Plan does not strike this balance. First, it constructs a simplistic caricature of law students' Internet use that fails to recognize the depth and complexity of their online expression.<sup>239</sup> Second, the Morris Plan is so broad and indiscriminate that it is certain to intimidate law students and keep them from exercising their associational freedoms online.<sup>240</sup> Finally, the Morris Plan ignores alternative measures, such as "traceable anonymity" and targeted disclosure, which would deter harmful online conduct without trampling on associational freedoms.<sup>241</sup>

"Clean up your act," Morris scolds law students. "We're watching."<sup>242</sup> But the Morris Plan watches the wrong thing. Rather than peering at blog posts and staring at status updates, law schools should be watching out for law students' constitutional rights. Odds are it will be a more worthwhile endeavor.

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<sup>238</sup> See Nakashima, *supra* note 7.

<sup>239</sup> Morris, *supra* note 12, at 56.

<sup>240</sup> *Id.* at 58.

<sup>241</sup> See, e.g., SOLOVE, *supra* note 2, at 146.

<sup>242</sup> Morris, *supra* note 12, at 58.