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## Digital Scarlet Letters: Social Media Stigmatization of the Poor and What Can Be Done

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# Digital Scarlet Letters: Social Media Stigmatization of the Poor and What Can Be Done

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## I. INTRODUCTION

The United States is a deeply unequal society, the home of many of the world's billionaires but with a higher poverty rate than the world's other advanced economies.<sup>1</sup> The recent economic recovery after the Great Recession of 2008 has disproportionately advanced the top one percent so that "[t]he most unequal country in the rich world is thus becoming even more so."<sup>2</sup> In 2010, "the top 1% of households (the up-

- 
1. Today, more than one in five children in the United States live in "official" poverty. Black children, Hispanic children, and children raised in families headed by a single parent have an even higher rate. The United States ranks second highest in child poverty among the world's 35 richest countries. RICHARD J. COLEY & BRUCE BAKER, EDUC. TESTING SERV., *POVERTY AND EDUCATION: FINDING THE WAY FORWARD* 3 (2013).
  2. *Growing Apart: America's Income Inequality is Growing Again. Time to Cut Subsidies to the Rich and Invest in the Young*, ECONOMIST, Sept. 21, 2013, <http://www.economist.com/news/leaders/21586578-americas-income-inequality-growing-again-time-cut-subsidies-rich-and-invest>, archived at <http://perma.unl.edu/YXF4>

per class) owned 35.4% of all privately held wealth,”<sup>3</sup> while 15% of all Americans fall below the official poverty line.<sup>4</sup>

America’s social inequality extends into cyberspace. In the late 1990s, researchers found that “[c]omputers may seem ubiquitous in today’s society, but their distribution is highly stratified by income, race/ethnicity, and educational attainment.”<sup>5</sup> In 1998, the College Board reported that:

[T]hree-quarters of households with incomes over \$75,000 have a computer, compared to one-third of households with incomes between \$25,000 and \$35,000, and one-sixth with incomes below \$15,000. White households are twice as likely as black and Hispanic households to have access to computers and online services. And those with a B.A. degree or higher are about four times as likely as those with only a high school education to have online service.<sup>6</sup>

African-American and Hispanic households, in 1999, were two-fifths as likely to be online than their white counterparts. Prosperous households, those with incomes above \$75,000, were twenty times more likely to have Internet access than those living at or near poverty level.<sup>7</sup>

President William Jefferson Clinton, in his 2000 State of the Union speech, popularized the term “digital divide” to mobilize America to bridge the gap between the Internet access “haves” and “have-nots.”<sup>8</sup> Greater Internet and social media access for minorities can serve important educative functions, enable employment, facilitate networking, and increase civic engagement—all things that clearly benefit the disadvantaged.

In the decade and a half since President Clinton developed a strategy for ending this new form of inequality, Internet access has increased dramatically but cyberspace usage still varies significantly by age, social class, race, and educational level. However, with the radical increase of minority populations on the Internet, the dynamics of

GFGQ (arguing that U.S. government policies are increasing U.S. economic inequality).

3. G. William Domhoff, *Wealth, Income and Power*, WHO RULES AM., <http://www2.ucsc.edu/whorulesamerica/power/wealth.html> (last visited Sept. 1, 2014), *archived at* <http://perma.unl.edu/UJ37-JJQZ>.
4. COLEY & BAKER, *supra* note 1, at 3.
5. Lawrence E. Gladieux & Watson Scott Swail, *The Internet: New Engine of Inequality?*, EDUCASE, <https://net.educause.edu/ir/library/html/edu9949/edu9949.html> (last visited May 1, 2014), *archived at* <http://perma.unl.edu/RDA8-7LUQ> (providing an analysis of the societal impact of the Digital Divide).
6. *Id.* (quoting U.S. Commerce Department 1998 statistics).
7. *Id.*
8. Mary Hillebrand, *Clinton Launches Initiative to Bridge Digital Divide*, E-COM. TIMES (Dec. 10, 1999), <http://www.ecommercetimes.com/story/1956.html>, *archived at* <http://perma.unl.edu/ALX2-U3GH> (discussing NAT’L TELECOMMS. AND INFO. ADMIN. REPORT, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE (1999)).

the digital divide have become more complex. The increasing availability of the Internet and social network access is allowing less advantaged groups to join Generation C (Connected). Pew Research Center's Internet & American Life Project found that by 2012:

88% of American adults have a cell phone, 57% have a laptop, 19% own an e-book reader, and 19% have a tablet computer; about six in ten adults (63%) go online wirelessly with one of those devices. Gadget ownership is generally correlated with age, education, and household income, although some devices—notably e-book readers and tablets—are as popular or even more popular with adults in their thirties and forties than young adults ages 18-29.<sup>9</sup>

America's digital divide is decreasing when it comes to the lack of Internet access for the poor. Rather, a more subtle form of digital stigmatization that we have labeled the "new digital divide" has arisen based on the ways that the Internet furthers the relative exclusion of disadvantaged Americans because of damaging posts by the data subject and others.<sup>10</sup>

The Internet has created a permanent and pervasive treasure trove of digital fingerprints beyond any scale created by prior information technologies such as television, radio, or the telephone.<sup>11</sup> Internet users increasingly live their private lives in public through the self-immolation of their own privacy. Blogging, photosharing, texting, instant messaging, and other postings on social media sites obliterate the division between the public and the private spheres. Facebook is where a less educated person can share with friends but this also means sharing how inept they are in managing privacy settings. Wearing gang styles such as a baseball cap worn backwards, colored bandannas, and baggy pants are considered to be cool styles by minority youth but create misleading stereotypes when viewed by mainstream Americans. A minority youth wearing a six-point star, a crescent moon, or a Playboy Bunny symbol to be cool is, in effect, sporting a self-inflicted digital scarlet letter, as these are also styles associated with gang membership. These stigmatizing images are posted on a 24/7 worldwide bulletin board, creating a variety of socio-legal dilemmas.

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9. Kathryn Zickuhr & Aaron Smith, *Digital Differences*, PEW RES. INTERNET PROJECT 2 (Apr. 13, 2012), [http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP\\_Digital\\_differences\\_041312.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Digital_differences_041312.pdf), archived at <http://perma.unl.edu/3C7S-9ASE>.

10. See, e.g., Kim Lyons, *CMU Study Finds Employer Discrimination Via Social Media Sites*, PITTSBURGH POST-GAZETTE, Nov. 27, 2013, <http://www.post-gazette.com/business/2013/11/28/Info-found-on-social-sites-can-be-off-limits/stories/201311280166>, archived at <http://perma.unl.edu/J3HT-ZDCH> (reporting that employers use social networks to uncover "potentially unprofessional behaviors in job candidates").

11. See generally, MARSHALL McLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964) (analyzing the different mediums of media and the effects that these "extensions of man" have on the individual and society).

This Article provides a comprehensive overview of how social media amplifies stereotypic images of the poor that undermine their economic and educational opportunities. We explore the ways that increased Internet and social media usage<sup>12</sup> is a catalyst for advancing equality but also can devalue the uneducated and the poor. The Internet has lifted the veil of individual privacy, so that information about factors like race, class, gender, sexual orientation,<sup>13</sup> obesity, physical handicaps, unpopular opinions, and nonmainstream clothing styles become easily visible to employers, potential employers, college admissions personnel, law enforcement officials, welfare providers, loan companies, landlords, merchants, and many other societal decision makers.

Monitoring social media postings allows these social gatekeepers to divide persons into “deserving” and “undeserving” categories based on their competency at online impression management.<sup>14</sup> The undeserving poor are depicted in terms of “characterological deficiencies and moral failings (e.g., substance abuse, crime, sexual availability).”<sup>15</sup> Sociologist Erving Goffman explained how stigmatized persons managed their spoiled identities resulting from real or reputed character traits, physical appearance, or group association.<sup>16</sup> Stigmatized individuals must continually manage “blemishes of individual character perceived as weak will, domineering or unnatural passions, treacherous and rigid beliefs, and dishonesty, these being inferred from a known record of, for example, mental disorder, imprisonment, addiction, alcoholism, homosexuality, unemployment, suicidal attempts, and radical political behavior.”<sup>17</sup> Digital marks of shame, resulting from naive online postings, are particularly indelible, deep, and far-

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12. “While the term ‘social media’ continues to include ‘social networks’ like Facebook and LinkedIn, as well as blogs or micro-blogs (like Twitter), it also includes media sharing sites (Vine, Pinterest); document-sharing sites like Google+; music-sharing tools (Spotify); social gaming sites; sites that transmit and then self-destruct images or video (Snapchat) or text messages (Confide); and last but not least, texting.” *Written Testimony of Carol R. Miaskoff, Acting Associate Legal Counsel, U.S. EQUAL EMP’T OPPORTUNITY COMM’N* (Mar. 12, 2014), <http://www.eeoc.gov/eeoc/meetings/3-12-14/miaskoff.cfm>, archived at <http://perma.unl.edu/F5ZR-TUGJ>.
  13. “A blog post can imply [an applicant’s] sexual orientation. A photo on LinkedIn can show her race. A comment on Facebook or an image on a social media profile can suggest her family status.” Lyons, *supra* note 10.
  14. Cf. Noah D. Zatz, *Poverty Unmodified?: Critical Reflections of the Disserving/Undeserving Distinction*, 59 UCLA L. REV. 550 (2012) (praising Joel Handler’s lifelong scholarship, which argues that the poor are highly vulnerable to being stigmatized by being viewed as undeserving of help because of moral failings).
  15. Heather E. Bullock, Karen Fraser Wyche & Wendy R. Williams, *Media Images of the Poor*, 57 J. SOC. ISSUES 229, 230 (2001).
  16. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).
  17. *Id.* at 4.

reaching for members of already devalued groups.<sup>18</sup> Postings can go viral as proof of an individual or group's cultural inferiority. By September of 2014, for example, a single Facebook page dedicated to "embarrassing party photos" had logged 1,804,434 likes.<sup>19</sup> Embarrassing photos on the web page tend to make fun of scantily clad women, the morbidly obese, the poorly dressed, the inebriated, and the less educated.

The People of Walmart website features humiliating images, videos, and snarky comments about the bizarre clothing styles, obesity, tattoos, and otherwise deviant presentation of self of low-status people who shop at Walmart.<sup>20</sup> In an era where cameras are standard features of mobile telephones, People of Walmart has the feel of a Fellini-grotesque movie with its collection of grossly overweight, strangely dressed, or surrealistic shoppers at Walmart.<sup>21</sup> These candid pictures, taken by fellow customers and viewed by millions, are the modern equivalent of Tod Browning's 1932 movie, *Freaks*, featuring bearded women and conjoined twins.

Minority male teenagers, seeking to appear cool and contemporary, will post photographs of themselves wearing oversized Dickie, Ben Davis, or Solos pants "worn low, or sagging and cuffed inside at the bottom or dragging on the ground."<sup>22</sup> Minority females may post pic-

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18. In a recent example, actor George Takei was criticized for retweeting a viral photograph of a woman in a wheel chair standing up to reach a liquor bottle. Scott Jordan Harris, *Despicable Memes*, SLATE (Aug. 13, 2014), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2014/08/miracle\\_memes\\_and\\_inspiration\\_porn\\_internet\\_viral\\_images\\_demean\\_disabled.html](http://www.slate.com/articles/health_and_science/medical_examiner/2014/08/miracle_memes_and_inspiration_porn_internet_viral_images_demean_disabled.html), archived at <http://perma.unl.edu/6R5R-2XSW>.
  19. Embarrassing Party Photos, FACEBOOK, <https://www.facebook.com/EmbarrassingPartyFail> (last visited Sept. 1, 2014), archived at <http://perma.unl.edu/7PUF-5V5A>.
  20. *Funny Pictures of People Shopping at Walmart*, PEOPLE OF WALMART, <http://www.peopleofwalmart.com> (last visited May 22, 2014), archived at <http://perma.unl.edu/78VG-F6JC>.
  21. "The People of Walmart invites users to post photos of shoppers with a questionable sense of style: bad hairdos, excessive tattoos or ill-fitting clothing are particular targets." Sarah Le Masson, *People of Walmart Among Most Searched Websites*, TELEGRAPH, Sept. 4, 2009, <http://www.telegraph.co.uk/technology/news/6138016/People-of-Walmart-among-most-searched-web-sites.html>, archived at <http://perma.unl.edu/D9P8-SKDF>.
  22. Cf. Tracy Barnhart, *Tell it Like it is: Gang Clothing*, CORRECTIONS.COM, [http://www.corrections.com/tracy\\_barnhart/?p=552](http://www.corrections.com/tracy_barnhart/?p=552) (last visited May 22, 2014), archived at <http://perma.unl.edu/NJ3E-A7WP> (describing boys gang-related style such as "[s]haved, bald head or extremely short hair, White oversized T-shirt creased in the middle White athletic type undershirt Polo type knit shirts (oversized) and usually worn buttoned to the top and not tucked in. Oversized Dickie, Ben Davis or Solos pants, Pants worn low, or 'sagging' and cuffed inside at the bottom or dragging on the ground. Baseball caps worn backwards (usually black and sometimes with the initials of the gang)").

tures of themselves wearing gang-related clothing and styles.<sup>23</sup> College admissions officials may view wearing a tee-shirt with a suggestive logo not as trendy fashion statement, but as an indication of undesirable deviancy.<sup>24</sup> A 2013 survey found that 31% of admissions officers have accessed an applicant's social media pages to learn more about them, which is up from 24% in 2011.<sup>25</sup>

The misfortunes of the poor are often blamed on their membership in the "culture of poverty."<sup>26</sup> Sociologists, for example, describe how media images of women receiving welfare depict them as "lazy, disinterested in education, and promiscuous."<sup>27</sup> Welfare recipients are commonly demeaned as "welfare queens," "bag ladies," or "trailer park trash." As one blogger wrote: "[p]eople here say 'she's on welfare' the way they'd say 'she kills baby seals.'"<sup>28</sup>

Facebook's privacy policy for current users consigns "certain personal information, such as a user's name, profile pictures, current city, gender, networks, and pages that user is a 'fan' of (now, pages that user 'likes')," deeming it "publicly available information."<sup>29</sup> Facebook postings have the power to confirm negative images about the disadvantaged, such as pages devoted to creating popular support for man-

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23. Gang-related female styles include: "Exaggerated use of mousse, gel or baby oil on hair, Black or dark clothing and shoes Black oversized jackets, sweatshirts, athletic football jerseys, etc. Oversized shirts worn outside of the pants, Oversized white T-shirts, Dark jackets with lettering (cursive or Old English style)[,] Baggy, long pants dragging on the ground, Heavy make-up, dark excessive eye shadow, shaved eyebrows, dark lipstick, dark fingernail polish, Tank tops or revealing blouses, Stretch belts with initial on belt buckle, Overalls not fastened." *Id.*

24. College admissions officers "acknowledged that alcohol consumption in pictures, vulgar posts, and illegal activities hurt the chances of admission for the applicants. So if you're applying to college or graduate school, be sure to take down that photo of you next to a beer." *Social Media in College Admissions*, IVY COACH (Aug. 12, 2012), <http://theivycoach.com/the-ivy-coach-blog/college-admissions/social-media-in-college-admissions/>, archived at <http://perma.unl.edu/DCB2-4HH8>.

25. *Kaplan Test Prep Survey: More College Admissions Officers Checking Applicants' Digital Trails, But Most Students Unconcerned*, BUSINESSWIRE (Oct. 31, 2013), <http://www.businesswire.com/news/home/20131031005158/en/Kaplan-Test-Prep-Survey-College-Admissions-Officers#.U2eJ85VOX5o>, archived at <http://perma.unl.edu/5Q3U-9MLF>.

26. Patricia Cohen, *'Culture of Poverty' Makes a Comeback*, N.Y. TIMES, Oct. 17, 2010, at A1, archived at <http://perma.unl.edu/764R-9QLQ>.

27. Bullock, Wyche 7 Williams, *supra* note 15, at 230.

28. Page Lucas-Stannard, *I'm a Welfare Mom*, EVERYDAY FEMINISM (Sept. 9, 2012), <http://everydayfeminism.com/2012/09/im-a-welfare-mom/>, archived at <http://perma.unl.edu/WAC9-DJQB>.

29. Michael J. Kasdan, *Is Facebook Killing Privacy Softly? The Impact of Facebook's Default Privacy Settings on Online Privacy*, 2 N.Y.U. INTELL. PROP. & ENT. LAW LEDGER 107, 112 (2011) (internal quotation marks omitted).

dating drug testing of welfare recipients.<sup>30</sup> One poster, for example, wrote on the drug-testing page:

I am waiting in the doctors [sic] office and I saw a lady that was on assistance and her small kids had Ipads. Her kids were telling her to start up netflix on their Ipads. WTF. If you are poor you Shouldn't [sic] have Ipads and a netflix subscription on your Ipads and phones. I cant [sic] even do that.<sup>31</sup>

Another visitor to the Facebook page reinforced the stereotype of the welfare queen.<sup>32</sup> The user—who dubs herself Welfare Queen—is either an example of the self-immolation of identity or, more likely, is a vicious satire. Welfare Queen's profile picture depicts her wearing a Burger King crown, lounging in an easy chair with a drink resting on her breasts.<sup>33</sup> Her likes include Aunt Jemima Frozen Breakfast, Fatboy Cookie Company, Carl's Jr., and Sour Patch Kids.<sup>34</sup> This page seems purposely designed to reinforce popular imagery of welfare recipients being indolent, slothful, and dysfunctional.

A seemingly innocuous social media posting may be used to discriminate against otherwise protected classes. A woman, for example, who proudly shows off her baby bump on Facebook, may have unknowingly influenced a potential employer to hire someone who will be less distracted by her family responsibilities.<sup>35</sup> Similarly, a posting by an African-American about his favorite rap performer may lead a conservative college admissions officer to deny a scholarship or even to reject the applicant. Law enforcement personnel and employers routinely troll social media, looking for evidence of suspicious behavior or deviant opinions.

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30. *Make Drug Testing Mandatory for Welfare*, FACEBOOK, <https://www.facebook.com/pages/MAKE-DRUG-TESTING-MANDATORY-FOR-WELFARE/126354694045438> (last visited May 22, 2014), archived at <http://perma.unl.edu/9BJC-Q7PZ>.

31. Comment to *Make Drug Testing Mandatory for Welfare*, FACEBOOK (Dec. 4, 2013), <https://www.facebook.com/pages/MAKE-DRUG-TESTING-MANDATORY-FOR-WELFARE/126354694045438>, archived at <http://perma.unl.edu/3CX5-YBPT>.

32. "Ashley Marie, you are absolutely right . . . . The people using drugs and abusing the welfare system will find a million reasons and excuses to try to convince you are wrong and they are right . . . . Why should government reward lazy people?" Comment to *Make Drug Testing Mandatory For Welfare*, FACEBOOK, (Jan. 25, 2013), <https://www.facebook.com/pages/MAKE-DRUG-TESTING-MANDATORY-FOR-WELFARE/126354694045438>, archived at <http://perma.unl.edu/GF2P-2HYB>.

33. *Welfare Queen*, FACEBOOK, <https://www.facebook.com/welfare.queen.7?fref=ts> (last visited May 22, 2014), archived at <http://perma.unl.edu/N86K-YLEG>.

34. *Id.*

35. A Carnegie-Mellon study found that "online disclosures of certain traits can have a significant effect on the hiring decisions of a self-selected set of employers who do look for candidates' personal information online." Lyons, *supra* note 10 (quoting Alessandro Acquisti & Christina M. Fong, An Experiment in Hiring Discrimination Via Online Social Networks (Nov. 18, 2013) (unpublished manuscript), archived at <http://perma.unl.edu/5BQR-AUA3>).

Employee complaints about working conditions on Twitter or Facebook can lead to termination in a non-union environment. Employers report six “red flags” while accessing the social media profiles of prospective candidates: (1) salacious photos and information; (2) posted information about soliciting drugs and alcohol; (3) negative postings about previous employers; (4) poorly written posts reflecting weak communication skills; (5) blasphemous remarks about race, gender, and sexual orientation; and (6) misrepresentations about job qualifications and competencies.<sup>36</sup>

Another survey of hiring managers found that more than a third (34%) had observed social media information that caused them to reject candidates, most commonly: (1) provocative or inappropriate photos; (2) information about the candidates’ substance abuse; (3) weak communication skills; (4) criticism of prior employer; (5) racist or discriminatory comments; and (6) misrepresentations.<sup>37</sup> Employers contend that they are justified in collecting as much information as possible about candidates to avoid negligent hiring claims.<sup>38</sup>

Social media can exacerbate America’s hidden injuries of social class by reinforcing insidious stereotypes. For example, postings that depict job candidates consuming unhealthy foods or smoking tobacco can foreclose employment opportunities on the theory that such applicants will inevitably have higher health costs. “Fifty-two percent of people who fell into the ‘obese’ or ‘morbidly obese’ categories believe they have been discriminated against when applying for a job or promotion.”<sup>39</sup> The poor are more likely to be morbidly obese perhaps be-

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36. Antique Nguyen, *Social Media Employment Screening: 6 Red Flags It Can Help Uncover*, THE PRECHECK BLOG (Jan. 8, 2014), <http://www.precheck.com/blog/social-media-employment-screening-6-red-flags-it-can-help-uncover>, archived at <http://perma.unl.edu/53CE-VMZS> (quoting *Social Networking Websites and Recruiting/Selection*, SOC’Y FOR HUMAN RES. MGMT. (Apr. 11, 2013), <http://www.shrm.org/research/surveyfindings/articles/pages/shrm-social-networking-web-sites-recruiting-job-candidates.aspx>, archived at <http://perma.unl.edu/837V-APZQ>) (reporting that 77% of employers are “increasingly using social network sites for recruiting”).

37. *Thirty-Seven Percent of Companies Use Social Networks to Research Potential Job Candidates*, NEW CAREERBUILDER SURVEY (April 18, 2012), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr691&sd=4%2F18%2F2012&ed=4%2F18%2F2099>, archived at <http://perma.unl.edu/W388-APM4>; See generally Liad Wagman, *Good News or Bad News? Information Acquisition and Applicant Screening in Competitive Labor Markets* (Jan. 11, 2014) (unpublished manuscript), archived at <http://perma.unl.edu/NHD4-MV8Q> (reporting the effects that occur when firms seek either “good news” or “bad news” when hiring new applicants).

38. Susan M. Heathfield, *Use Social Media for Recruiting, Screening, and Background Checks?*, ABOUT MONEY, <http://humanresources.about.com/od/selectemployees/qt/why-use-social-media-for-recruiting-and-screening.htm> (last visited Apr. 29, 2014), archived at <http://perma.unl.edu/3JP9-JSA6>.

39. Amanda Gardner, *Many Obese Americans Struggle With Stigma, Discrimination, Poll Finds*, U.S. NEWS, Aug. 23, 2012, <http://health.usnews.com/health-news/>

cause “individuals who live in impoverished regions have poor access to fresh food. Poverty-dense areas are oftentimes called ‘food deserts,’ implying diminished access to fresh food.”<sup>40</sup>

Twenty-eight percent of adults living below the poverty level smoke tobacco, versus 17% of adults living in households that are more prosperous.<sup>41</sup> Forty-two percent of adults with a GED diploma smoke tobacco versus 23% of adults with a high school diploma.<sup>42</sup> Tobacco smoking is statistically more common among minorities and the poor, partly due to the targeting of this market by cigarette manufacturers.<sup>43</sup> Given the negative perceptions of obesity and smoking, the poor are at risk of reputational harm when they post pictures of themselves and family members smoking or eating unhealthy food.

Vulnerable populations require increased protection against harms resulting from the permanent digital memory of social media sites. Currently, the default setting is that information posted on social media is publicly accessible.<sup>44</sup> We propose that the default for privacy settings be that social media postings and pictures be kept private unless the user affirmatively agrees to make them public. This European-style opt-in approach to social media privacy protects postings and pictures from the scrutiny of prospective and future employers, law enforcement personnel, college admissions committees, and countless others trolling for personally identifiable data.

Part II explores the new privacy digital divide between mainstream America and the disadvantaged by illustrating how the less educated unwittingly risk discrimination when they reveal private information online. The expanding use of social media by the poor has left them vulnerable to racial, class, age, and health status profiling by landlords, advertisers, employers, law enforcement, college admissions directors, and other societal gatekeepers.

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news/articles/2012/08/23/many-obese-americans-struggle-with-stigma-discrimination-poll-finds, archived at <http://perma.unl.edu/8JR7-5MWY>.

40. James A. Levine, *Poverty and Obesity in the United States*, 60 *DIABETES* 2667 (2011), archived at <http://perma.unl.edu/6BN4-A5ZR>.
41. CTRS. FOR DISEASE CONTROL & PREVENTION, *SMOKING & TOBACCO RATE, ADULT CIGARETTE SMOKING IN THE UNITED STATES: CURRENT ESTIMATES (2012)*, archived at <http://perma.unl.edu/ZPD5-W2DG>.
42. *Id.*
43. Robert G. Robinson et al., *Report of the Tobacco Policy Research Group on Marketing and Promotions Targeted at African Americans, Latinos, and Women*, *TOBACCO CONTROL*, Sept. 1992, at S24, archived at <http://perma.unl.edu/9CNV-6SG9>.
44. “By default, Facebook pages are public. However, Facebook has customizable privacy settings that allow users to restrict access to their Facebook content. Access can be limited to the user’s Facebook friends, to particular groups or individuals, or to just the user.” *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 663 (D.N.J. 2013).

Part III will present our original research on the incomprehensibility and imbalanced provisions of social media terms of use that foreclose rights but do not inform users of this consequence. Disadvantaged Americans are particularly vulnerable to being victimized by online boilerplate because they are unlikely to possess the educational skills necessary to comprehend the complex legalese in which privacy policies and terms of use are written. We recommend that social media policies be drafted at a lower reading level so that privacy settings are easier to understand. Social media websites also should be required to set their defaults so that postings remain private unless the user affirmatively makes the conscious decision to select public settings.

## II. THE BENEFITS AND HIDDEN COSTS OF EXPANDED SOCIAL MEDIA ACCESS

### A. Race, Class, and Internet Access

Over the past decade, social networks have evolved from an infant technology to occupy a central place in American society. From 1995 to 2014, the percentage of American adults who use the Internet expanded from only 14% to 87%.<sup>45</sup> Policymakers hail bridging the digital divide as a potential pathway out of poverty for previously excluded groups.<sup>46</sup> There is no question that the poor benefit greatly from being able to go online in order to locate job opportunities, obtain medical information, organize for social justice, and raise public awareness of their plight. However, online communications are a two-edged sword because “social media can amplify—and hinder—discourse about race, how we use social networks for social justice, and whether they are even the right tools to use.”<sup>47</sup> The expansion of social media creates unanticipated risks of discrimination as previously concealed information about race, class, gender, medical condition, life style, and opinions become more easily available.

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45. Susannah Fox & Lee Rainie, PEW RES. INTERNET PROJECT (Feb. 27, 2014), [http://www.pewinternet.org/files/2014/02/PIP\\_25th-anniversary-of-the-Web\\_0227141.pdf](http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf), archived at <http://perma.unl.edu/7G5N-ZKJV> (citing a Pew Research Center survey regarding Internet use by American adults from 1995–2014).

46. *Children’s Rights: The Internet Pertinent to Poverty and Education*, VOICES OF YOUTH, <http://www.voicesofyouth.org/posts/childrens-rights-the-internet-pertinent-to-poverty-and-education> (last visited May 10, 2014), archived at <http://perma.unl.edu/6MH8-7AGB>.

47. Matt Petronzio, *Race and Social Media: How to Push the Conversation Forward*, MASHABLE (Apr. 27, 2014), <http://mashable.com/2014/04/27/race-social-media/>, archived at <http://perma.unl.edu/B2PT-QA5B> (discussing recent Race and Social Media Conference, which discussed issues such as the ways that online racial discussions are both harmful and helpful to minorities).

## B. The Persistence of the Digital Divide

The poor and racial minorities lag significantly behind the rest of America in being able to access the Internet, although the gap is rapidly closing.<sup>48</sup> A 2014 study from the Pew Foundation reports that Internet usage is on a path to becoming almost ubiquitous, although substantial groups of the impoverished and undereducated are still underrepresented on the information superhighway:

87% of American adults now use the Internet, with near-saturation usage among those living in households earning \$75,000 or more (99%), young adults ages 18-29 (97%), and those with college degrees (97%). Fully 68% of adults connect to the internet with mobile devices like smartphones or tablet computers. The adoption of related technologies has also been extraordinary: Over the course of Pew Research Center polling, adult ownership of *cellphones* has risen from 53% in our first survey in 2000 to 90% now. Ownership of *smartphones* has grown from 35% when we first asked in 2011 to 58% now.<sup>49</sup>

Whites have the highest rate of computer usage at 83%, followed by African-Americans with a 77% rate and Hispanics ranked third at 71%.<sup>50</sup> Ninety-four percent of adults who are college graduates have access to the Internet.<sup>51</sup> In contrast, only 66% of adults who are high school graduates or below have Internet access.<sup>52</sup> Only 65% of adults who earned \$30,000 or less have Internet access, as compared to 96% of adults earning \$75,000 or more.<sup>53</sup>

The following demographic subcategories are still underrepresented on the Internet: “Seniors: 44%, People who did not graduate high school: 41%, People from households earning less than \$30,000/year: 24%, Hispanics 24%, High school graduates with no further education: 22%, and Rural dwellers: 20%.”<sup>54</sup> Just 45% percent of black seniors age 65 and older have Internet access, with only 30% having broadband at home.<sup>55</sup> Mobile-phone ownership and usage does not vary significantly between whites and African-Americans.<sup>56</sup>

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48. A 2012 Pew Internet Project Report concluded that “[o]ne in five American adults does not use the [I]nternet. Senior citizens, those who prefer to take our interviews in Spanish rather than English, adults with less than a high school education, and those living in households earning less than \$30,000 per year are the least likely adults to have [I]nternet access.” Zickuhr & Smith, *supra* note 9, at 2.

49. Fox & Rainie, *supra* note 45, at 5.

50. *Id.* at 12.

51. *Id.*

52. *Id.*

53. *Id.*

54. Amy Gahran, *Who's Online, Who Isn't and Why: Pew Digital Divide Research*, KNIGHT DIGITAL MEDIA CTR. (Oct. 1, 2013), <http://www.knightdigitalmediacenter.org/news/2013/10/whos-online-who-isnt-and-why-pew-digital-divide-research>, archived at <http://perma.unl.edu/ER4V-SADW>.

55. *Id.*

56. The Pew study found: 90% of whites and 92% of African Americans own a cell phone of some kind, and there are few differences between whites and blacks across demographic categories when it comes to cell phone ownership. Aaron

Similarly, English-speaking Latinos are as likely as whites to own and use mobile phones.<sup>57</sup> The rise of smartphones has enabled racial and cultural minorities to participate in social media.

### C. The Social Media Digital Divide

The “social media digital divide” takes a more complex form than the Internet access divide. The social media user divide is based on age and social class rather than on race. The Pew Internet Research Project<sup>58</sup> found that 73% of all Americans use one or more social media sites.<sup>59</sup> Young adults are particularly active on social media websites. “seventy-five percent of people age 18 to 24 have a profile on online social networks such as Facebook and MySpace. One-third of adults age 35 to 44 are active on online social networks, and nearly 20 percent of people age 45 to 54 have profiles on a social network.”<sup>60</sup> Surprisingly, low-income Americans are currently more likely to utilize social media than higher income groups, perhaps because they tend to be younger. More than 77% percent of all adult Internet users earning \$30,000 or less use social media as compared to the more than 75% of those earning \$75,000 or above.<sup>61</sup> Nearly three out of four adult Internet users who lack a high school education have joined at least one social network.<sup>62</sup> While these users of social networks may derive considerable pleasure from their online interactions, their unguarded postings can also be stigmatizing.

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Smith, *Detailed Demographic Tables: Internet Use and Broadband Adoption*, PEW RES. INTERNET PROJECT (Jan. 6, 2014), <http://www.pewinternet.org/2014/01/06/detailed-demographic-tables/>, archived at <http://perma.unl.edu/ZX46-APRM> (reporting cell phone ownership).

57. “Even beyond smartphones, both African Americans and English-speaking Latinos are as likely as whites to own any sort of mobile phone, and are more likely to use their phones for a wider range of activities.” Zickuhr & Smith, *supra* note 9, at 3.
58. “The results in this report are based on data from telephone interviews conducted by Princeton Survey Research Associates International from August 7 to September 16, 2013, among a sample of 1,801 adults, age 18 and older. Telephone interviews were conducted in English and Spanish by landline (901) and cell phone (900, including 482 without a landline phone). For results based on the total sample, one can say with 95% confidence that the error attributable to sampling is plus or minus 2.6 percentage points. For results based on Internet users (n=1,445), the margin of sampling error is plus or minus 2.9 percentage points.” *Social Media Update*, PEW RES. INTERNET PROJECT (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/social-media-update-2013/>, archived at <http://perma.unl.edu/6WCF-DVSS>.
59. *Social Networking Fact Sheet*, PEW RES. INTERNET PROJECT, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited April 29, 2014), archived at <http://perma.unl.edu/4WN6-USSY>.
60. 8 JAY E. GREINIG & JEFFREY S. KINSLER, WISCONSIN PRACTICE SERIES § 14:18 (2d ed. 2014).
61. Social Networking Fact Sheet, *supra* note 59.
62. *Id.*

An empirical study of Internet access by 664 African-American respondents concluded: “The black/white ‘Digital Divide’ continues to persist, but is not consistent across technology platforms or demographic groups.”<sup>63</sup> Age and social class, not race, are becoming decisive, as college educated blacks have nearly identical rates of social media usage as their white counterparts.<sup>64</sup> Elderly and the less educated African-Americans continue to be underrepresented on some cyberspace platforms.

For the Latino population, social media use also correlates significantly with age, education, and whether they are native born.<sup>65</sup> Forty-four percent of Hispanics with some college education access social media sites, while immigrants from Latin America are far less likely to post on social media.<sup>66</sup> Only 68% of Hispanics earning less than \$30,000 yearly use any of the major social networks such as Facebook or Twitter.<sup>67</sup> A mere 27% of Hispanics who are aged 65 or over use major social networks.<sup>68</sup>

An Equal Employment Opportunity Commission attorney warns that firms that only advertise job openings on social media potentially could be sued for employment discrimination by individuals who lack access to this mode of communication.<sup>69</sup> To date, however, plaintiffs have not been successful in pursuing claims of employment discrimination based upon lack of access to social media. In *Reese v. Department of the Interior (National Park Service)*,<sup>70</sup> the plaintiff contended that she was not chosen as a park ranger because of age and sex discrimination. She contended that the “agency’s recruitment of younger people for this position through Facebook and other social media”

63. Aaron Smith, *African Americans and Technology Use: A Demographic Portrait*, PEW RES. INTERNET PROJECT, (Jan. 6, 2014), <http://www.pewinternet.org/2014/01/06/african-americans-and-technology-use/>, archived at <http://perma.unl.edu/XDE3-7R8S>.

64. *Id.*

65. Mark Hugo Lopez et al., *Closing the Digital Divide: Latinos and Technology Adoption*, PEW HISP. (March 7, 2013), [http://www.pewhispanic.org/files/2013/03/Latinos\\_Social\\_Media\\_and\\_Mobile\\_Tech\\_03-2013\\_final.pdf](http://www.pewhispanic.org/files/2013/03/Latinos_Social_Media_and_Mobile_Tech_03-2013_final.pdf), archived at <http://perma.unl.edu/Y9LM-TK25> (citing social networking site use among Latinos).

66. *Id.*

67. *Id.*

68. *Id.*

69. Disparate impact also could become an issue in cases where employers only recruit through social media, he noted. For example, users of Facebook are disproportionately under the age of 40, he said, so someone may bring a claim arguing he or she was not considered for a job because of the lack of a Facebook account.

C. Reilly Larson, *EEOC Lawyer Advises Careful Navigation of Issues in the Workplace*, BLOOMBERG BUREAU OF NAT'L AFFS. (Sept. 4, 2012), <http://www.bna.com/eec-lawyer-advises-n17179869380/>, archived at <http://perma.unl.edu/CK28-XJRA> (quoting Edward Loughlin, a trial attorney with the Equal Employment Opportunity Commission’s Washington, D.C., field office).

70. *Reese v. Salazar*, EEOC Appeal No. 0120122339 (Nov. 15, 2012).

placed older applicants for park ranger positions at a disadvantage.<sup>71</sup> The EEOC ruled that the complainant did not make a prima facie case for age discrimination.<sup>72</sup>

#### D. The Benefits of Increased Social Media Access

*The Internet is America's most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment. As a "general purpose technology," the Internet has been, and remains to date, the preeminent 21st century engine for innovation and the economic and social benefits that follow.*

Federal Communications Commission,  
Protecting and Promoting the Open Internet  
Rulemaking Launched May 15, 2014<sup>73</sup>

##### 1. *The Internet as an Engine of Equality*

The Federal Communications Commission (FCC) is studying whether broadband providers such as Verizon, AT&T, and Comcast should be allowed to institute differential pricing for faster Internet access.<sup>74</sup> Communities of color have expressed concern that differential pricing will deepen the digital divide, by slowing the Internet connections of social media that specialize in serving the poor and minorities.<sup>75</sup> Charging tolls on the information superhighway endangers the cyberspace gains made by less advantaged groups.<sup>76</sup> What happens if new immigrant groups can no longer afford fast Internet connections to communicate with their home countries? Can students who are priced out of fast Internet access compete with their wealthier counterparts? The Federal Communications Commission has not seri-

71. Carol R. Miaskoff, *Written Testimony of Carol R. Miaskoff, Acting Associate Legal Counsel*, EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/meetings/3-12-14/miaskoff.cfm> (last visited May 15, 2014), *archived at* <http://perma.unl.edu/ESJ3-JMGE> (discussing case).

72. *Id.*

73. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,447, 37,448 (proposed July 1, 2014) (to be codified at 47 C.F.R. pt. 8), *archived at* <http://perma.unl.edu/6HQC-9KXS>.

74. Marius Schwartz & Philip J. Weiser, *Introduction to a Special Issue on Network Neutrality*, 8 REV. OF NETWORK ECONS. 1, 1 (2009).

75. Malkia A. Cyria, *Hell No, We Won't Go: No Fake Net Neutrality for Racial Justice Advocates*, HUFFINGTON POST (April 28, 2014, 2:42 PM), [http://www.huffingtonpost.com/malkia-a-cyria/fake-net-neutrality-the-f\\_b\\_5206464.html](http://www.huffingtonpost.com/malkia-a-cyria/fake-net-neutrality-the-f_b_5206464.html), *archived at* <http://perma.unl.edu/P3S8-JBZW>.

76. "[A] principle of nondiscrimination has long governed electric utilities and telephone networks. And now that a single big pipe has taken the place of telephones and, increasingly, broadcast, the president's platform called for similar nondiscrimination rules to be applied to Internet access." Susan Crawford & Lawrence Lessig, *Opinion: Google-Verizon Should Prompt FCC to Demand Net Neutrality*, SAN JOSE MERCURY NEWS (Aug. 12, 2010), [http://www.mercurynews.com/opinion/ci\\_15745767?nclick\\_check=1](http://www.mercurynews.com/opinion/ci_15745767?nclick_check=1), *archived at* <http://perma.unl.edu/AW3N-ENNC>.

ously considered the social justice aspects in revising their network neutrality rules.<sup>77</sup>

## 2. *Providing Economic and Educational Opportunities*

Access to social media sites can potentially enhance economic and educational opportunities for the less advantaged. Social media can be enlisted to build links between the poor and job opportunities.<sup>78</sup> Minorities have harnessed the Internet “to find new revenue streams to support upward mobility; and activists have been able to educate the greater online community about a range of issues . . . and to organize for social justice.”<sup>79</sup> The Joseph Rowntree Foundation, for example, found that Internet connections and social networks could combat poverty and social exclusion.<sup>80</sup> Cyberspace can advance social justice by enabling resource sharing, mutual support and opportunities, and collective action.<sup>81</sup>

## 3. *Building Job Networks*

The poor and minorities tend to be socially isolated, particularly from those organizations that can provide job opportunities. The U.S. Department of Commerce’s National Telecommunications and Information Administration (NTIA) funds a variety of job-related initiatives utilizing Internet technologies.<sup>82</sup> The Obama Administration has created a Digital Literacy portal:

[T]o serve as a valuable resource to practitioners who are delivering digital literacy training and services in their communities. As more and more jobs and educational offerings are available online, the ability to navigate the Internet is critical to participate more fully in the economy. Jumpstarted by a federal interagency working group dedicated to spurring the advancement of digital literacy across all age groups and stages of learning, the Digital Liter-

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77. Cyria, *supra* note 75.

78. “The Internet is about empowerment.” Tina Barseghian, *For Low-Income Kids, Access to Devices Could Be the Equalizer*, MINDSHIFT (May 13, 2013), <http://blogs.kqed.org/mindshift/2013/03/for-low-income-kids-access-to-devices-could-be-the-equalizer/>, archived at <http://perma.unl.edu/78U3-Y665>.

79. Jessica Gonzalez, *LOVE: Latinos Organizing Virtually for Equality*, NEWSCHALLENGE.ORG, <https://www.newschallenge.org/challenge/2014/feedback-review/love-latinos-organizing-virtually-for-equality> (last visited May 16, 2014), archived at <http://perma.unl.edu/8CYY-YEML>.

80. ASIF AFRIDI, *SOCIAL NETWORKS: THEIR ROLE IN ADDRESSING POVERTY* (2011) (describing research on improving Internet access to spur employment opportunities among the poor and disadvantaged).

81. *Id.* at 9.

82. Nat’l Telecom. Info. Admin., *NTIA Releases 3 Case Studies Examining Impact of Broadband Grants Program on Connecting Libraries*, U.S. DEP’T OF COM. (April 17, 2014), <http://www.ntia.doc.gov/blog/2014/ntia-releases-3-case-studies-examining-impact-broadband-grants-program-connecting-librarie>, archived at <http://perma.unl.edu/8RD2-BQFB> (describing programs that upgrade Internet access for job creation, teaching digital literacy, and resume construction).

acy portal organizes content conveniently, enables valuable discussion and collaboration among users and elevates best practices to improve the quality of digital literacy offerings. We invite users to share their content and their ideas to make the portal more robust and to fulfill its role as a destination for practitioners devoted to enhancing digital opportunity for all Americans.<sup>83</sup>

This project is designed to provide lower income persons with the Internet mastery that will help them achieve economic success.

#### 4. *Improved Public Engagement*

One of the common justifications for bridging the digital divide is to increase political engagement for politically powerless groups. The less advantaged are more likely to engage in civic participation if they are connected to like-minded individuals.<sup>84</sup> The Occupy movement,<sup>85</sup> the campaign to raise the minimum wage,<sup>86</sup> and labor unions<sup>87</sup> all use the Internet to organize and rally public support. However, as sociologist Herbert Gans points out in his classic essay *The Uses of Poverty: The Poor Pay All*, the disadvantaged are constantly in danger of being tainted by collective judgments about their social worth:

[T]he poor can be identified and punished as alleged or real deviants in order to uphold the legitimacy of conventional norms. To justify the desirability of hard work, thrift, honesty, and monogamy, for example, the defenders of these norms must be able to find people who can be accused of being lazy, spend-thrift, dishonest, and promiscuous. Although there is some evidence that the poor are about as moral and law-abiding as anyone else, they are more likely than middle-class transgressors to be caught and punished when they participate in deviant acts. Moreover they lack the political and cultural power to

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83. *About Us*, DIGITALLITERACY.GOV, <http://www.digitalliteracy.gov/about> (last visited May 3, 2014), *archived at* <http://perma.unl.edu/MJ8Y-QBXQ>.
84. See generally PIPPA NORRIS, *DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE* (W. Lance Bennett & Robert M. Entman eds., 2001).
85. *Occupy Movement's Use of Social Media as an Organizing Method*, PARTICIPEDIA (Mar. 1, 2012), <http://participedia.net/en/methods/occupy-movements-use-social-media-organizing-method>, *archived at* <http://perma.unl.edu/B7AR-9HHG>; *Occupy Social Media*, FACEBOOK, <https://www.facebook.com/OccupySocialMedia> (last visited Oct. 26, 2014), *archived at* <http://perma.unl.edu/C3EA-VH4E>. Occupy Wall Street also uses web sites such as, OCCUPY WALL STREET, <http://occupywallst.org/> (last visited Sept. 26, 2014), *archived at* <http://perma.unl.edu/38M3-2YFH>, to build solidarity and coordinate activities.
86. *Social Media Meme Says Lawmakers Will Get \$2,800 Raise in January 2015*, POLITIFACT.COM (May 1, 2014), <http://www.politifact.com/truth-o-meter/statements/2014/may/06/facebook-posts/social-media-meme-says-lawmakers-will-get-2800-raise/>, *archived at* <http://perma.unl.edu/VFL-4SU5> (noting that a Facebook post accusing Republicans of being hypocrites—"Every single one of the 41 Republican senators who just blocked a raise in the minimum wage will receive a \$2,800 cost-of-living adjustment on January 1, 2015."—has gone viral).
87. *The NLRB and Social Media*, NAT'L LABOR RELATIONS BD., <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Oct. 29, 2014), *archived at* <http://perma.unl.edu/AXJ5-3R8V> (releasing reports demonstrating many cases where employers were attempting to restrain union organizing on social media).

correct the stereotypes that other people hold of them and thus continue to be thought of as lazy, spendthrift, etc., by those who need living proof that moral deviance does not pay.<sup>88</sup>

While there is a link between social media exclusion and social exclusion, there is also a danger of “techno-utopianism” by overestimating the benefits of Internet access, while downplaying the negative aspects.<sup>89</sup> The next section questions whether the possible drawbacks associated with greater social media use will defeat its advantages.

## E. The Hazards of Increased Social Media Access

### 1. *The Difference Between Public & Privacy Settings*

Social media sites generally provide two privacy settings to its user: public and private. Under Twitter’s public setting, “anyone searching the Internet may view and read a public user’s tweets whether or not that person is a follower of the tweeter.”<sup>90</sup> However, even with a private account, the user is still “disseminat[ing] his postings and information to the public, [and] they are not protected by the Fourth Amendment.”<sup>91</sup>

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88. Herbert J. Gans, *The Uses of Poverty: The Poor Pay All*, SOCIAL POLICY, July–Aug. 1971, at 20, 22.

89. ELLEN J. HELSPER, DEP’T OF CMTYS. AND LOCAL GOV’T, DIGITAL INCLUSION: AN ANALYSIS OF SOCIAL DISADVANTAGE AND THE INFORMATION SOCIETY 16 (2008).

90. *Roasio v. Clark Cnty. Sch. Dist.*, No. 2:13–CV–362 JCM (PAL), 2013 WL 3679375, at \*5 (D. Nev. July 3, 2013).

Twitter provides two privacy settings to its user: public and private.

If a user maintains a public setting, then any of his or her followers may read the user’s tweets. Additionally, anyone searching the internet may view and read a public user’s tweets whether or not that person is a follower of the tweeter. When a user with a public privacy setting tweets a message, he or she intends the message to be heard by the public at large. It just happens that typically the only people that read the tweet are the users’ followers.

*Id.* In contrast, when a Twitter user selects a private setting only his or her followers reads the tweet. If a person who is not a follower of a private user’s profile searches and finds that private user’s profile, that person who searched and found the profile may not read any of the private user’s tweets (though there could be an exception for “retweeting” that is irrelevant under the facts of this case). “A Twitter user with his or her privacy setting set to private has a more colorable argument about the reasonable expectation of privacy in his or her tweets than a user with a public setting.” *Id.* at \*6. Even if a user has maximum control of his or her privacy settings, a court may nevertheless order discovery. 8 JAY E. GREINIG & JEFFREY S. KINSLER, WISCONSIN PRACTICE SERIES § 14:18 (2d ed. 2014) (“According to a New York court, a plaintiff who alleges the loss of enjoyment of life due to physical injuries may not ‘hide relevant information behind self-regulated privacy settings[.]’ on social networking sites such as Facebook and MySpace.” (quoting *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 655 (Sup. Ct. 2010))).

91. *Roasio*, 2013 WL 3679375, at \*6 (quoting *United States v. Meregildo*, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012)).

Disadvantaged Americans are less likely to calibrate social media privacy settings to control what information they share. A 2012 Pew Research Internet survey found African-American parents “were half as likely to report use of these controls (31% vs. 59%).”<sup>92</sup> Lower income parents are less likely than their wealthier counterparts to help shield their children’s Facebook or Twitter accounts from public view,<sup>93</sup> in large part because of their lack of awareness of how damaging self-immolation can be.<sup>94</sup> Because lower class users of social media often fail to hide their injurious postings, they are particularly vulnerable to discrimination.<sup>95</sup>

## 2. Harmful Social Media Disclosures

The single-minded preoccupation with the positive functions of bridging the digital divide has distracted observers from considering how social media and the Internet can create a permanent digital stigma.<sup>96</sup> Social media provides widespread distribution of private information that had, pre-Internet, only reached a limited circle of friends and family.

Lapses of online judgment are predictable when social media defaults are set to public: “[I]t is easier to keep everything – the drunken email you sent your boss, the photo you put on Facebook in which you’re doing something non-CV-enhancing to an inflatable cow – rather than go through the palaver of deciding what to consign to oblivion.”<sup>97</sup> Social media postings about a consumer’s innermost thoughts confirm the wisdom of Marshall McLuhan’s observation that “publication is a self-invasion of privacy.”<sup>98</sup> “We’re invading each other’s privacy and we’re also even invading our own privacy by expo-

92. Mary Madden et al., *Parents, Teens and Online Privacy*, PEW RES. INTERNET PROJECT 17 (Nov. 20, 2012), [http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP\\_ParentsTeensAndPrivacy.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_ParentsTeensAndPrivacy.pdf), archived at <http://perma.unl.edu/66F9-8JA7>.

93. “White parents are almost twice as likely as African-American parents to help their child set up privacy settings (44% vs. 23%). Parents living in the highest-income households (earning \$75,000 or more per year) are more likely than those in the lowest-income households (earning less than \$30,000 per year) to say that they have helped their child with privacy settings on a social network site (44% vs. 27%).” *Id.* at 15.

94. *Id.*

95. Caitlin Seida, *My Embarrassing Picture Went Viral*, SALON.COM (Oct. 2, 2013, 6:15 PM), [http://www.salon.com/2013/10/02/my\\_embarrassing\\_picture\\_went\\_viral](http://www.salon.com/2013/10/02/my_embarrassing_picture_went_viral), archived at <http://perma.unl.edu/LP6U-XVJP>.

96. See generally GOFFMAN, *supra* note 16 (defining spoiled identities as people whose undesirable social identities have been exposed to public view).

97. Stuart Jeffries, *Why We Must Remember to Delete—and Forget—In the Digital Age*, THE GUARDIAN, June 30, 2011, <http://www.theguardian.com/technology/2011/jun/30/remember-delete-forget-digital-age>, archived at <http://perma.unl.edu/EDJ7-YQR6> (interviewing Viktor Mayer-Schönberger).

98. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

asures of information we later come to regret. Individual rights are implicated on both sides of the equation.”<sup>99</sup> For social network sites, the greatest privacy threats arise from self-disclosure and disclosures by friends, families, or social network contacts.<sup>100</sup>

Social media use can further disadvantage the poor by subjecting them to the negative judgments of those who control important resources.<sup>101</sup> Race, gender, general age, handicaps, and ethnicity are unveiled even if the social media user is careful about their postings and pictures.<sup>102</sup> Increased minority access to social media can enable new forms of surveillance and social control by creating, sharing, and distributing “an indelible record of people’s past misdeeds . . . . The Internet is indeed a cruel historian.”<sup>103</sup> Minorities have many reasons to be concerned about the misuse of increased social media surveillance by the societal gatekeepers.

### 3. *Social Media Trolling by Colleges*

The least educated are less likely to recognize that there is no expectation of privacy in public postings.<sup>104</sup> “[M]any high school students today document much of their lives online” without awareness

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99. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* vii (2007).

100. “What haunts people is typically user-generated content, i.e., information that people themselves, their friends, and other social media users upload. If other social media users disseminate offensive information, you may have claims against them under tort laws against libel and invasion of privacy. But, social media platform providers are not directly responsible for user generated privacy invasions.” Lothar Determann, *Social Media Privacy: A Dozen Myths and Facts*, 2012 STAN. TECH. L. REV. 7, ¶ 3.

101. Cf. Annette Richmond, *Don’t Let Social Media Derail Your Career—Use It to Attract Potential Employers*, FORBES, Nov. 21, 2013, <http://www.forbes.com/sites/85broads/2013/11/21/dont-let-social-media-derail-your-career-use-it-to-attract-potential-employers>, archived at <http://perma.unl.edu/YP39-PFWL> (noting that potential employers are disregarding candidates because of content found on their social media pages).

102. In March 2014, The United States Equal Employment Opportunity Commission (EEOC) held a meeting addressing the growing use of social media and how it impacts the laws the EEOC enforces. Experts warned that social media is frequently used in the hiring process in ways that could lead to employment discrimination and harassment. Press Release from the Equal Emp’t Opportunity Comm’n, *Social Media Is Part of Today’s Workplace but Its Use May Raise Employment Discrimination Concerns* (March 12, 2014), archived at <http://perma.unl.edu/QU8R-C8TF>.

103. SOLOVE, *supra* note 99, at 11.

104. See, e.g., *Romano v. Steelcase Inc.*, 907 N.Y.S. 2d 650, 657 (Sup. Ct. 2010) (“Thus, when plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites, else they would cease to exist. Since plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.”).

that social media postings may affect their life chances.<sup>105</sup> A New York court observed:

Social media web sites, such as Facebook and Twitter, exist to allow individuals to interact with “real world” friends, relatives and those individuals sharing common interests that may be as close as your own town, or as far away as a distant continent. The court takes judicial notice that subscribers to these sites share their political views, their vacation pictures, and various other thoughts and concerns that subscribers deem fit to broadcast to those viewing on the internet. Whether these broadcasts take the form of “tweets,” or postings to a user’s “wall,” the intent of the users is to disseminate this information.<sup>106</sup>

In *Chaney v. Fayette County Public School District*,<sup>107</sup> the school district held a seminar illustrating the permanency of social media postings by showing an embarrassing picture of a high school student accompanied by her full name.<sup>108</sup> The student filed suit, charging that the school falsely depicted her as a “sexually-promiscuous abuser of alcohol who should be more careful about her Internet postings.”<sup>109</sup> The *Chaney* court ruled that the student, even though she was a minor, “had no right to privacy in the photograph under the Due Process Clause; student intentionally shared the photograph on the website and had non-restrictive privacy settings.”<sup>110</sup> Had the student used password protection, her case might have had a different outcome.<sup>111</sup>

Reasonable expectation of privacy has long turned on whether the user has a way to exclude the public.<sup>112</sup> A Nevada court ruled that a high school student who tweeted racial epithets against a basketball coach that he thought favored the team’s African-American players had no reasonable expectation of privacy.<sup>113</sup> The *Roasio* court observed:

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105. Alan Katzman, *Why Ivy League Admissions Officers Have No Choice But to Google College Applicants*, BUSINESS INSIDER (Sept. 28, 2013 10:00 AM), <http://www.businessinsider.com/why-ivy-league-admissions-will-google-you-2013-9>, archived at <http://perma.unl.edu/A2ZE-J6EA>.

106. *Fawcett v. Altieri*, 960 N.Y.S.2d 592, 595–96 (Sup. Ct. 2013).

107. 977 F. Supp. 2d 1308 (N.D. Ga. 2013).

108. *Id.* at 1312.

109. *Id.*

110. *Id.* at 1310.

111. *R.S. v. Minnewaska Area Sch. Dist.*, No. 2149, 894 F. Supp. 2d 1128, 1142 (D. Minn. 2012) (holding “that one cannot distinguish a password-protected private Facebook message from other forms of private electronic correspondence,” and thus, “based on established Fourth Amendment precedent, that R.S. had a reasonable expectation of privacy to her private Facebook information and messages”).

112. Courts have long recognized that a person’s reasonable expectation of privacy “turns in large part” on their “ability to exclude others from place searched.” *Minnesota v. Carter*, 525 U.S. 83, 107 (1998) (Ginsburg, J., dissenting) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)).

113. *Roasio v. Clark Cnty. Sch. Dist.*, No. 2:13-CV-362 JCM, 2013 WL 3679375 (D. Nev. July 3, 2013).

A tweet from a user with public privacy settings is just a twenty-first century equivalent of an attempt to publish an opinion piece or commentary in the *New York Times* or the *Las Vegas Sun*. When a person with a public privacy setting tweets, he or she intends that anyone that wants to read the tweet may do so, so there can be no reasonable expectation of privacy.<sup>114</sup>

The school board disciplined the tweeter who then filed suit against the coach, the school board, and other defendants. The court dismissed the student's Fourth Amendment, equal protection, and numerous tort claims but not the First Amendment claim.<sup>115</sup> The *Roasio* court ruled that the student had "no reasonable expectation of privacy in his tweets," as there was still no "Fourth Amendment violation because the school administrators accessed [his] tweets via one of his follower's accounts."<sup>116</sup>

While sophisticated parents and high school teachers warn middle class students that indiscreet postings may be harmful, lower class youth are often unaware of the risks created by unwanted viewers. The most intemperate illustrations of social media naiveté occur when criminals post self-incriminating proof of their crimes. A twenty-year-old man was arrested after he posted a picture "of himself on Facebook siphoning gas from a local police vehicle."<sup>117</sup> A Bronx New York gang boasted on Facebook and Instagram, "using terms like 'glocc,' 'swammy,' and 'hammer' for firearms," resulting in them being arrested for conspiracy to commit murder and other felonies.<sup>118</sup>

A nineteen-year-old burglarized a *Washington Post* reporter's home and "posted a photo of himself with the soon-to-be-stolen goods."<sup>119</sup> Not surprisingly, the jury convicted him of burglary based upon this "smoking gun" evidence.<sup>120</sup> It is difficult to feel empathy towards these remarkably injudicious criminals. However, postings that are far more innocent can easily create negative consequences for the unsophisticated Internet poster.

Tort plaintiffs have unwittingly damaged their causes of action by indiscreet postings that create misgivings about the genuineness of their injuries. In *Richards v. Hertz Corp.*,<sup>121</sup> for example, a New York court approved Hertz's discovery order of an automobile accident victim's privately secured Facebook account by demonstrating that the victim had posted pictures of herself skiing that postdated purported

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114. *Id.* at \*5.

115. *Id.* at \*12.

116. *Id.* at \*6.

117. Eric Larson, *8 Dumb Criminals Caught Through Facebook*, MASHABLE (Dec. 12, 2012), <http://mashable.com/2012/12/12/crime-social-medial>, archived at <http://perma.unl.edu/3QEA-VWWW>.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Richards v. Hertz Corp.*, 953 N.Y.S.2d 654 (App. Div. 2012).

injuries from an automobile accident.<sup>122</sup> The court reasoned that the publicly available information on the victim's webpage that was blocked by the plaintiff's privacy setting might contain other evidence relevant to the defense.<sup>123</sup> Internet postings of photographs of a person drinking, smoking, or using offensive language may be instrumental in screening out a college or job applicants.<sup>124</sup>

Thirty-seven percent "of employers use social media to assess potential job candidates"; and "34% percent of employers who scan social media find content that causes them not to hire a candidate."<sup>125</sup> Even the most innocent Internet or social media postings can enable discrimination by giving the decision maker a window onto a world otherwise concealed in the back stage:

When a supervisor "friends" a subordinate on Facebook, the supervisor becomes privy to the subordinate's friends, photos, activities and wall postings unless privacy settings are activated. This information could include references to organizations in which the employee is involved which would reveal his race, sexual orientation, national origin, union activity and possible other protected categories/classes. Any detrimental employment decisions made in the future involving that employee could allegedly be based on one or more of these protected categories.<sup>126</sup>

Thus, well-drafted social media privacy policies can also serve societal gatekeepers by shielding them from charges of illegal discrimination by employers that conduct due diligence on social media sites. Part III is an empirical analysis of the terms of service and privacy policies of the five largest social media providers representing hundreds of millions of users to demonstrate how they can be drafted to reduce the radius of the risk of unintended reputational harms.

### III. SOCIAL MEDIA'S PROVIDERS INCOMPREHENSIBLE TERMS OF USE AND PRIVACY POLICIES

Part II surveyed the risks for lower class users who are unlikely to understand the significance of privacy preferences and controls because of their low-grade level of reading comprehension. Social media users with a higher educational level are more likely to understand and calibrate their social media preferences shielding private information from public view. The disadvantaged are also harmed by a second parallel social media risk; terms of use and privacy policies are drafted

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122. *Id.* at 656.

123. *Id.* at 729.

124. John Hechinger, *College Applicants, Beware: Your Facebook Page Is Showing*, WALL ST. J., Sept. 18, 2008, <http://online.wsj.com/news/articles/SB122170459104151023>, archived at <http://perma.unl.edu/E7ZJ-HKPF>.

125. Miaskoff, *supra* note 71.

126. Maureen Minehan, *Should Supervisors and Employees Be "Friends?"*, INT'L HR J., Spring 2010, at 45, 45 (2010) (quoting Philip S. Mortensen, partner at Barton Barton & Plotkin LLP, New York).

beyond their reading comprehension. Our empirical research, which will be presented in Part III, demonstrates that social media terms of use (TOU) and privacy policies are incomprehensible to those with less than a high school education. Educational research demonstrates that the average high school graduate reads, on the average, at the ninth grade level.

Social network sites (SNSs) generally include two types of boilerplate forms: terms of use and privacy policies, both of which declare that they bind consumers as a condition of access.<sup>127</sup> Generic clauses in social media privacy policies include information about what data the provider receives and shares with third parties, information the user agrees to share with third parties (by choosing privacy settings or sharing everything by default), whether the SNS follows the Safe Harbor agreement with the U.S. Commerce Department and European Union, policy about children using the site and providing personally identifiable information, location information, friend information, and cookie information.<sup>128</sup>

### A. Asymmetrical Terms of Use: A Case Study of BlackPlanet

One-sided social media TOU produce a systematic rights-depletion scheme that undermines or “cancel[s] the rights of users granted by legislatures.”<sup>129</sup> TOU have long been critiqued for being demanding for any non-expert, much less a poorly educated American, to understand. BlackPlanet, for example, a social network that bills itself as “the largest Black community online,”<sup>130</sup> has a TOU that is drafted at

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127. *See, e.g.*, In re LinkedIn User Privacy Litigation, No. 5:12–CV–02088–EJD, 2014 WL 1323713, at \*1 (N.D. Cal. March 28, 2014) (order granting in part and denying in part defendant’s motion to dismiss) (noting how “[p]rospective members may sign up for membership by providing a valid email address and registration password . . . . When members register, they are required to confirm that they agree to LinkedIn’s User Agreement (‘User Agreement’) and Privacy Policy (‘Privacy Policy’)”).

128. *See, e.g.*, *Facebook’s Privacy Policy - Full Version*, FACEBOOK (Oct. 29, 2009, 11:59 AM), [https://www.facebook.com/note.php?note\\_id=%20322194465300](https://www.facebook.com/note.php?note_id=%20322194465300), archived at <http://perma.unl.edu/44JQ-AHQL>.

129. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 16* (2013) (reporting studies of Facebook and other social media searches by college admissions committees); *see Social Media Is Part of Today’s Workplace But Its Use May Raise Employment Discrimination Concern*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (March 12, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm>, archived at <http://perma.unl.edu/4CA7-EHXX> (reporting that social media is pervasive in the workplace and “may be discriminatory since most individuals’ race, gender, general age, and possibly ethnicity can be discerned” from these sites).

130. BLACKPLANET.COM, <http://www.blackplanet.com> (last visited May 15, 2014), archived at <http://perma.unl.edu/SM3M-VCYA>.

a reading level typically gained after 18.4 years of education, a comprehension level beyond a master's degree.<sup>131</sup>

The attorneys who authored BlackPlanet's boilerplate seem indifferent that the TOU is written at a reading level nine grades above that possessed by a typical American high school graduate. In 2012, the U.S. Census Bureau reported that only 18.7% of African-Americans age 25 or older held at least a bachelor's degree.<sup>132</sup> Three and one-half percent of all African-Americans hold an advanced educational degree (1.6 million out of 45.5 million),<sup>133</sup> suggesting that the great majority of this site's users lack the literacy skills necessary to understand the terms of use.

BlackPlanet's TOU is not only extremely difficult to comprehend, it is sharply skewed in favor of the provider. BlackPlanet's limitation of liability clause, for example, forecloses most categories of monetary damages that a member would likely have against the social media site.<sup>134</sup> Similarly, BlackPlanet disclaims all warranties of any kind

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131. The Flesch-Kincaid Grade Level, also called the Flesch Grade Level Readability Test, for the BlackPlanet Terms of Use was 18.4 years. As a readability formula website explains, "Rudolph Flesch, an author, writing consultant, and the supporter of Plain English Movement, is the co-author of this formula along with John P. Kincaid." *The Flesch Grade Level Readability Formula*, READABILITY FORMULAS, <http://www.readabilityformulas.com/flesch-grade-level-readability-formula.php> (last visited May 14, 2014), archived at <http://perma.unl.edu/4NCR-JAEG>. See *id.* for the Flesch-Kincaid Grade Level formula.

132. *African Americans by the Numbers*, INFOPLEASE, <http://www.infoplease.com/spot/bhmcensus1.html> (last visited May 15, 2014), archived at <http://perma.unl.edu/TC5S-NG3G>.

133. *Id.*

134. **LIMITATION OF LIABILITY**

NEITHER INTERACTIVE ONE, NOR ITS AFFILIATES, SUBSIDIARIES, LICENSORS, OR THIRD PARTY SERVICE PROVIDERS SHALL BE LIABLE FOR ANY DAMAGES OF ANY KIND, WHETHER DIRECT, INDIRECT, CONSEQUENTIAL, INCIDENTAL, PUNITIVE OR OTHERWISE, ARISING OUT OF OR RELATING TO YOUR USE OF THE SITES, EVEN IF INTERACTIVE ONE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. INTERACTIVE ONE CANNOT GUARANTEE AND DOES NOT PROMISE ANY SPECIFIC RESULTS FROM USE OF THE SITES AND/OR THE SERVICES AND/OR THE SITE CONTENT. INTERACTIVE ONE DOES NOT REPRESENT OR WARRANT THAT SOFTWARE, CONTENT OR MATERIALS ON THE SITES OR THE SERVICES ARE ACCURATE, COMPLETE, RELIABLE, CURRENT OR ERROR-FREE OR THAT THE SITES, THE SERVICES, ITS SERVERS, OR THE SITE CONTENT ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. THEREFORE, YOU SHOULD EXERCISE CAUTION IN THE USE AND DOWNLOADING OF ANY SUCH CONTENT OR MATERIALS AND USE INDUSTRY-RECOGNIZED SOFTWARE TO DETECT AND DISINFECT VIRUSES. WITHOUT LIMITING THE FOREGOING, YOU UNDERSTAND AND AGREE THAT YOU DOWNLOAD OR OTHERWISE OBTAIN CONTENT, MATERIAL, DATA OR SOFTWARE FROM OR THROUGH THE SERVICES AND THE SITE CONTENT AT YOUR OWN DISCRETION AND RISK AND THAT YOU

without limitation.<sup>135</sup> In contrast, the provider holds its members responsible for all damages they cause to the social network to the limits of the law.<sup>136</sup> BlackPlanet includes a combined choice of law and

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WILL BE SOLELY RESPONSIBLE FOR YOUR USE THEREOF AND ANY DAMAGES TO YOUR COMPUTER SYSTEM OR PROPERTY, LOSS OF DATA OR OTHER HARM OF ANY KIND THAT MAY RESULT.

*BlackPlanet.com's Terms of Service*, BLACKPLANET.COM, <http://www.blackplanet.com/misc/tos.html> (last visited Oct. 26, 2014), *archived at* <http://perma.unl.edu/DW6X-BHRN>.

135. **DISCLAIMER OF WARRANTY**

THIS SITE, THE SERVICES, AND THE SITE CONTENT ARE PROVIDED "AS IS" AND "AS AVAILABLE" WITHOUT WARRANTIES OF ANY KIND, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR TITLE. INTERACTIVE ONE DOES NOT WARRANT THE CURRENCY, COMPLETENESS, OR ACCURACY OF THE INFORMATION CONTAINED ON THIS SITE, OR THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE.

The Company Sites and/or the Services may be temporarily unavailable from time to time for maintenance or other reasons. Company assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, User communications. Company is not responsible for any technical malfunction or other problems of any telephone network or service, computer systems, servers or providers, computer equipment, software, failure of email or players on account of technical problems or traffic congestion on the Internet or at the Site or combination thereof, including injury or damage to User's or to any other person's computer, or other property, related to or resulting from using or downloading materials in connection with the Web and/or in connection with the Services. Under no circumstances will Company be responsible for any loss or damage, including any loss or damage to any User Content or personal injury or death, resulting from anyone's use of the Site or the Services, any User Content or Site Content posted on or through the Site or the Services or transmitted to Users, or any interactions between users of the Site, whether online or offline.

*Id.*

136. **INDEMNITY**

You agree to indemnify and hold Company, its parent, subsidiaries, affiliates, and each of their directors, officers, agents, contractors, partners and employees and third-party service providers harmless from and against any claim, demand, damages, cause of action, debt, loss or liability, costs and expenses including reasonable attorneys' fees and other professional fees, to the extent that such action is based upon, arises out of, or in connection with any User Content you post or share on or through the Sites, any Third Party Sites or Content, any Third Party Services, your use of the Services or any Company Site, your conduct in connection with the Services or the Site or with other users of the Services or the Site, or any violation of these Terms of Service or of any law or the rights of any third party. This indemnity shall survive the termination of these Terms of Service.

*Id.*

choice of forum clause under a section entitled “Choice of Law.”<sup>137</sup> This African-American dating website requires consumers to submit to jurisdiction in New York, but leaves itself the option to file claims against users “in any jurisdiction.”<sup>138</sup>

BlackPlanet asserts the unfettered right to unilaterally modify its terms of use without notice at any time.<sup>139</sup> The social media site also claims the right to change its privacy policy at any time without notice.<sup>140</sup> It also has a clause entitled “Third Party Content,” which notes: “We do not have access to or control . . . the information [unnamed third parties] collect or how they use such information.”<sup>141</sup> This clause in favor of the provider fails to provide members with any disclosures as to which third parties use their personal information, how it is collected, or what efforts, if any, these third parties take to protect user privacy.

Social media terms of use are paradigmatic examples of contracts of adhesion because “[l]ike their paper-based, real world counterparts, they contain one-sided provisions, companies offer them on a take-it-or-leave-it basis, and consumers fail to read their terms.”<sup>142</sup> For example, FC2, a Nevada website, drafted what appears to be an unintentionally ironic dispute resolution clause that states the laws of Nevada, USA are applied to these Terms of Use:

2. Any disputes resulting from the use of Our Service(s), will be resolved through arbitrary [sic] proceedings recognized by the state of Nevada.
3. If a resolution cannot be made through arbitration, a Nevada State District Court receives exclusive jurisdiction rights.
4. The parties concerned are responsible for their own legal costs in court and arbitration.
5. If any clauses in This Document are found to be invalid, or otherwise non-binding, by a court; all other clauses will still remain as valid and binding.<sup>143</sup>

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137. *Id.*

138. *Id.*

139. **CHANGES TO THESE TERMS OF USE**

We reserve the right, at our sole discretion, to change, modify, add, or delete portions of these Terms of Service at any time without further notice. If we do this, we will post the changes to these Terms of Service on this page and will indicate at the top of this page the date these terms were last revised. Your continued use of the Site after the posting of any revisions to these Terms of Service signifies your acceptance of the revised Terms of Service. Therefore, it is important that you check and review these Terms of Service regularly to determine if there have been changes.

*Id.*

140. *BlackPlanet.com's Terms of Service*, BLACKPLANET.COM, <http://www.blackplanet.com/misc/tos.html#privacy> (last revised Nov. 11, 2011), *archived at* <http://perma.unl.edu/M3M2-79AW> (Changes to This Privacy Policy clause).

141. *Id.* (Third Party Content clause).

142. Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 267 (2014); *see* RADIN, *supra* note 129, at 14.

143. *FC2 Terms of Use*, FC2 TOTAL WEB SOLUTIONS, <http://help.fc2.com/common/tos/en/> (last visited Aug. 13, 2014), *archived at* <http://perma.unl.edu/V4YE-229R>.

The FC2 dispute resolution clause, although concise, is filled with ambiguity. For example, FC2 does not spell out whether it is substituting court proceedings with “arbitrary proceedings.” FC2 does not specify an arbitral provider, the rules under which arbitration would take place, the location of the arbitration, whether small claims can be pursued, whether class arbitration or actions are permitted, and whether they provide any subsidy to the consumer as required by consumer arbitration rules of both the American Arbitration Association (AAA)<sup>144</sup> and the Judicial Arbitration and Mediation Services, Inc. (JAMS).<sup>145</sup> Both AAA<sup>146</sup> and JAMS, the two largest arbitral provid-

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144. See *The American Arbitration Association (AAA) Offers Two Fee Schedules*, AM. ARBITRATION ASS'N (June 1, 2010), [https://www.adr.org/aaa/ShowPDF?doc=ADRS\\_TG\\_012009](https://www.adr.org/aaa/ShowPDF?doc=ADRS_TG_012009), archived at <http://perma.unl.edu/GMV4-JLYP>.

145. The ten JAMS minimum standards for consumer arbitration closely parallel AAA principles and include:

1. The arbitration agreement must be reciprocally binding on all parties such that: A) if a consumer is required to arbitrate his or her claims or all claims of a certain type, the company is so bound; and, B) no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction.
2. The consumer must be given notice of the arbitration clause. Its existence, terms, conditions and implications must be clear.
3. Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the unavailable remedies in court.
4. The arbitrator(s) must be neutral and the consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s).
5. The consumer must have a right to an in-person hearing in his or her hometown area.
6. The clause or procedures must not discourage the use of counsel.
7. With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company including any remaining JAMS Case Management Fee and all professional fees for the arbitrator's services. When the company is the claiming party initiating an arbitration against the consumer, the company will be required to pay all costs associated with the arbitration.
8. In California, the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail.
9. The arbitration provision must allow for the discovery or exchange of non-privileged information relevant to the dispute.
10. An Arbitrator's Award will consist of a written statement stating the disposition of each claim. The award will also provide a concise written statement of the essential findings and conclusions on which the award is based.

*JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, JUD. ARB. & MEDIATION SERVICES (July 15, 2009), [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Consumer\\_Min\\_Stds-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf), archived at <http://perma.unl.edu/JC35-S8JZ>.

146. The fifteen AAA consumer due process standards are:

ers, have adopted consumer arbitration principles to ensure fundamental fairness that appear to be violated by FC2's terms. FC2 ignores nearly every principle of consumer due process promulgated by the AAA and JAMS but provides too few words to assess readability.

## B. The Reading Problem in America

American adults, in general, read and compute poorly when compared to the citizens of other developed countries.<sup>147</sup> The average U.S. reading skill, measured on a 500 point scale, was 270, three points below the international average.<sup>148</sup> Data from the Program for the International Assessment of Adult Competencies showed that “[n]ot only did Americans score poorly compared to many international competitors, the findings reinforced just how large the gap is between the nation’s high- and low-skilled workers and how hard it is to move ahead when your parents haven’t.”<sup>149</sup>

The National Center for Educational Statistics estimated: “Twenty-one to 23 percent—or some 40 to 44 million of the 191 million—adults demonstrated skills in the lowest level of prose, document, and quantitative proficiencies.”<sup>150</sup> The average reading level of

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- Principle 1. Fundamentally-Fair Process
  - Principle 2. Access to Information Regarding ADR Program
  - Principle 3. Independent and Impartial Neutral; Independent Administration
  - Principle 4. Quality and Competence of Neutrals
  - Principle 5. Small Claims
  - Principle 6. Reasonable Cost
  - Principle 7. Reasonably Convenient Location
  - Principle 8. Reasonable Time Limits
  - Principle 9. Right to Representation
  - Principle 10. Mediation
  - Principle 11. Agreements to Arbitrate
  - Principle 12. Arbitration Hearings
  - Principle 13. Access to Information
  - Principle 14. Arbitral Remedies
  - Principle 15. Arbitration Awards.

*Consumer Due Process Protocol*, AM. ARBITRATION ASS'N (April 17, 1998), [https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014), archived at <http://perma.unl.edu/BAK8-2H38>.

- 147. Kimberly Hefling, *American Adults Score Poorly on Global Test*, ASSOCIATED PRESS (Oct. 8, 2013, 12:24 PM), <http://bigstory.ap.org/article/us-adults-score-below-average-worldwide-test>, archived at <http://perma.unl.edu/84RR-CLX4> (reporting data from the Program for the International Assessment of Adult Competencies).
- 148. *Id.*
- 149. *Id.*
- 150. IRWIN S. KIRSCH ET AL., NAT'L CTR. FOR EDUC. STATISTICS, *ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY* at xvi (3d ed. 2002).

Americans is between Grade 8 and Grade 9,<sup>151</sup> with one in five Americans reading at a level of Grade Five or less.<sup>152</sup> The Pew Research Internet Project concluded that 71% of Facebook users had a high school education or less, too low to grasp the website's TOU.<sup>153</sup>

### C. The Incomprehensibility of the Big Five Social Media's Terms of Use

Consumer contracts are enforced on the theory that both parties have read, understood, and agreed to every clause. For most consumers, that theory is patent fiction. Nearly all consumer contracts are based on mass-produced, nonnegotiable forms. Although some businesses have simplified contract forms in recent years, consumers still do not read the contracts they sign, and would not understand them if they did. Furthermore, consumers often have no real alternative to signing such contracts.

—Bernard Black, *A Model Plain Language Law*<sup>154</sup>

The Pew Research Journalism Project studied how diverse U.S. demographic groups used Facebook, YouTube,<sup>155</sup> Twitter, Google+, and LinkedIn.<sup>156</sup> The researchers uncovered significant demographic differences in how consumers use these five popular SNSs:

LinkedIn news consumers stand out from other groups as more likely to be high earners and college educated. Twitter news consumers are significantly younger than news consumers on Facebook, Google Plus and LinkedIn. And Facebook news consumers are significantly more likely to be female than news consumers on YouTube, Twitter and LinkedIn.<sup>157</sup>

LinkedIn, the most elite of these networks, is a source of news for only 7% of Americans earning more than \$30,000 or less; in contrast to 64% percent of citizens earning more than \$75,000.<sup>158</sup> Only 12% of high school graduates or less obtain their news from LinkedIn versus 64% of college graduates.<sup>159</sup> The dissimilarities in LinkedIn usage are less pro-

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151. CECILIA CONRATH DOAK ET AL., *TEACHING PATIENTS WITH LOW LITERACY SKILLS* 3 (2d ed. 1996), archived at <http://perma.unl.edu/DC3D-8BND>.

152. *Id.*

153. Maeve Duggan & Aaron Smith, *Demographics of Key Social Networking Platforms*, PEW RES. INTERNET PROJECT (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/demographics-of-key-social-networking-platforms/>, archived at <http://perma.unl.edu/6L8L-NXNH>.

154. Bernard Black, Note, *A Model Plain Language Law*, 33 STAN. L. REV. 255 (1981).

155. In 2006, Google purchased YouTube for \$1.65 billion. *Google Buys YouTube for \$1.65 Billion*, NBC NEWS (Oct. 10, 2006, 10:47:04 AM), [http://www.nbcnews.com/id/15196982/ns/business-us\\_business/t/google-buys-youtube-billion/](http://www.nbcnews.com/id/15196982/ns/business-us_business/t/google-buys-youtube-billion/), archived at <http://perma.unl.edu/K39X-Q72B>. Thus, only four companies operate our Big Five social media sites.

156. See Jesse Holcomb, Jeffrey Gottfried & Amy Mitchell, *News Use Across Social Media Platforms*, PEW RES. JOURNALISM PROJECT (Nov. 14, 2013), <http://www.journalism.org/2013/11/14/news-use-across-social-media-platforms/>, archived at <http://perma.unl.edu/6S4R-ZNVV>.

157. *Id.* (The Demographics of Social News Consumers).

158. *Id.* (Profile of the Social Media News Consumer).

159. *Id.*

nounced for race: 58% of whites and non-Hispanics are LinkedIn users versus 42% of nonwhites.<sup>160</sup>

In this section, we examine the terms of use and privacy policies of Facebook, Youtube, Twitter, Google+ and LinkedIn, which we will refer to as “the Big Five.” Two of the Big Five SNSs, Facebook and Google+, are largely about social connections, whereas YouTube is a multimedia site. LinkedIn is a business and professional site, while Twitter is a microblogging site. This Big Five group of Social Media providers has expressed support for net neutrality because it creates and enables a “world without discrimination.”<sup>161</sup> The Internet companies “have created enormous value for Internet users, fueled economic growth, and made our Internet companies global leaders . . . . An open Internet has also been a platform for free speech and opportunity for billions of users.”<sup>162</sup>

Table One below depicts the use of the Big Five SNS websites by less advantaged and less educated groups. These demographic groups are more likely to use Google+, followed by YouTube and Facebook. Twitter is ranked fourth while LinkedIn is the least likely SNS to be used by the less educated and disadvantaged.

**Table One: Less Advantaged and Less Educated Use of Five Popular Social Media Sites<sup>163</sup>**

Social Network Site	Percentage of Users Earning \$30,000 or Less	Percentage of Users With High School Education or Less
Facebook	22%	39%
YouTube	26%	48%
Twitter	17%	31%
Google+	27%	46%
LinkedIn	7%	12%

1. *Social Media Users Do Not Read TOU*

Contract scholars have established that consumers are unlikely to review standard form TOU but have not previously assessed whether these forms are readable.<sup>164</sup> Florencia Marotta-Wurgler’s research team found only one or two consumers out of 1,000 actually read con-

160. *Id.*

161. Letter from various Internet companies to Chairman Wheeler and FCC Comm’rs Clyburn, Rosenworcel, Pai, and O’Reilly (May 7, 2014), *archived at* <http://perma.unl.edu/WP62-QU8N>.

162. *Id.*

163. Holcomb, Gottfried & Mitchell, *supra* note 156.

164. *But see*, Forrest E. Harding, *The Standard Automobile Insurance Policy: A Study of its Readability*, J. RISK & INS. 39, 39 (1967) (finding that the reading level of

sumer license agreements and that, of this miniscule number, the average reader spent only twenty-nine seconds with the form.<sup>165</sup> The NYU researchers made the assumption that because the average length of the clickwrap agreements in their sample was 2,277 words, it was unlikely that users could read the terms of use in less than a minute.<sup>166</sup> Marotta-Wurgler and her NYU co-investigators concluded that the widespread practice of post-transaction marketing is deceptive because vendors exploit the empirical reality that consumers do not read online contracts.<sup>167</sup> Browsewrap, clickwrap, and other mass-market agreements are nonnegotiated, one-sided, and divest consumers of basic rights.<sup>168</sup> As the next section will demonstrate, social media TOU are also incomprehensible, while eliminating basic rights of consumers.

## 2. *Reading Comprehension Varies by Social Class*

Table Two below reports our evaluation of the readability of the Big Five TOU using the Flesch Reading Ease Formula<sup>169</sup> the Flesch-Kincaid Grade Level Formula,<sup>170</sup> the Linsear Write Formula,<sup>171</sup> and the Text Readability Consensus Calculator, which averages seven different readability measures.<sup>172</sup> Prior to this analysis, no researcher

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the standard automobile insurance policy “was well beyond the reading ability of a significant percentage of the United States adult population”).

165. *Aggressive Sales Techniques on the Internet and Their Impact on American Consumers: Hearing Before the Comm. on Commerce, Sci. & Tech.*, 111th Cong. 27 (2009) (statement of Florencia Marotta-Wurgler, Associate Professor, New York University School of Law).
166. *Id.*
167. *Id.*
168. See RADIN, *supra* note 129, at 7–12 (2013) (describing alternative legal universe created by form contracts and comparing World B (Boilerplate) to World A (Agreement)).
169. The Flesch Reading Ease test was developed by Rudolph Flesch sixty-five years ago and is the most widely used test for readability. See generally RUDOLPH FLESCHE, *THE ART OF READABLE WRITING* 128–56 (1949) (describing the Flesch Reading Ease Score methodology).
170. “The Flesch-Kincaid test is a reformulation of the Flesch Reading Ease Score test that expresses its result in terms of the grade level a hypothetical reader should have achieved before the selected passage would be readable.” Ian Gallacher, “When Numbers Get Serious”: A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals, 46 SUFFOLK U. L. REV. 451, 458 (2013) (discussing Flesch-Kincaid test for readability).
171. “The *Linsear Write* readability formula is generally recommended for technical manuals and is primarily used by the U.S. Air Force. This test calculates the U.S. grade level of a text sample based on sentence length and number of complex words (i.e., words that contain three or more syllables).” *Linsear Write Readability Formula*, OLEANDERSOLUTIONS, <http://archive.is/S6b7x> (last visited Aug. 2, 2014), archived at <http://perma.unl.edu/EY5X-MNTK>.
172. This aggregate measure averages the seven leading readability formulas: (1) Flesch Reading Ease Score, (2) Flesch-Kincaid Grade Level for Readability, (3)

had studied the question of whether consumers have a realistic opportunity to review *readable* TOU. Table Two presents leading measures for measuring the readability of the text of the five leading social media TOU.

**Table Two: Measures of Readability for Five Popular Social Media Terms of Use Employed by the Pew Research Study of News Use Across Demographic Groups**

Readability Formula for SNS Terms of Use	Interpretation Guide	Scores for Terms of Use or Service for Facebook, YouTube, Twitter, Google+, and Linked In
<b>Flesch Reading Ease Test</b> <sup>173</sup>	The Flesch Readability Ease Scale ranges from zero (practically unreadable) to 100 (easy for any literate person). <sup>174</sup>	Range: 44–56 (difficult to very difficult to understand) Mean: 51 Median: 54
<b>Flesch-Kincaid Grade Level</b> <sup>175</sup>	“The Flesch-Kincaid Grade Level Formula was originally developed for use on technical manuals by the United States Navy.” <sup>176</sup>	Range Grade Level: 9–12 Mean Grade Level: 10.6 Median Grade Level: 11.0

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Fog Scale, (4) SMOG Index, (5) Coleman-Liau Index, (6) Automated Readability Index, and (7) Linsear Write Formula. *Free Text Readability Consensus Calculator*, READABILITY FORMULAS, <http://www.readabilityformulas.com/free-readability-formula-tests.php> (last visited Aug. 2, 2014), *archived at* <http://perma.unl.edu/C3WQ-HH6C>.

173. John Garger, *Determine Readability Using the Flesch Reading Ease*, JOHN GARGER (Oct. 23, 2012), <http://www.johngarger.com/articles/writing/determine-readability-using-the-flesch-reading-ease>, *archived at* <http://perma.unl.edu/QS A7-5H52> (“The Flesch Reading Ease Test is calculated by the following method: Average sentence length is multiplied by 1.015, and average number of syllables is multiplied by 84.6. These two products are subtracted, and the difference is subtracted from 206.835, resulting in a score ranging from 0 to 100 . . . . A score of 100 represents the easiest to read text and a score of 0 represents the most difficult to read text. Scores from 60 to 70 are plain English, readable by the average literate reader.”).
174. *Id.*
175. The Flesch Kincaid Grade Level translates the Flesch Reading Ease Test to a grade level. “The formula takes average sentence length and multiplies it by 0.39, and average number of syllables and multiplies it by 11.8. These products are summed, and the result is reduced by 15.59. Therefore, the formula is:  $0.39 \text{ (TOTAL WORDS/TOTAL SENTENCES)} + 11.8 \text{ (TOTAL SYLLABLES/TOTAL WORDS)} - 15.59$ . A score of about 65 correlates with the 8th to 9th grade level, and a score of about 55 indicates a 10th to 12th grade level. Scores between 0 and 30 represent college graduate readability.” John Garger, *supra* note 173.
176. Carolyn Sutherland, *The Elusive Quest for Simplicity: Measuring and Assessing the Readability of Enterprise Agreements, 1993 to 2011*, 35 SYDNEY L. REV. 349, 358 (2013) (discussing tests of readability used to assess eight years of industrial enterprise agreements widely employed in Australia).

<b>Linsear Write Formula</b> <sup>177</sup>	The Linsear Write Formula calculates the grade level of text and is used by the U.S. Air Force. <sup>178</sup>	Range Grade Level: 9 to 15 Mean Grade Level: 12 Median Grade Level: 13
<b>Readability Consensus Calculator</b> <sup>179</sup>	Grade level based upon seven of the most commonly used readability formulas. <sup>180</sup>	Range Grade Level: 9–13 Mean: 11.2 Median: 12

### 3. *TOU Are Objectively Difficult to Read*

Under the Flesch Readability Ease Test, a higher score indicates greater readability for the social media TOU.<sup>181</sup> Flesch Readability Ease scores range from zero (practically impossible to read) to 100 (easy for any literate person). The Flesch score is computed from an assessment of the total word length, total sentence length, and total syllables per word in a submitted text passage that requires a minimum of 4–5 full sentences of 200–500 words.<sup>182</sup> States incorporating the Flesch Test will frequently require statutory provisions to meet a standard of 60 or greater to satisfy minimum standards of readability. Table Two reveals that for the five most popular social media sites, not a single Big Five provider achieved the standard reading level score of 60. Every Big Five TOU was drafted beyond the comprehension of an average reader as all were below 60. Because social media and other Internet TOU “are not summarized in easy language,”<sup>183</sup> many consumers will not have a meaningful opportunity to understand what rights they are waiving.

177. “The *Linsear Write* readability formula is generally recommended for technical manuals and is primarily used by the U.S. Air Force. This test calculates the U.S. grade level of a text sample based on sentence length and number of complex words (i.e., words that contain three or more syllables).” *Linsear Write Readability Formula*, *supra* note 171.

178. *Linsear Write Readability Formula*, READABILITY FORMULAS, <http://www.readabilityformulas.com/linsear-write-readability-formula.php> (last visited Aug. 2, 2014), *archived at* <http://perma.unl.edu/3SU5-LKJZ>.

179. *See supra* note 172.

180. The Text Readability Consensus Calculator is reported in grade levels. *Id.*

181. FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS app. B (1987) (“The ‘readability’ score is an index designed by Dr. Rudolph Flesch to test written materials for ease of comprehension. It combines into a single score two measures that are associated with ease of comprehension: the average number of syllables per word and the proportion of words that are concrete as contrasted with abstract. The test does not require much subjective judgment by the person doing the scoring and may therefore be said to be relatively objective. As with any test of this nature, however, it provides an indirect and imperfect measure of comprehensibility. We would generally expect improvement in comprehensibility to be accompanied by improvement in Flesch scores, but it should not be assumed that instructions with higher Flesch scores are invariably more understandable than instructions with lower scores.”).

182. *Free Text Readability Consensus Calculator*, *supra* note 172 (noting that a sufficient text is 200–500 words or 4–5 full sentences).

183. OMRI BEN-SHAHAR, THE MYTH OF THE ‘OPPORTUNITY TO READ’ IN CONTRACT LAW 13 (2009).

To place the SNS readability ease scores of the Big Five media sites in context, we compared the social media TOU readability ease scores to a sample of sixty-six consumer financial services agreements studied by the U.S. Consumer Financial Protection Bureau (CFPB)<sup>184</sup> and to a recent NYU study of consumer software TOU.<sup>185</sup> Prior empirical research on readability of standard forms employs the Flesch Readability Ease Test to determine comprehensibility. The social media TOU in our study were only slightly more difficult to read than the CFPB sample of financial services contracts. None of the Big Five social media TOU satisfied the standard readability score, which is sixty or greater, because the range was 44 to 56. In contrast, the CFPB researchers found that the readability of the TOU they reviewed for the financial services market (excluding the arbitration clause) was 52 (median=52), which indicates that they are nearly identical to the Big Five TOU.

#### 4. *TOU Require a High School Graduate Reading Level*

Table Two utilizes other widely employed tests for assessing the readability of the TOU for the five leading sources of news information for these least advantaged groups. The Flesch-Kincaid Grade Level test reveals that the social media sites' TOU were drafted at an average 10.6 grade level (median=11). The Linsear Write Test, developed by the U.S. Air Force, revealed an average grade level of 12 (median=13) for comprehending the TOU.<sup>186</sup> The readability consensus, which aggregates seven different readability formulas, reveals a mean difficulty level of grade 11.2 and a median of 11, approximately two grade levels above the reading level of the average U.S. high school graduate.<sup>187</sup>

In short, the TOU drafted by the five leading social media sites are "fairly difficult" to understand for the typical American user, not to speak of the difficulties faced by the poorly educated or non-native English speakers. The U.S. Department of Education's National Center for Education Statistics released a 2013 study, which concluded that only four out of ten high school seniors were proficient in reading.<sup>188</sup>

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184. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE 28 n.64 (2013), archived at <http://perma.unl.edu/7E3U-AGYY>.

185. Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 254 (2013).

186. No prior empirical study has used multiple measures of readability such as the Linsear Write formula and the aggregate tests reported in this subsection.

187. See *supra* note 172.

188. Liz Klimas, *Nation's Report Card of High School Seniors Shows 'Unacceptable' Test Performance*, THEBLAZE.COM (May 7, 2014), <http://www.theblaze.com/stories/2014/05/07/nations-report-card-of-high-school-seniors-shows-unacceptable-test-performance/>, archived at <http://perma.unl.edu/RU5H-P2JJ>.

Social media TOU are going to be challenging to process for the millions of U.S. users who do not have a reading proficiency of Grade 11. The average reading level of Americans is between Grade 8 and Grade 9,<sup>189</sup> with one in five Americans reading at a level of Grade 5 or below.<sup>190</sup> The Pew Research Internet project found that 71% of Facebook users had a high school education or less, too low to comprehend the website's TOU.<sup>191</sup> The National Center for Educational Statistics estimated that "21 to 23 percent—or some 40 to 44 million of the 191 million U.S. adults[—]demonstrated skills in the lowest level of prose, document, and quantitative proficiencies."<sup>192</sup> Our research on the readability of TOU suggests that the largest and most popular social media providers do not achieve a minimum readability standard so they can be understood by high school graduates and below. But Table Three reveals that the rights-foreclosure clause, warranty disclaimer, and caps on damages are drafted at a much higher level than the TOU as a whole. Clauses that take away rights are challenging to comprehend unless the social media user has a postgraduate education, as Table Three reveals.

**Table Three: Readability of Rights-Foreclosure Clauses Compared**

<b>Readability Formulas</b>	<b>Terms of Service or Use as a Whole</b>	<b>Warranty Disclaimers Alone</b>	<b>Exclusion of Liability Clauses Alone</b>
<b>Flesch-Kincaid Grade Level</b>	Mean: 10.6 Median: 11	Mean: 18 Median: 16	Mean: 19.8 Median: 17

The average Flesch-Kincaid Grade Level for the five social media TOU was 10.6 (median=11 years). Warranty disclaimers were on average drafted at seven grade levels above the grade level of the Big Five social media TOU (median=five grade levels)<sup>193</sup> Liability limitation clauses were drafted an average of 9 grade levels above the TOU or a median of 6 grade levels. LinkedIn, the only one of the Big Five to incorporate a predispute arbitration option drafted its ADR clause at a grade 21 level, a full ten grade levels above the TOU. The overall results confirm rights-foreclosure clauses are more difficult to read than

189. *The Literacy Problem*, HARVARD SCH. OF PUBLIC HEALTH, <http://www.hsph.harvard.edu/wp-content/uploads/sites/135/2012/09/doakchap1-4.pdf> (last visited Aug. 3, 2014), archived at <http://perma.unl.edu/H8M-N7A4>.

190. *Id.*

191. Duggan & Smith, *supra* note 153.

192. KIRSCH ET AL., *supra* note 150, at xvi (3d ed. 2002).

193. We computed the difference of the aggregate measures of the readability of the warranty disclaimers and the terms of use as a whole. The aggregate measure averages the readability of the disclaimer clause (versus the terms of use) for seen readability formula. See *supra* note 172.

the Big Five social media TOU as a whole. This demonstrates that providers that claim that consumers have a duty to read TOU do not make their boilerplate readable. This finding casts doubt on whether social media users manifest assent to terms that benefit the provider such as warranty disclaimers, limitation of liability, and mandatory arbitration clauses, which we call rights foreclosure clauses.

##### *5. Readability of Liability Limitation Clauses*

Not only are the Big Five social media providers uncompromising in systematically foreclosing the social media user's remedies, but they also drafted these rights foreclosure clauses at a level of complexity that renders them incomprehensible for most social media users. The Flesch-Kincaid Grade Level for the social media TOU as a whole was 11.62 (median=Grade 11). Exclusion of liability clauses are written at a mean grade level of 19.8, which means that a reader would require an education beyond a master's degree to comprehend it. The median grade level for liability limitation clauses is grade 17, which is beyond the level of a college graduate.

Social media providers also drafted clauses that eliminated their responsibility for breach of warranty and monetary remedies at such a high-grade level of reading comprehension that they are indecipherable to most users. The mean liability limitation clause was 9.2 grade levels above the TOU as a whole, whereas the median was greater than seven grade levels higher. The public policy underlying plain English statutes is to make rights-foreclosure clauses more comprehensible, certainly not less readable.<sup>194</sup> However, Congress's emphasis on making the labeling of warranties readable and understandable is not mandated in other consumer transactions. TOU employed by the Big Five providers are rights-foreclosure devices drafted so there can be no "meeting of the minds," which is the emblem of modern contract formation.

##### *6. Privacy Policies of the Big 5 Social Media Sites*

In 2012, the Federal Trade Commission (FTC) released a report noting that it launched enforcement actions against Google and Facebook arising out of these entities' privacy policies: "The orders obtained in these cases require the companies to obtain consumers' affirmative express consent before materially changing certain of their

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194. "With the tendency of insurance companies to use 'plain English' in their policies, the insured's expectations should be more easily defined and the courts will not have to resort to the arbitrary rules of construction to define these expectations." 2 COUCH ON INSURANCE § 21:11 (2013).

data practices and to adopt strong, company-wide privacy programs that outside auditors will assess for 20 years.”<sup>195</sup>

In 2011, Facebook sought to reduce the “sophistication of how its privacy policy reads. Its new ‘controlling how you share’ section simply and relatively briefly explains the basics of information sharing on the site.”<sup>196</sup> One critic of Facebook’s remodeling of its privacy policy contends that it “could also lead to confusion and may keep people away from perusing the entire privacy policy, which is always a wise choice to make.”<sup>197</sup> Google+’s 2013 revisions to its privacy policy created a firestorm in the user community and regulators:

Before Google rolled out its controversial new privacy policy last March [2013] — the one that sparked government concerns around the world and could trigger fines in Europe — Google actually considered providing users with a simple privacy slider to let them choose the maximum amount of information to share across every one of its services, according to *The Wall Street Journal*. Google CEO Larry Page himself reportedly asked for the privacy slider. So why wasn’t it adopted? Apparently, Google was worried that people wouldn’t share information on its new Google+ social network if they had an easy way to opt out of data collection. “Allowing people to select the maximum-protection setting, known as the ‘tin-foil-hat option,’ went against Google’s newer efforts to get more people to share information about themselves on the Google+ social-networking service,” writes the *Journal*. It wasn’t the only reason: reportedly, Google also “found it impossible to reduce privacy controls to so few categories.”<sup>198</sup>

*UFC-Que Choisir*, a French consumer group filed a lawsuit against “Google, Facebook and Twitter for having privacy policies that are ‘illegible’ and ‘incomprehensible’ to the average user.”<sup>199</sup> Table Four assesses the readability of the privacy policies of the Big Five sites to test *UFC-Que Choisir*’s claim that their privacy policies are incomprehensible.

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195. FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE at i (2012).

196. Molly McHugh, *Privacy Policies: Google+ vs. Facebook*, DIGITAL TRENDS (July 12, 2011), <http://www.digitaltrends.com/social-media/privacy-policies-google-vs-facebook/#!buDBH4>, archived at <http://perma.unl.edu/8EGM-QMSM>.

197. *Id.*

198. Sean Hollister, *How Google+ Killed Google’s Company-Wide Privacy Effort*, THE VERGE (July 30, 2013), <http://www.theverge.com/2013/7/30/4573436/how-google-killed-googles-company-wide-privacy-effort>, archived at <http://perma.unl.edu/XA7B-KB79>.

199. Brad Reed, *Google and Facebook Get Sued Over Their ‘Incomprehensible’ Privacy Policies*, BGR (Mar. 7, 2014), <http://bgr.com/2014/03/27/google-facebook-privacy-lawsuit/>, archived at <http://perma.unl.edu/6ZR6-4RSK>.

**Table Four: Readability of Big Five Social Media Privacy Policies**

Interpretation Guide	Scores for Terms of Use or Service for Facebook, YouTube, Twitter, Google+, and Linked In
The Flesch Readability Ease Scale ranges from zero (practically unreadable) to 100 (easy for any literate person). <sup>200</sup> The greater the Flesch Readability Ease scores the better the readability. <sup>201</sup>	Range: 40–53 (difficult to very difficult to understand) Mean: 45.6 Median: 45
“The Flesch-Kincaid Grade Level Formula was originally developed for use on technical manuals by the United States Navy.” <sup>202</sup>	Range Grade Level: 9–12 Mean Grade Level: 11.6 Median Grade Level: 12
The Linsear Write Formula calculates the grade level of text and is used by the U.S. Air Force. <sup>203</sup>	Mean Grade Level: 12.6 Median Grade Level: 13

Table Four reveals that the Big Five social media privacy policies are drafted at a reading level two or more grade levels beyond the comprehension of the average high school graduate. For social media users with a high school education or less, the privacy policy will be difficult, if not impossible, to comprehend. Each of the privacy policies of the Big Five social media also had a section on how to set privacy settings and control what postings or pictures may be seen by the public. Table Five below assesses the readability of each Big Five media site’s instructions.

200. The higher the score the easier the text to read. “Designations for easily understood material include 71–80 (“fairly easy;” 80% of adults), 81–90 (“easy;” 86% of adults), and 91–100 (“very easy;” 90% of adults).” Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUMAN BEHAVIOR 124, 127 (2008).

201. A score of 60–69 is the standard score versus 50–59 is difficult. A score of 30–49 is very difficult. Scores of 29 and below are very confusing. *The Flesch Reading Ease Readability Formula*, READABILITY FORMULAS, <http://www.readabilityformulas.com/flesch-reading-ease-readability-formula.php> (last visited Aug. 3, 2014), archived at <http://perma.unl.edu/HQ3P-FPNR>.

202. Carolyn Sutherland, *supra* note 176, at 358 (discussing tests of readability used to assess eight years of industrial enterprise agreements widely employed in Australia).

203. *Linsear Write Readability Formula*, *supra* note 178.

**Table Five: Readability of Big Five Social Media Instructions on How to Set Privacy Preferences**

Interpretation Guide	Scores for Terms of Use or Service for Big Five: Facebook, YouTube, Twitter, Google+, and Linked In.
The Flesch Readability Ease Scale ranges from zero (practically unreadable) to 100 (easy for any literate person). <sup>204</sup>	Range: 29-73 (difficult to fairly easy to understand) Mean: 56 Median: 61
“The Flesch-Kincaid Grade Level Formula was originally developed for use on technical manuals by the United States Navy.” <sup>205</sup>	Range Grade Level: 7-21 Mean Grade Level: 11 Median Grade Level: 9

Table Five reveals a wide range of readability of setting privacy descriptions from difficult to very confusing. Facebook’s clause explaining how users can control privacy settings was 29, far below the standard score of 60. Twitter’s 52 score was much better but still well below the standard score. In contrast, Google+, LinkedIn, and YouTube’s instructions on how to protect personal information from public view were written at a reading level that was easier than the standard score. The Flesch-Kincaid test ranged from Grade 8 to Grade 21, with three out of five clauses drafted at a Grade 9 reading level or above. Overall, the readability of Big Five privacy policies was at a lower reading level than the TOU. Nevertheless, this empirical study of the readability of the privacy policy and the section on setting privacy settings demonstrates that relatively few disadvantaged users will be able to understand how to protect their personally identifiable information from public view.

7. *Three Proposals to Protect Social Media Privacy for the Poor*  
 a. *A Plain Language Statute for Social Media Contracts*

Part III demonstrates that vast majority of less educated Americans lack the reading comprehension necessary to take control of their privacy settings. Our reform proposal is to require social media providers to attain a 60 on the Flesch Readability Ease Score or a Grade 9 on the Flesch-Kincaid test. These minimum reading levels will expand the number of users who can potentially understand how to set privacy settings. This reform alone, however, is inadequate because few users actually read TOU or privacy policies.

204. John Garger, *supra* note 173.

205. Carolyn Sutherland, *supra* note 176, at 358 (discussing tests of readability used to assess eight years of industrial enterprise agreements widely employed in Australia).

*b. Adopting Opt-In Default to Sharing Public Information*

Given that relatively few social media users will read TOU and privacy policies even if they are made readable, it is necessary to set the default privacy settings at “private.” This presumption that private postings should be visible only to a selected audience could be overcome only if users take affirmative steps to indicate that they desire this information to be available to the wider public. This European-style opt-in default would create incentives for social media providers to educate their users about how to use privacy settings. The risk to the less educated is simply too great to allow social media providers to commodify their personal information by trading upon users’ lack of sophistication. The current U.S. opt-out approach that presumes that social media postings are public creates disparate negative impacts on the poor.

*c. Limited Right of Erasure*

On May 13, 2014, The European Court of Justice ruled that a user (data subject) may approach a website operator directly and require them to “remove or alter the pages in question (so that the personal data relating to him no longer appeared).”<sup>206</sup> Under the proposed Data Protection Regulation, European citizens will soon have the right to expunge or erase personal data and “abstention from further dissemination.”<sup>207</sup> The right to be forgotten, as conceptualized by the European Commission (EC), applies to “every photo, status update, and tweet.”<sup>208</sup>

Article 17(1) of the EC’s General Data Protection Regulation states:

The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data, which are made available by the data subject while he or she was a child, where one of the following grounds applies:

- (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (A) of Article 6(1), or when the storage period consented

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206. Press Release No. 70/14, Court of Justice of the European Union, An Internet Search Engine Operator is Responsible for the Processing that it Carries out of Personal Data Which Appear on Web Pages Published by Third Parties (May 13, 2014), *archived at* <http://perma.unl.edu/JFK-9RC3> (reporting Judgment in Case C-131/12, Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González).

207. *Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, at 51 COM (2012) 11 final (Jan. 25, 2012) [hereinafter *Commission Proposal*].

208. Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN L. REV. ONLINE 88 (2012).

- to has expired, and where there is no other legal ground for the processing of the data;
- (c) the data subject objects to the processing of personal data pursuant to Article 19;
- (d) the processing of the data does not comply with this Regulation for other reasons.<sup>209</sup>

This EU “right to be forgotten” further elaborates and specifies the “right of erasure . . . [,] including the obligation of the controller which has made the personal data public to inform third parties on the data subject’s request to erase any links to, or copy or replication of that personal data.”<sup>210</sup> Viviane Reding, the European Union Justice Commissioner, stated the rationale for a digital eraser: “At present a citizen can request deletion only if [data is] incomplete or incorrect. We want to extend this right to make it stronger in this [I]nternet world. The burden of proof shall be on the companies. They will have to show that data is needed.”<sup>211</sup>

The “right to be forgotten” “should also be extended in such a way that a controller who has made their personal data public should be obliged to inform third parties which are processing such data that a data subject requests them to erase any links to, or copies or replications of that personal data.”<sup>212</sup>

This EU reform is highly controversial, particularly in the U.S. Jeffrey Rosen characterized the General Data Protection Regulation’s right to be forgotten as representing “the biggest threat to free speech on the Internet in the coming decade.”<sup>213</sup> Jimmy Wales, Wikipedia’s founder, views the right to be forgotten as a right to rewrite history, threatening free expression: “History is a human right and one of the worst things that a person can do is attempt to use force to silence another.”<sup>214</sup> If the U.S. adopts a digital eraser, it will be more limited than the EU’s right to be forgotten because of the need to balance expression with the right to a reputational fresh start.

Youthful hijinks should not stigmatize an individual forever. The right to be forgotten is especially “relevant, when the data subject has given their consent as a child, when not being fully aware of the risks

209. *Commission Proposal*, *supra* note 207, at 51.

210. *Id.*

211. Owen Bowcott, *Britain Seeks Opt-Out of New European Social Media Privacy Laws*, THE GUARDIAN, April 4, 2013, <http://www.theguardian.com/technology/2013/apr/04/britain-opt-out-right-to-be-forgotten-law>, archived at <http://perma.unl.edu/W9R9-M5DA>.

212. *Commission Proposal*, *supra* note 207.

213. Rosen, *supra* note 208.

214. Sophie Curtis and Alice Philipson, *Wikipedia Founder: EU’s Right to be Forgotten is ‘Deeply Immoral,’* THE TELEGRAPH, Aug. 6, 2014, <http://www.telegraph.co.uk/technology/wikipedia/11015901/EU-ruling-on-link-removal-deeply-immoral-says-Wikipedia-founder.html> (last visited Aug. 13, 2014), archived at <http://perma.unl.edu/KSG2-NTD5>.

involved by the processing, and later wants to remove such personal data especially on the Internet.”<sup>215</sup> California has enacted a statute, which will go into effect on January 1, 2015, that will give minors the right to erase social media and other Internet postings.<sup>216</sup> If California’s right of erasure is expanded, it would be of particular value to poor and upwardly mobile Americans who wish to get a “privacy fresh start” by removing evidence of their indiscreet postings and youthful indiscretions.<sup>217</sup>

The EU’s “right to erasure” provision would be particularly useful to America’s poor and less educated who seek to remove evidence of their spoiled identity.<sup>218</sup> For example, American “mugshot websites” base their business model on publishing often outdated information about arrests.<sup>219</sup> These websites often profit by charging a fee to remove the picture. Under the EU’s erasure policy, the data subject would have an absolute right to order the website to remove it or the website would be fined. Data providers face “ruinous monetary sanctions for any data controller that does not comply with the right to be forgotten or to erasure”—a fine up to 1,000,000 euros or up to two percent of Facebook’s annual worldwide income.”<sup>220</sup> At present, there is no right to erasure in the United States, even if a person was exoner-

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215. *Commission Proposal*, *supra* note 207.

216. S.B. 568, 2013–14 Leg., Reg. Sess. (Cal. 2013) (as approved by Governor Sept. 23, 2013), *archived at* <http://perma.unl.edu/U9ZW-J3Y2>.

The bill would, on and after January 1, 2015, require the operator of an Internet Web site, online service, online application, or mobile application to permit a minor, who is a registered user of the operator’s Internet Web site, online service, online application, or mobile application, to remove, or to request and obtain removal of, content or information posted on the operator’s Internet Web site, service, or application by the minor, unless the content or information was posted by a 3rd party, any other provision of state or federal law requires the operator or 3rd party to maintain the content or information, or the operator anonymizes the content or information. The bill would require the operator to provide notice to a minor that the minor may remove the content or information, as specified.

*Id.*

217. *See generally* SOLOVE, *supra* note 99 (describing how teenagers became internationally notorious for Internet images and posted home video); Evan Selinger & Woodrow Hartzog, *Why Is Facebook Putting Teens at Risk?*, BLOOMBERG VIEW (Oct. 24, 2013), <http://www.bloombergview.com/articles/2013-10-24/why-is-face-book-putting-teens-at-risk->, *archived at* <http://perma.unl.edu/5E7Y-ZYV2>.

218. *See generally* GOFFMAN, *supra* note 16 (explaining strategies that stigmatized persons use to adjust and present their social identities).

219. MUGSHOTS, BUSTEDMUGSHOTS, and JUSTMUGSHOTS are examples of “pay to delete” websites. David Segal, *Mugged by a Mug Shot Online*, NYTIMES.COM, Oct. 5, 2013, [http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&_r=2&), *archived at* <http://perma.unl.edu/L345-5HQW> (explaining how mugshot websites charged fees ranging from “\$30 to \$400, or even higher. Pay up, in other words, and the picture is deleted.”).

220. Rosen, *supra* note 208, at 90–91 (quoting *Commission Proposal*, *supra* note 207).

ated or completely rehabilitated. These proposals update Louis Brandeis's right to be left alone by giving the data subject the ability to expunge embarrassing items from the Internet.<sup>221</sup>

#### IV. CONCLUSION

The less educated have too little concern about the negative consequences of potentially damaging social media postings and pictures. Less educated and disadvantaged Americans fail to grasp the threats to privacy from social media participation and leave themselves open to potentially damaging third party surveillance. The Big Five social media sites set privacy preferences at "public," which does not protect users from third-party access. Our empirical research on the readability of social media TOU, privacy policies, and clauses explaining privacy settings demonstrates that they are incomprehensible to users who have a high school education or below. Thus, it is not surprising that reputational damage from social media sites is class linked. The radius of the risk of injury of self-immolation from social media postings and pictures would be further reduced if the U.S. adopts a European-style right of erasure. The injuries of online postings for less educated groups can be mitigated if users have the right to delete their own postings or pictures. These two proposals for comprehensible privacy policies and for a EU-style right of erasure will grant all Americans a fundamental right to control their social media privacy and if necessary to obtain a privacy fresh start in cyberspace.

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221. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (arguing for a right to be left alone and remedies "for the unauthorized circulation of portraits of private persons").