

# CROSSING THE LINE: WHEN CYBERBULLYING PREVENTION OPERATES AS A PRIOR RESTRAINT ON STUDENT SPEECH

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## Abstract

*The proliferation of technology has shifted bullying from the schoolyard to the computer screen. To prevent the detrimental impact cyberbullying has on the educational environment, state legislatures are increasingly vesting school districts with almost unfettered authority to seek out and monitor student speech. This Article will survey some of the resulting proactive efforts schools have implemented to conduct suspicionless monitoring of student social media accounts. After outlining the relevant constitutional framework for student speech regulation, the Article will show why proactive prevention efforts infringe on students' First Amendment rights and operate akin to a presumptively impermissible system of prior restraint. The Article will conclude by proposing a heightened judicial standard to protect students' First Amendment rights while allowing schools to effectively prevent cyberbullying threats.*

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## I. INTRODUCTION

Advances in technology have undoubtedly changed the landscape of public classrooms across the country.<sup>1</sup> However, in addition to enhancing learning opportunities, the increasing accessibility of technology among students has also led to the rise of a serious problem: cyberbullying. Unlike traditional bullying, cyberbullying has the unique ability to be omnipresent, following students at school, at home, and on mobile devices.<sup>2</sup> The novel nature of this issue has brought new challenges to schools, which must work to strike a balance between using discipline to create a positive and productive learning environment for students while still obeying the constitutional limitations imposed on state actors.<sup>3</sup> However, legislative pressures to combat cyberbullying, coupled with inconsistent judicial guidance regarding regulation of student speech, has created room for schools to adopt aggressive, proactive policies to monitor student expression before speech actually occurs—policies that veer dangerously close to unconstitutionality.<sup>4</sup>

Minnesota sixth grader Riley Stratton’s experience publicized the concerns raised by these aggressive policies.<sup>5</sup> After posting comments to her Facebook page from her home, and having a personal, “naughty” conversation with another student via Facebook messages through wholly off-campus communications held after school hours, Stratton found herself in the school office of the deputy sheriff assigned to her school.<sup>6</sup> Here, she was bombarded

1. See generally *Technology in the Classroom*, U.S. NEWS, <http://www.usnews.com/education/technology-in-the-classroom> (last visited Sept. 16, 2015) (listing articles discussing how technology is affecting high school and college classrooms).

2. Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 641 (2011) (citing SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RES. CTR., CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE (Oct. 2014), <http://cyberbullying.org/Cyberbullying-Identification-Prevention-Response.pdf>).

3. *Id.* at 643.

4. *Id.* at 654–55.

5. Carol Kuruvilla, *Schools Pay \$70,000 to Minnesota Student Forced to Give Up Facebook Password*, N.Y. DAILY NEWS (Mar. 27, 2014, 11:52 AM), <http://www.nydailynews.com/news/national/school-pays-70-000-forcing-student-reveal-facebook-password-article-1.1736528>.

6. R.S. *ex rel.* S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1134 (D. Minn.

by three school officials asking her about her private conversation and forcing her to hand over the passwords to her e-mail and Facebook account, or risk detention.<sup>7</sup> Feeling threatened, without a choice, and without access to her parents, Stratton surrendered her passwords and watched as officials logged into her Facebook account, viewing her public postings and private messages, and commenting on the private quizzes she had taken in her personal time.<sup>8</sup>

Other proactive school policies require students to share their private passwords or allow schools to screen and monitor private student accounts *without* any prior level of suspicion of wrongdoing<sup>9</sup> and have received minimal judicial guidance to date. Fearing the rise of suspicionless efforts, these proactive policies are the subject of this analysis.

While cyberbullying is undoubtedly a serious problem in our country,<sup>10</sup> a proper balance must be struck between prevention efforts and protecting the First Amendment rights of students in public schools. Because courts and scholars alike have not yet analyzed newer proactive policies by schools to obtain social media passwords or actively monitor student speech, this Article addresses the uncertainty that has resulted. These concerns are increasingly important as proactive efforts—as opposed to punishment following speech after it has occurred—raise serious constitutional problems by chilling innocent student speech and operate akin to a presumptively unconstitutional system of prior restraints.<sup>11</sup>

First, Part II of this Article will describe the rise of cyberbullying and outline legislative responses that vest school districts with authority to proactively monitor student speech. It will also survey various proactive efforts by school districts, which have recently received national attention. It will then trace the development of First Amendment jurisprudence regarding the prior restraint doctrine and its previous applications to on-campus student speech. Finally, it will discuss the constitutionality of student speech regulation and how courts have applied these standards to off-campus speech within the cyberbullying context, illustrating that all prior applications have dealt with reactive school discipline after the speech had already occurred. Part III then offers a unique analysis demonstrating that proactive monitoring techniques infringe on students' constitutional rights and are akin to a presumptively impermissible system of prior restraint. It concludes by proposing a new, heightened judicial standard to protect students' First Amendment rights, while still allowing schools to effectively prevent cyberbullying threats, and outlines the detrimental ramifications if a new standard is not adopted to analyze these newly instituted proactive efforts.

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2012).

7. *Id.*

8. *Id.*

9. *See infra* Section II.C.

10. *See infra* Section II.A.1.

11. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

## II. BACKGROUND

To fully grasp the implications of proactive school cyberbullying regulations, it is important to first illuminate the pervasive nature of cyberbullying and the legislative response that has given rise to these novel measures. Second, it is equally critical to assess the current backdrop of First Amendment jurisprudence, which all student speech regulations must comport with. Thus, this Part will first outline the rise of cyberbullying legislation, describing current on-campus regulation as well as the novel area of proactive, off-campus speech regulation. It will then trace jurisprudence relating to the prior restraint doctrine and school speech parameters, highlighting the inconsistent approaches lower courts have taken to apply school speech standards to off-campus expression. Finally, it will illuminate that, as of the date of this writing, courts and scholars have not sufficiently analyzed these proactive efforts, underlining the need to develop a constitutional framework to analyze their expansive reach.

### A. Cyberbullying

#### 1. *The Rise of Cyberbullying*

Although schoolyard bullying has been around for generations, the rise of technology has increased the intensity and pervasiveness of traditional bullying.<sup>12</sup> For the purposes of this Article, cyberbullying is defined as an individual or group using technologies such as e-mails, text messages, instant messages, and defamatory personal websites and social media forums to support deliberate, hostile behavior that is intended to harm others.<sup>13</sup> Unlike face-to-face harassment, cyberbullying uniquely follows victims “from their schools to their homes to their personal computer screens,” allowing others to easily join in by tagging, discussing, and sharing commentary.<sup>14</sup> Due to ease of accessibility, cyberbullying also has the unique ability to garner a wide audience quickly, and the permanence of information on the Internet may lead to more widespread and longer-lasting harm to the victim.<sup>15</sup>

New technology increasing access to the Internet has paralleled the rise in cyberbullying.<sup>16</sup> In 2007, an estimated forty-five million children between ten and seventeen years of age used the Internet daily,<sup>17</sup> and in 2012, 42% of teenagers with tech access reported being cyberbullied online within the past

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12. Goodno, *supra* note 2.

13. Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 56 (2005).

14. Goodno, *supra* note 2.

15. Justin W. Patchin & Sameer Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 YOUTH VIOLENCE & JUV. JUST. 148, 154–55 (2006); Jamison Barr & Emmy Lugus, *Digital Threats on Campus: Examining the Duty of Colleges to Protect Their Social Networking Students*, 33 W. NEW ENG. L. REV. 757, 762 (2011).

16. Patchin & Hinduja, *supra* note 15, at 152.

17. Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729, 2746–47 (2013).

year.<sup>18</sup> On Facebook in particular, more than seven million Facebook users are under the age of thirteen, and of these children, one in ten report being bullied on the site.<sup>19</sup> More generally, one in three children report having been threatened in some form online.<sup>20</sup> Additionally, studies have shown that cyberbullying primarily occurs through instant messages, e-mails, and websites while students are off campus.<sup>21</sup> A 2006 study found that among twelve- to fourteen-year-olds, only 30% of cyberbullied students reported being bullied at school.<sup>22</sup>

These statistics are particularly problematic for educators, and the prevalence of cyberbullying has made it one of the top challenges facing public schools today.<sup>23</sup> Although cyberbullying begins online, it often has detrimental consequences in the physical world, as it may create a hostile school environment where students do not feel comfortable—depriving them of an equal opportunity to learn.<sup>24</sup> One recent study found that 13% of teens on social media had felt nervous about going to school the next day due to online activity.<sup>25</sup> Cyberbullying may manifest itself in physical confrontation, which tends to take place in school and makes students feel unsafe—depriving victims of their equal opportunity to learn.<sup>26</sup> For example, a recent study found that 25% of teenagers on social media had an experience on a social networking site that resulted in a face-to-face argument or confrontation with someone, and 8% had entered into a physical fight with another person due to a social media interaction.<sup>27</sup> The increasing prevalence and severity of online bullying, coupled with these insights into its sources and locations where harm

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18. Sam Laird, *Cyberbullying: Scourge of the Internet [INFOGRAPHIC]*, MASHABLE (July 8, 2012), <http://mashable.com/2012/07/08/cyberbullying-infographic/>; see also Randy Taran, *Cyberbullying: Strategies to Take Back Your Power*, HUFFINGTON POST (Nov. 17, 2011), [http://huffingtonpost.com/randy-taran/cyberbullying-10-ways-to\\_b\\_807005.html](http://huffingtonpost.com/randy-taran/cyberbullying-10-ways-to_b_807005.html) (reiterating that 42% of students have been bullied while online). But see AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS, ONLINE STRANGER CONTACT AND CYBERBULLYING 13 (Apr. 30, 2008), [https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/Teens%20Strangers\\_AmandaLenhart.pdf](https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/Teens%20Strangers_AmandaLenhart.pdf) (finding that 32% of online teenagers surveyed reported being cyberbullied).

19. Laird, *supra* note 18.

20. *Id.*

21. *Id.*

22. OPINION RESEARCH CORP., CYBER BULLY TEEN 6 (2006), <http://www.fightcrime.org/cyberbullying/cyberbullyingteen.pdf> (last visited Apr. 1, 2015) (noting that 60% of cyberbullied students reported being bullied at home, 26% reported being bullied at a friend's home, and 5% reported being bullied somewhere else).

23. Mary Ellen Flannery, *Top Eight Challenges Teachers Face This School Year*, NEATODAY (Sept. 13, 2010), <http://neatoday.org/2010/09/13/top-eight-challenges-teachers-face-this-school-year> (“[N]early one in three teens say they’ve been victimized via the Internet or cell phones. A teacher’s role—or a school’s role—is still fuzzy in many places. What legal rights or responsibilities do they have to silence bullies, especially when they operate from home?”).

24. Fenn, *supra* note 17, at 2748–49 (citing Shaheen Shariff & Dianne L. Hoff, *Cyber Bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace*, 1 INT’L J. CYBER CRIMINOLOGY 76, 83–84 (2007)).

25. AMANDA LENHART ET AL., PEW RES. CTR., TEENS, KINDNESS AND CRUELTY ON SOCIAL NETWORK SITES: HOW AMERICAN TEENS NAVIGATE THE NEW WORLD OF “DIGITAL CITIZENSHIP” 4 (Nov. 9, 2011), [http://www.pewinternet.org/files/old-media/Files/Reports/2011/PIP\\_Teens\\_Kindness\\_Cruelty\\_SNS\\_Report\\_Nov\\_2011\\_FINAL\\_110711.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2011/PIP_Teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf).

26. Fenn, *supra* note 17, 2748–49 (citing Shariff & Hoff, *supra* note 24; Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students’ Free Speech Rights*, 33 VT. L. REV. 283, 286–87 (2008)).

27. LENHART ET AL., *supra* note 25.

is felt, emphasize the need to craft a sound solution targeted at off-campus cyberbullying activities.

## 2. *State Legislation to Combat Cyberbullying*

Traditionally, cyberbullying victims were forced to rely on tort law (e.g., libel, defamation) and certain criminal laws such as harassment and cyberstalking.<sup>28</sup> However, in response to criticism about the inadequacy of these options and the increasing pressure to combat cyberbullying,<sup>29</sup> several states have enacted legislation to address the problem.<sup>30</sup> The federal government has not yet passed cyberbullying legislation,<sup>31</sup> and thus, the analysis of these laws is state-specific.

Currently, forty-nine states and Washington D.C. have anti-bullying laws, with Montana being the only state with no bullying or cyberbullying legislation.<sup>32</sup> These laws are typically implemented by requiring schools to adopt a policy to carry out the legislation, and forty-four of the states' laws mandate school sanctions for violating the law.<sup>33</sup> For example, in Oregon, the statute reads, "Each district school shall adopt a policy prohibiting harassment, intimidation or bullying and prohibiting cyberbullying."<sup>34</sup> The principle behind mandating school policies is the belief that each student has a right to receive a public education in an educational environment reasonably free from substantial intimidation or harm.<sup>35</sup> Several of these laws then include the process for setting the anti-bullying or cyberbullying policies.<sup>36</sup> Fourteen of these states' laws expressly include off-campus behaviors.<sup>37</sup> Because a

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28. Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 852 (2010).

29. See *supra* Section II.A.1.

30. See SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RES. CTR., STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES (Jan. 2016), <http://www.cyberbullying.us/Bullying-and-Cyberbullying-Laws.pdf> (reviewing state cyberbullying laws and policies).

31. *Id.*

32. *Id.*; see also Maggie Clark, *49 States Now Have Anti-Bullying Laws. How's that Working Out?*, GOVERNING (Nov. 4, 2013), <http://www.governing.com/news/headlines/49-States-Now-Have-Anti-Bullying-Laws-How's-that-Working-Out.html> (describing the effects of anti-bullying laws).

33. HINDUJA & PATCHIN, *supra* note 30.

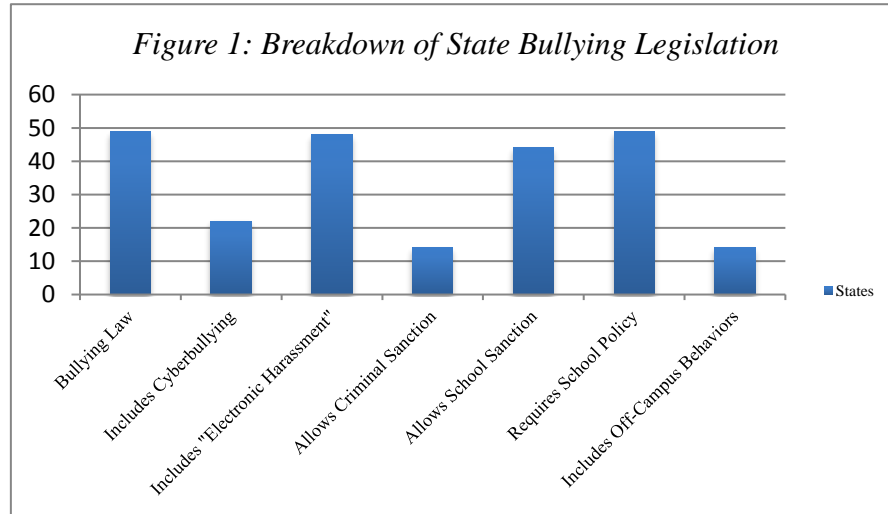
34. OR. REV. STAT. § 339.356 (2015).

35. See, e.g., ARK. CODE ANN. § 6-18-514 (2012); see also CAL. EDUC. CODE § 32261(a) (2016) ("[A]ll pupils enrolled in the state public schools have the inalienable right to attend classes on school campuses that are safe, secure, and peaceful."); IOWA CODE § 280.28(1) (2016) ("The state of Iowa is committed to providing all students with a safe and civil school environment in which all members of the school community are treated with dignity and respect. The general assembly finds that a safe and civil school environment is necessary for students to learn and achieve at high academic levels."); OR. ADMIN. R. 581-022-1140(1) (2016) (basing anti-cyberbullying policy on the principle of "assur[ing] equity, opportunity and access for all students").

36. See, e.g., WASH. REV. CODE § 28A.300.285(3) (2016).

37. *Id.*; see also John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 93 (2011) ("[Some] of them (Arkansas, Massachusetts, New Hampshire, Oklahoma, Pennsylvania) specifically mention that cyber bullying is prohibited away from school if it disrupts school activity. Delaware and Florida law provides that the physical location and time of access of the technology-related incident is not a valid defense in a disciplinary proceeding, with Delaware adding the proviso of a 'sufficient school nexus.' [Others] (Idaho, Iowa, Maryland, Missouri) do not mention location or defenses but simply declare that bullying by electronic means or communication is prohibited.").

significant number of states include “cyberbullying” and off-campus activity within the legislation,<sup>38</sup> and because most states with bullying laws depend on the school districts to craft school policies and allow schools to impose sanctions for violating the legislation, it becomes extremely important to properly craft and analyze the resulting school policies.



Substantively, these statutes contain several common elements.<sup>39</sup> Most contain language prohibiting cyberbullying if it: (1) causes a material or substantial disruption of the school environment; (2) creates an intimidating, threatening, or hostile learning environment; (3) causes actual harm to a student or their property (or puts a student in reasonable fear of the same); (4) interferes with a student’s education; (5) targets school personnel; and/or (6) incites third parties to carry out the bullying.<sup>40</sup> Often, statutes also prohibit cyberbullying from students’ personal devices, specify the level of harm required, or define the electronic communication at issue to include blogs, websites, and pagers.<sup>41</sup> Other statutes require reporting of cyberbullying to school officials, prohibit retaliation for reporting cyberbullying, offer training for school personnel, or impose criminal sanctions for cyberbullying.<sup>42</sup>

38. HINDUJA & PATCHIN, *supra* note 30.

39. *See id.* (providing substantive analysis of state cyberbullying legislation); Kara D. Williams, *Public Schools vs. MySpace and Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 723 (2008); Beckstrom, *supra* note 26; Hayward, *supra* note 37, at 91.

40. Hayward, *supra* note 37, at 91.

41. *See id.* at 93–98 (providing additional detail about the states including each provision and specific language used).

42. *Id.*

### B. Policies Addressing On-Campus Cyberbullying

It is generally accepted that schools may regulate on-campus student activity due to the special needs of maintaining a proper educational environment.<sup>43</sup> As described in Section II.D.3, U.S. Supreme Court precedent indicates that schools have the ability to regulate on-campus speech that is reasonably foreseeable to result in a material and substantial disruption,<sup>44</sup> speech reasonably interpreted to be school-sponsored,<sup>45</sup> and speech taking place at school-sanctioned activities equivalent to being on campus.<sup>46</sup> Therefore, “in the cyberbullying context, it falls within the school’s jurisdiction to regulate speech that originates on-campus whether the student uses the school’s resources or her own personal technology while on-campus.”<sup>47</sup>

In fact, federal regulation directly requires on-campus efforts to regulate cyberbullying.<sup>48</sup> For example, the Children’s Internet Protection Act (CIPA) was enacted by Congress in 2000 to address concerns regarding harmful Internet content accessed by children.<sup>49</sup> The law requires schools and libraries receiving federal discounts for Internet access to certify that they have safety policies to block or filter access to pictures that are obscene, child pornography, or harmful to minors.<sup>50</sup> Additionally, schools must certify that their Internet safety policies include monitoring the online activity of minors and educating minors about appropriate online behavior, including online interactions and cyberbullying awareness and response.<sup>51</sup> Thus, many district policies reflect these CIPA mandates by prohibiting inappropriate, on-campus technological communication and include consequences for violating these terms.<sup>52</sup>

Although a full discussion is beyond the scope of this Article, it is worth mentioning that even on-campus cyberbullying regulations may raise Fourth Amendment problems, which may implicate foundational First Amendment concerns. Within the school environment, physical student searches must be

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43. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (“[C]onduct by the student, in class or out of it, which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.”).

44. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that lewd offensive speech given at a school assembly is punishable).

45. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (holding that schools can regulate student speech in school-sponsored newspapers bearing the imprimatur of the school).

46. *Morse v. Frederick*, 551 U.S. 393, 401, 408 (2007) (explaining that a student “cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not in school” and promote illegal drug use) (internal quotations omitted)).

47. Goodno, *supra* note 2, at 658.

48. See S. REP. 106-141, at 2–6 (1999) (discussing the expanded amount of Internet access and the problems of both intentional and accidental access to sexually explicit material online).

49. *Guide to Children’s Internet Protection Act*, FED. COMM’N COMM’N, <http://www.fcc.gov/guides/childrens-Internet-protection-act> (last visited Sept. 16, 2016).

50. *Id.*

51. *Id.*

52. Kathleen Conn, *Cyberbullying and Other Student Misuses of Technology Affecting K-12 Public Schools: Will Public School Administrators Be Held Responsible for the Consequences?*, 244 EDUC. L. REP. 479, 495–96 (2009).



justified by “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”<sup>53</sup> Noting that the need to maintain a school environment conducive to learning necessarily eases the search restrictions that public officials are typically subject to under the Fourth Amendment, the U.S. Supreme Court has held that the warrant preference is unsuited to the swift action required within the school environment.<sup>54</sup> Thus, within the special school context, the search must be reasonable. This means the search must be: (1) justified at its inception (which requires reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school); and (2) reasonably related in scope to the circumstances that justified the interference in the first place.<sup>55</sup> However, the search need not require “probable cause” to believe that a violation of the law has occurred.<sup>56</sup> For the purposes of this Article, these Fourth Amendment concerns are important because violations of the Fourth and First Amendments may be interconnected: knowledge of unreasonable searches regarding personal communication often chills speech by causing speakers to self-censor.<sup>57</sup> Thus, school policies allowing aggressive on-campus searches must also be carefully tailored to avoid causing students to think twice before communicating at all.<sup>58</sup>

### C. Proactive Policies Addressing Off-Campus Cyberbullying

In response to legislative mandates requiring cyberbullying prevention policies, several school districts have created alarmingly proactive policies, reaching beyond on-campus student speech and demanding access to students’ social media passwords or monitoring wholly private, off-campus student speech.<sup>59</sup> These policies embody the fears of scholars who argue against off-campus cyberbullying legislation and who believe extending school authority beyond the schoolyard allows its watch to become essentially limitless. For example, as John Hayward argues:

[N]o student, even in the privacy of his or her own home, can write about controversial topics of concern to them without worrying that it may be “disruptive” or cause a “hostile environment” at school. In effect, students will be punished for off-campus speech based on

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53. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

54. *T.L.O.*, 469 U.S. at 340.

55. *Id.* at 341–42.

56. *Id.* at 339–41.

57. See Caitlin Thistle, Note, *A First Amendment Breach: The National Security Agency’s Electronic Surveillance Program*, 38 SETON HALL L. REV. 1197, 1198 (2008) (documenting the notion that these rights may be interconnected).

58. See Brett Max Kaufman, *ACLU Files Lawsuit Challenging NSA’s Patriot Act Phone Surveillance*, ACLU (June 11, 2013, 3:30 PM), <https://www.aclu.org/blog/free-future/aclu-files-lawsuit-challenging-nsas-patriot-act-phone-surveillance> (discussing how individuals might think twice about calling the ACLU if they know that the government is listening to their phone calls).

59. Benjamin Herold, *Schools Weigh Access to Students’ Social-Media Passwords*, EDUC. WK. (Feb. 17, 2015), <http://www.edweek.org/ew/articles/2015/02/18/schools-weigh-access-to-students-social-media.html>.

the way people react to it at school.<sup>60</sup>

Some states—including Louisiana, Maine, Michigan, Rhode Island, and Utah—have passed legislation allowing schools to access students' social media accounts to detect and eliminate cyberbullying.<sup>61</sup> While many schools used this authority in practice to investigate speech after it occurred, these incidents highlight an aggressive shift to regulate off-campus speech and validate the fear of more routine, suspicionless monitoring.

For example, a Minnesota school district recently came under scrutiny for demanding a student's Facebook and e-mail usernames and passwords to investigate a report from a parent regarding the student's off-campus online conversations.<sup>62</sup> Following a lawsuit filed by the student, the school recently agreed to settle by paying \$70,000 in damages and rewriting its policies to limit the search of student e-mail and social media accounts created off campus.<sup>63</sup> Although the school claimed its intent in demanding this information was purely to "remedy [the speech of a student] getting off track a little," the circumstances generated significant media attention and resulted in the student filing a lawsuit against the district in conjunction with the American Civil Liberties Union.<sup>64</sup> After losing its motion to dismiss,<sup>65</sup> the district agreed to amend its rules to address electronic devices and require that "electronic records and passwords created off campus can only be searched if [there is] a reasonable suspicion they will uncover violations of school rules."<sup>66</sup> However, it is important to note that even uncovering violations of school rules may be insufficient to comport with the applicable constitutional standards for abridging student speech.<sup>67</sup>

Similarly, an Illinois law that took effect in January 2015 prompted controversy, leading to its amendment in August 2015. The initial law allowed schools to:

[R]equest or require a student or his or her parent or guardian to provide a password or other related account information in order to gain access to the student's account or profile on a social networking website [when a school] . . . has reasonable cause to believe that a student's account on a social networking website contains evidence that the student has violated a school disciplinary rule or policy.<sup>68</sup>

Controversy arose when an Illinois school district, Triad Community

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60. Hayward, *supra* note 37, at 91; *see also* Beckstrom, *supra* note 26.

61. Herold, *supra* note 59, at 2.

62. R.S. *ex rel.* S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1133 (D. Minn. 2012).

63. Curt Brown, *ACLU Wins Settlement for Sixth-Grader's Facebook Posting: ACLU Sued Minnewaska School After Sixth-Grader Was Forced to Give Up Password*, STARTRIBUNE (Mar. 25, 2014, 11:06 PM), <http://www.startribune.com/local/252263751.html>.

64. *Id.*

65. *Minnewaska Area Sch. Dist.*, 894 F. Supp. 2d at 1149.

66. Brown, *supra* note 63.

67. *See infra* Section II.D.3.

68. Right to Privacy in the School Setting Act, Ill. Pub. Act 98-129, § 10 (H.B. 64) (2013), *amended by* Ill. Pub. Act 99-460 (H.B. 3527) (2015) (codified as amended at 105 ILL. COMP. STAT. 75/10 (2016)).

Schools, sent letters to parents notifying them that their children may be asked to provide passwords.<sup>69</sup> Before the law, Illinois schools could only take action if online bullying occurred during the school day.<sup>70</sup> However, the new law greatly expanded the ability of schools to demand a student's social media password based on the mere belief that a student's online account contains evidence of violating any school policy.<sup>71</sup> Although the school claimed the measure would not be used unless there was a pervasive bullying issue or a threat made to another student, parents and students remained troubled that the policy applied to any off-campus speech even without proof of actual speech evidencing a policy violation.<sup>72</sup> The amended law responded to public concern and now requires that the student cooperate in an investigation if there is specific information about activity on his or her account that violates a school policy.<sup>73</sup>

A few schools have also instituted measures to proactively monitor or regulate students' online activity absent any prior speech made by the student. These suspicionless prevention techniques are the main subject of this Article's analysis. In California, the Lodi Unified School District created social networking guidelines that required students to sign a social media contract in order to participate in extracurricular activities.<sup>74</sup> The contract outlined that students participating in "athletics and other co-curricular activities" must obey the guidelines of the contract or risk being suspended from the activity.<sup>75</sup> The contract initially appeared to properly follow Supreme Court precedent, allowing schools to discipline students for online conduct that is related to a school activity and is: "1) substantially or foreseeably disruptive to the [school] environment; 2) lewd, vulgar or offensive; and/or 3) advocating violence or illegal activity."<sup>76</sup> However, the contract then went on to describe activities

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69. Hunter Schwarz, *Schools Can Require Students to Hand Over Their Social Media Passwords Under Illinois Law*, WASH. POST (Jan. 22, 2015) <http://www.washingtonpost.com/blogs/govbeat/wp/2015/01/22/schools-can-require-students-to-hand-over-their-social-media-passwords-under-illinois-law/>.

70. Kelley Hoskins, *New Illinois Law Gives Schools Access to Students Social Media Passwords*, FOX2NOW (Jan. 20, 2015, 3:52 PM), <http://fox2now.com/2015/01/16/new-illinois-law-gives-schools-access-to-students-social-passwords/>.

71. *Id.*

72. Chris Matyszczuk, *Illinois Law Allows Schools to Demand Students' Facebook Passwords*, CNET (Jan. 20, 2015, 6:27 PM), <http://www.cnet.com/news/new-illinois-law-allows-schools-to-demand-students-facebook-passwords/>.

73. The Right to Privacy in the School Setting Act Amendment, Ill. Pub. Act 99-460 (H.B. 3527) (2015) (codified as amended at 105 ILL. COMP. STAT. 75/10 (2016)).

74. Sara Gregory, *Calif. Students Protest Social Media Contract Banning "Inappropriate" Posts*, STUDENT PRESS L. CTR. (Aug. 5, 2013, 7:25 PM), <http://www.splc.org/article/2013/08/calif-students-protest-social-media-contract-banning-inappropriate-posts>; Melinda Meza, *Bear Creek HS Students Protest Social Media Contract*, KCRA (Aug. 5, 2013, 7:47 PM), <http://www.kcra.com/news/local-news/news-stockton/bear-creek-hs-students-protest-social-media-contract/21343068>.

75. See Gregory, *supra* note 74 (detailing social media contract students were required to sign); LODI UNIFIED SCH. DIST., SOCIAL NETWORKING BY STUDENT-ATHLETES AND CO-CURRICULAR PARTICIPANTS 2013-2014, [http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/LUSD\\_social\\_media\\_contract.pdf](http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/LUSD_social_media_contract.pdf) (last visited Sept. 16, 2016).

76. LODI UNIFIED SCH. DIST., *supra* note 75. These requirements appear to follow, respectively, the U.S. Supreme Court cases addressing student speech of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512-13 (1969), which held that schools may regulate student speech causing a material and substantial disruption to the school environment, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), which allowed schools to regulate lewd and vulgar speech on campus, and *Morse v. Frederick*,

that would automatically satisfy these requirements, including “general inappropriate language of a profane or sexual nature,” “demeaning statements about or threats to any third party,” “engaging in or indicating knowledge of cyberbullying,” and “other inappropriate behavior as deemed so by [the school].”<sup>77</sup> Students were particularly worried about the last portion, which allows the definition of “inappropriate” to be determined at the unfettered discretion of administrators.<sup>78</sup> Following protests at a local high school in the district, the district suspended the policy until further revision to comply with “current law.”<sup>79</sup>

Additionally, reports revealed that Alabama’s Huntsville City Schools paid \$157,000 in 2013 to a security firm employing a former FBI agent to investigate social media activity of public school students.<sup>80</sup> These online investigations are part of the district’s Students Against Fear (SAFe) program, which according to the district’s superintendent, was initiated after the NSA called the district with a tip that a student was making violent threats on Facebook.<sup>81</sup> The school district has explained that the focus of the program is on gangs, threats of violence, and threats of suicide.<sup>82</sup> According to the school, “the program is meant to identify potential dangers to the school, and not necessarily code violations on school property.”<sup>83</sup>

Proactive policies amounting to monitoring have also been instituted in Tennessee’s Williamson County Schools, which require students to obtain permission from an administrator before posting photographs of other students or district employees, even off campus, and allows the district to inspect any student device brought on campus at any time.<sup>84</sup> The American Civil Liberties Union and Electronic Frontier Foundation contested this policy as

551 U.S. 393, 403 (2007), which allowed schools to regulate speech promoting illegal activity.

77. LODI UNIFIED SCH. DIST., *supra* note 75.

78. Meza, *supra* note 74.

79. Sarah Heise, *Amid Controversy, Lodi Unified Suspends Social Media Policy*, KCRA (Aug. 14, 2013, 4:38 PM), <http://www.kcra.com/news/local-news/news-stockton/amid-controversy-lodi-unified-suspends-social-media-policy/21471596>.

80. Challen Stephens, *Huntsville Schools Paid \$157,000 for Former FBI Agent, Social Media Monitoring Led to 14 Expulsions*, AL.COM (Nov. 7, 2014 12:17 PM), [http://www.al.com/news/huntsville/index.ssf/2014/11/huntsville\\_schools\\_paid\\_157100.html](http://www.al.com/news/huntsville/index.ssf/2014/11/huntsville_schools_paid_157100.html); *see also* NCAC Staff, *EFF Probes Troubling Social Media Monitoring Policies in AL and TN*, NAT’L COALITION AGAINST CENSORSHIP (Nov. 10, 2014), <http://ncac.org/blog/eff-probes-troubling-social-media-monitoring-policies-in-al-and-tn/> (noting that schools have “increasingly fortified their hold over what students say online”).

81. Challen Stephens, *Huntsville Schools Say Call from NSA Led to Monitoring Students Online*, AL.COM (Oct. 6, 2014, 7:49 AM), [http://www.al.com/news/index.ssf/2014/09/after\\_warning\\_from\\_nsa\\_huntsvi.html](http://www.al.com/news/index.ssf/2014/09/after_warning_from_nsa_huntsvi.html). The NSA, however, denies having made the call. *Id.*

82. *Id.*

83. *Id.*

84. WILLIAMSON CTY. BD. OF EDUC., PROCEDURES AND GUIDELINES: ACCEPTABLE USE, MEDIA RELEASE, AND INTERNET SAFETY PROCEDURES 2–3 (Nov. 17, 2014), <http://www.wcs.edu/wp-content/pdf/BoardPolicies/4406p1415.pdf>; Kevin Walters, *ACLU: Williamson Schools’ Social Media Policy Goes Too Far*, TENNESSEAN (Oct. 27, 2014, 8:08 PM), <http://www.tennessean.com/story/news/local/williamson/schools/2014/10/27/aclu-says-williamson-schools-violating-students-rights/18028933/>; Andrea Peterson, *Civil Liberties Groups Think This Tennessee School District’s Tech Policy Is Unconstitutional*, WASH. POST (Oct. 27, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/10/27/civil-liberties-groups-think-this-tennessee-school-districts-tech-policy-is-unconstitutional/> (quoting executive director of the ACLU’s Tennessee chapter: “Imagine a student is going out bowling on the weekend with other students and posts a photo on Facebook—this policy requires they get written permission from school officials.”).

unconstitutionally limiting student speech by requiring permission to post photos (as well as infringing on the students' Fourth Amendment right to be free of unreasonable searches and seizures).<sup>85</sup>

Similarly, California's Glendale Unified School District attracted national media attention in 2013 when students learned that the school district was using a company called Geo Listening to monitor students' social media posts absent any prior suspicion of wrongdoing.<sup>86</sup> The district pays \$40,500 for a system to monitor approximately 14,000 middle and high school students and alert analysts to terms indicating "controlled substances, self-harm, disruption of class or school activities, hazing, sexual harassment of peers or teachers, threats or acts of physical violence, use of fake identification, hate speech, racism, weapons and suicide or despair."<sup>87</sup> Although the company says it is only monitoring publicly available posts and is not observing private correspondence or hacking into accounts, the American Civil Liberties Union has commented that the program is going beyond what is necessary to ensure student safety on campus and intrudes into student privacy and off-campus conduct.<sup>88</sup> Although no students have been disciplined under this system so far, the company alerted the district to more than 1,400 incidents through daily e-mail reports,<sup>89</sup> and students reported being worried about the district being able to monitor this information and then potentially using it to discipline off-campus activities.<sup>90</sup> However, a recent bill signed by the California governor requires districts to notify students and their parents of such a program, to allow comment before adopting the program, to only gather and maintain information pertaining directly to student safety, and to destroy the gathered information.<sup>91</sup>

These novel measures have yet to be sufficiently analyzed by courts and scholars. Their unique, proactive nature differs from the generally accepted ability of schools to restrain on-campus speech by reaching to regulate student speech outside the school's boundaries, possibly before a student has spoken at all. Thus, these measures must be carefully analyzed to comport with established First Amendment jurisprudence.

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85. See Walters, *supra* note 84 (describing the ACLU's complaint); see also Press Release, ACLU, Policy Violates Students' First and Fourth Amendment Rights (Oct. 27, 2014), <https://www.aclu.org/news/aclu-tn-and-eff-urge-williamson-county-schools-change-social-media-and-technology-policy> (detailing ACLU's particular assertions of unconstitutionality).

86. Stephen Caesar, *Glendale District Says Social Media Monitoring Is for Student Safety*, L.A. TIMES (Sept. 14, 2013), <http://articles.latimes.com/2013/sep/14/local/la-me-glendale-social-media-20130915>.

87. *Id.*

88. *Id.*

89. Kelly Corrigan, *GUSD Continues to Monitor Students' Social Media Posts*, L.A. TIMES (Aug. 14, 2014, 10:11 AM), <http://www.latimes.com/tn-gnp-me-0814-geolistening-monitoring-to-continue-20140814-story.html>.

90. *Id.*

91. Assemb. B. 1442, 2013–2014 Sess. (Cal. 2014), [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1442](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1442).

#### D. First Amendment Backdrop

In light of high profile cyberbullying cases, many parents have pointed fingers at schools to regulate cyberbullying among students.<sup>92</sup> To analyze this option, it is important to understand the guidance provided by the U.S. Supreme Court regarding freedom of speech and the limitations on public schools to censor student speech.

Generally, free speech regulation is governed by a “forum analysis,” which determines the level of restriction the government may impose in various settings.<sup>93</sup> A traditional public forum is a place with a long tradition of freedom of expression (such as a public park or street corner), and content-based regulations will be struck down unless the government can pass strict scrutiny, showing the restriction is narrowly tailored to further a compelling government interest.<sup>94</sup> In a limited public forum, the government may designate that expressive activity is limited for certain groups or topics (such as a university meeting hall or city-owned theater) and may impose content-based restrictions that are reasonably related to the purpose of the forum.<sup>95</sup> A nonpublic forum, on the other hand, is a place that is traditionally not open to public expression (such as a jail or military base).<sup>96</sup> In a nonpublic forum, then, the government may make any content-based regulations so long as they are reasonable.<sup>97</sup>

Within public forums, the First Amendment protects speech and expressive conduct from content-based restriction by the government unless it falls within an unprotected category.<sup>98</sup> If speech is protected by the First Amendment, any attempt to restrict it must generally pass strict scrutiny (requiring the state to show that the law is narrowly tailored to serve a compelling state interest).<sup>99</sup> However, certain categories of speech are considered unprotected<sup>100</sup> and may be regulated based on content without meeting strict scrutiny.<sup>101</sup> These areas of unprotected speech are exceptions to the First Amendment’s guarantee that government bodies may not abridge free expression, and are justified because they do not involve ideas or viewpoints valuable to the marketplace of ideas and do not advance any socially

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92. Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. Times (June 27, 2010), <http://www.nytimes.com/2010/06/28/style/28bully.html>.

93. *Public Forum*, BLACK’S LAW DICTIONARY (10th ed. 2014).

94. *Id.*

95. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

96. *Public Forum*, BLACK’S LAW DICTIONARY (10th ed. 2014).

97. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

98. *Virginia v. Black*, 538 U.S. 343, 358 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 304 (1984).

99. Abby L. Schloessman Risner, Comment, *Violence, Minors and the First Amendment: What Is Unprotected Speech and What Should Be?*, 24 ST. LOUIS U. PUB. L. REV. 243, 247 (2005).

100. *R.A.V.*, 505 U.S. at 383 (“We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, or that the protection of the First Amendment does not extend to them.” (internal citations and quotation marks omitted)).

101. *Id.*; see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”).

worthwhile goal.<sup>102</sup> Areas of unprotected speech include the following categories: incitement of imminent lawless activity,<sup>103</sup> true threats to a particular individual,<sup>104</sup> face-to-face “fighting words” intended to cause a violent reaction,<sup>105</sup> obscene speech appealing to the prurient interest,<sup>106</sup> and child pornography.<sup>107</sup> Because of the unique environmental characteristics of the school environment, the government may also regulate student speech under certain situations where it could not otherwise regulate adults.<sup>108</sup>

### 1. *Prior Restraint Law*

A prior restraint can be generally defined as restricting speech in advance of its dissemination on the basis of content.<sup>109</sup> Under the prior restraint doctrine, the government is limited in its ability to restrain protected expression before it is disseminated, even though the same expression could be constitutionally subjected to punishment after the fact through civil and criminal liability.<sup>110</sup> This preference is rooted in a foundational tenet of U.S. law as it departed from English rule: a free society prefers to punish those who abuse rights of speech *after* they break the law, rather than to suppress them and all others beforehand.<sup>111</sup> Scholars have explained this tenet by illustrating that subsequent punishment still allows the communication to reach the market place of ideas—for whatever it may be worth.<sup>112</sup> Thus, the analysis turns on the nature and form of the government’s regulation, rather than the content of the particular expression,<sup>113</sup> and typically takes one of two classic formulations: judicial injunctions and administrative licensing schemes.<sup>114</sup>

Scholars have argued that prior restraints are also more procedurally inhibiting than subsequent punishment for the activity because they bring a wider range of expression under government scrutiny and will likely be abused and more commonly utilized than adjudicating through the criminal process

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102. Hayward, *supra* note 37, at 102; *see also Black*, 538 U.S. at 358–59 (“The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” (internal citations and quotation marks omitted)).

103. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

104. *Black*, 538 U.S. at 344.

105. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

106. *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that unprotected obscene speech must appeal to the prurient interest, depict or describe sexual conduct in a patently offensive way, and lack serious literary, artistic, political, or scientific value).

107. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

108. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

109. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 42 (10th Cir. 2013) (citing ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 978–79 (4th ed. 2011)).

110. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984).

111. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBS. 648, 650 (1955); Marin Scardato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 4 (1989).

112. Emerson, *supra* note 111, at 657.

113. Redish, *supra* note 110, at 53.

114. *Taylor*, 713 F.3d at 42 (citing CHERMERINSKY, *supra* note 109).

after the expression has taken place.<sup>115</sup> This is problematic because the procedure of obtaining a prior restraint does not require the same safeguards as the criminal process (used in after-the-fact punishment), and allows less opportunity for public appraisal and criticism.<sup>116</sup> Systems of prior restraints place the decision to censor in the hands of a single judge, rather than subjecting it to the criminal process and adjudication by jury, which would occur if the expression were punished after it occurred.<sup>117</sup>

Moreover, as the U.S. Supreme Court articulated in *City of Lakewood v. Plain Dealer Publishing Co.*, the “mere existence of the [government’s] unfettered discretion [to screen and punish], coupled with the power of prior restraint, intimidates parties into censoring their *own* speech, even if the discretion and power are never actually abused.”<sup>118</sup> Thus, the prior restraint was not pernicious only because of what it chose to censor, but also because of the “threat to censure comments on matters of public concern”—it is the “pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.”<sup>119</sup> Thus, concerns of self-censoring innocent speech remain even if the system of prior restraints is not actually abused.

Historical judicial wariness toward systems of prior restraints underlines the skepticism that has led prior restraints to be considered presumptively invalid.<sup>120</sup> Prior restraint jurisprudence was re-invigorated in 1931 under *Near v. Minnesota*,<sup>121</sup> where the U.S. Supreme Court held that a law permitting the government to obtain a court order stopping publication of defamatory newspapers created an unconstitutional prior restraint.<sup>122</sup> Noting that the chief purpose of the guarantee of freedom of the press is to prevent previous restraints upon publication, the Court emphasized that the “object and effect” of the statute at issue was to “suppress” future publication and put “the publisher under an effective censorship,” which amounted to a constitutionally impermissible prior restraint.<sup>123</sup> The case clarified that the ban on prior restraints was not unlimited, but was subject to limitation only in exceptional cases including: obstruction of the draft, sailing dates of transports or the location and number of troops, requirements of decency against obscene publications, incitements of violence or overthrow of government by force, and protection of private rights under equitable law.<sup>124</sup> Additionally, the Court specifically highlighted that “for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous

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115. *Burch v. Barker*, 861 F.2d 1149, 1155 (9th Cir. 1988) (quoting THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970), *quoted in* WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* (6th ed. 1986)).

116. *Id.*

117. Emerson, *supra* note 111, at 657.

118. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) (emphasis added).

119. *Id.* at 757 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

120. Emerson, *supra* note 111, at 649.

121. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 712 (1931); Emerson, *supra* note 111, at 649.

122. Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 *MERCER L. REV.* 1087, 1090 (2001).

123. *Id.* at 1090–91 (quoting *Near*, 283 U.S. at 712).

124. *Near*, 283 U.S. at 716.



restraints upon publications” because the victims at issue could find remedies under other proceedings providing for redress.<sup>125</sup>

Later cases continued to stress the extraordinary nature of a valid prior restraint. In *New York Times Co. v. United States*, the U.S. Supreme Court denied a government request for an injunction against publication of confidential Pentagon Papers by the *New York Times* and *Washington Post*.<sup>126</sup> Although each Justice wrote a separate opinion, the per curiam opinion focused entirely on the prior restraint and stressed that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,”<sup>127</sup> and thus, the government carries a “heavy burden of showing justification for the imposition of such a restraint.”<sup>128</sup> Key explanations came from Justice Stewart’s concurring opinion, stating that a prior restraint was impermissible if the disclosure would not “surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>129</sup> Justice Brennan’s concurrence used similar language, stating that “only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”<sup>130</sup> Then, in *Nebraska Press Association v. Stuart*, the U.S. Supreme Court struck down a state court order prohibiting the publishing or broadcasting of confessions implicating the accused.<sup>131</sup> In doing so, the Court declared, “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”<sup>132</sup> Additionally, the Supreme Court in both *Nebraska Press* and *New York Times* required those seeking to impose a prior restraint to demonstrate the likelihood of harm with a “high degree of certainty.”<sup>133</sup>

This rigid history emphasizes that courts must *begin* with the heavy presumption against the prior restraint as the starting point for their analysis.<sup>134</sup> Then, those seeking the restraint must present clear and convincing evidence that the release of information would pose an “imminent, not merely a likely, threat to the administration of justice” and that this danger is not remote, but rather would “immediately imperil.”<sup>135</sup> Next, courts should explore alternatives to restraints and require support that the desired restraint will

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125. *Id.* at 718–19.

126. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

127. *Id.* (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

128. *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

129. *Id.* at 730 (Stewart, J., concurring).

130. *Id.* at 726–27 (Brennan, J., concurring); *see also id.* at 715 (“I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia . . . Court of Appeals . . . for the reasons stated by my Brothers Douglas and Brennan.”) (Black, J., concurring).

131. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 541 (1976).

132. *Id.* at 559.

133. Meyerson, *supra* note 122, at 1100.

134. *Alexander v. United States*, 509 U.S. 544, 550 (1993); Meyerson, *supra* note 122, at 1100–01 (“[T]he restraint struck down in *Nebraska Press* was not a permanent gag order but applied only until a jury was impaneled. Thus, [even] a preliminary injunction . . . poses the same threat to First Amendment freedoms as the traditional presumptively invalid restraint.”)

135. Meyerson, *supra* note 122, at 1101 (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

effectively prevent the feared harm.<sup>136</sup>

Within the school speech context, prior restraints have primarily been analyzed within the context of school newspaper censorship or the screening of student materials distributed *on campus*, stressing the enhanced ability of schools to regulate through prior restraints.<sup>137</sup> For example, in *Taylor v. Roswell Independent School District*, the Tenth Circuit dismissed a student's First Amendment claims after her school district prevented her from distributing 2,500 rubber fetus dolls to other students on campus.<sup>138</sup> In part, the school had prevented distribution because the student violated its "Distribution of Non School Sponsored Literature" policy, which required that students obtain approval from the school administration before distributing more than ten copies of "any non-school sponsored literature."<sup>139</sup> The court held that the school district's preapproval requirement resembled an administrative licensing scheme because it required approval before engaging in certain speech.<sup>140</sup> Noting that preapproval requirements should be limited to "obviate the dangers of . . . censorship" and that prior restraints often run afoul of the First Amendment when permitting broad official discretion, the court nonetheless held that students' "First Amendment rights [are] circumscribed 'in light of the special characteristics of the school environment.'"<sup>141</sup> Because schools must perform the traditional function of "inculcat[ing] the habits and manners of civility,"<sup>142</sup> they must be allowed more discretion in addressing student speech occurring on campus, and thus, the court held that they "may regulate some speech 'even though the government could not censor similar speech outside the school.'"<sup>143</sup>

Some courts addressing on-campus prior restraints have also required that the school's approval policy contain adequate procedural safeguards. For example, in *Westfield High School L.I.F.E. Club v. City of Westfield*, the district court held that a high school's Free Speech Policy and Distribution

136. *Id.* at 1101.

137. See generally *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972); *Fujishima v. Bd. of Educ.*, 460 F.2d 1355 (7th Cir. 1972); *Riseman v. Sch. Comm. of Quincy*, 439 F.2d 148 (1st Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971).

138. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 29 (10th Cir. 2013).

139. *Id.* at 32. The policy allowed approval to be withheld if the school district administration "reasonably determines" that the distribution:

- a. Would cause a substantial disruption or a material interference with the normal operation of the school or school activities.
- b. Is potentially offensive to a substantial portion of the school community due to the depiction or description of sexual conduct, violence, morbidity or the use of language which is profane or obscene and which is inappropriate for the school environment as judged by the standards of the school community.
- c. Is libelous or which violates the rights of privacy of any person.
- d. Is false or misleading or misrepresents facts.
- e. Is demeaning to any race, religion, sex, or ethnic group
- f. Encourages violation of local, state or federal laws.

*Id.* at 32–33.

140. *Id.* at 42.

141. *Id.* at 45 (quoting *Morse v. Frederick*, 551 U.S. 393, 405 (2007)).

142. *Id.* (quoting *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996)).

143. *Id.* (quoting *Morse*, 551 U.S. at 406).

Policy Regarding Literature Unrelated to Curriculum was an unconstitutional prior restraint.<sup>144</sup> The policy required an administrator to review and approve literature distributed on school grounds, and allowed only “responsible speech” to be distributed in a manner avoiding disruptions of student mobility.<sup>145</sup> In the case, the school’s Bible club was prevented from distributing religious literature to other students on campus during non-instructional time.<sup>146</sup> The court said, “To limit the stifling of free expression, school policies acting as prior restraints on private speech must comport with constitutional limitations, . . . and must contain procedural safeguards in an ‘effort to minimize the adverse effect of prior restraint.’”<sup>147</sup> Procedural safeguards require that the policy contain narrow, objective, and reasonable standards to judge the material, contain a reasonably short time for the administrator to grant or deny the request to distribute literature, and include an expeditious review procedure of the school’s decision.<sup>148</sup> Although the court specified that the school may exercise prior restraint upon a student’s literature distributed on school premises during school hours,<sup>149</sup> the policy at issue was held to be unconstitutional because it did not limit the school’s discretion under the required constitutional and procedural standards.<sup>150</sup>

Other courts have analyzed school-imposed prior restraints for on-campus speech within the context of a public forum analysis. In addressing on-campus restraints, these courts stress that because the public school’s campus is not a public forum, the school may forbid or regulate types of on-campus speech, asking only whether the restrictions are reasonable.<sup>151</sup> For example, in *Muller by Muller v. Jefferson Lighthouse School*, the Seventh Circuit upheld the school’s system of prior restraint after a student’s request to hand out invitations to a religious meeting during school was denied.<sup>152</sup> In relevant part, the student had failed to give a copy to the principal for written permission at least twenty-four hours before distribution.<sup>153</sup> In upholding the prior restraint, the Seventh Circuit began its analysis by emphasizing that public junior high and elementary schools are nonpublic forums, where the teaching of civility and need to structure the educational environment are important concerns.<sup>154</sup> It stressed that school facilities could only be considered public forums if school authorities had “‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public.’”<sup>155</sup> Thus, within such a nonpublic forum, prior restraints on student speech are constitutional if reasonable, and

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144. Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 127 (D. Mass. 2003).

145. *Id.* at 103.

146. *Id.* at 104.

147. *Id.* at 124 (quoting *Riseman v. Sch. Comm. of Quincy*, 439 F.2d 148, 149–50 (1st Cir. 1971)).

148. *Id.* at 125–26.

149. *Id.* at 125 (citing *Quarterman v. Byrd*, 453 F.2d 54, 58–59 (4th Cir. 1971)).

150. *Id.* at 127–30.

151. See, e.g., *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996).

152. *Id.* at 1532, 1540, 1545 (noting that the issue was whether the school’s system of prior restraint was reasonable since the school is a nonpublic forum).

153. *Id.* at 1532, 1540.

154. *Id.* at 1540.

155. *Id.* at 1539 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)).

oftentimes prior restraints are reasonable because they “can be an important tool in preserving a proper educational environment,” especially for young children in elementary schools.<sup>156</sup> Consequently, after noting that the procedural safeguards in the policy were reasonable, the court held that even content-based restrictions are allowed in nonpublic forums if reasonable to preserve the forum for the purpose for which it was created.<sup>157</sup> Accordingly, the court held that the school’s prior restraint policy passed constitutional muster.<sup>158</sup>

It is important to note that each case analyzing prior restraints within the school setting has addressed prior restraints as applied to materials actually distributed *on campus*.<sup>159</sup> Even those cases applying the public forum framework to justify reasonable prior restraints have analyzed the *on-campus* school environment as the relevant forum in question.<sup>160</sup> However, no case to date has addressed the application of prior restraint law to *off-campus* restrictions on student speech. This observation will be analyzed in Part III.

## 2. *True Threat Doctrine*

As mentioned above,<sup>161</sup> “true threats” do not fall within the protection of the First Amendment, and thus, the state may generally proscribe this category of speech, even in a public forum. In *Virginia v. Black*, a case involving cross-burnings outside of the school environment, the Court affirmed that “true threats” do not fall within the protection of the First Amendment.<sup>162</sup> True threats “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>163</sup> Although the speaker need not actually intend to carry out the threat, the prohibition on true threats protects individuals from fear of violence and the possibility that the threatened violence will occur.<sup>164</sup> Thus, “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death,” this speech is unprotected by the First Amendment.<sup>165</sup>

This category of unprotected speech is important for the purposes of this Article because schools may regulate true threats without infringing on the

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156. *Id.* at 1540.

157. *Id.* at 1542. In reaching its holding, the court applied the *Tinker* standard. *Id.*

158. *Id.*

159. *Do Schools that Permit the Distribution of Student Religious Literature Give Up All Control over How It Is Done?*, FIRST AM. CTR. (Jan. 4, 2005), <http://www.firstamendmentcenter.org/do-schools-that-permit-the-distribution-of-student-religious-literature-give-up-all-control-over-how-it-is-done> (“[C]ourts have repeatedly held . . . that schools may place reasonable . . . restrictions on all student materials distributed on campus.”).

160. See generally *Frequently Asked Questions—Speech*, FIRST AM. CTR., <http://www.firstamendmentcenter.org/faq/frequently-asked-questions-speech> (last visited Sept. 9, 2016) (discussing the rights of schools to limit free speech on campus in cases where public forum frameworks are used).

161. See *supra* Section II.D.

162. *Virginia v. Black*, 538 U.S. 343, 367 (2003).

163. *Id.* at 359.

164. *Id.* at 360.

165. *Id.*

student's First Amendment rights.<sup>166</sup> Thus, regulation of true threats is beyond the scope of this analysis and will be unaffected by this Article's proposed standard, as it may be regulated both in and out of schools upon only a rational basis review. Additionally, regardless of whether a school can discipline the student for a "true threat," the student would still be subject to criminal penalties because the speech is not protected.<sup>167</sup> However, speech not amounting to a "true threat" remains protected, and school discipline may only be enforced if consistent with the student speech framework set forth in Section II.D.3.<sup>168</sup>

Currently, courts tend to apply the "true threat" doctrine in cases of school discipline for threatening off-campus speech, upholding school discipline if the student's off-campus speech constitutes a true threat.<sup>169</sup> Some scholars claim that this approach fails to appropriately limit the jurisdiction of the school, and urge that courts require a significant connection between the off-campus threatening speech and the school before applying the true threat doctrine to uphold school discipline.<sup>170</sup> However, the U.S. Supreme Court has not yet addressed this suggestion.

This doctrine is particularly important to the analysis of proactive student speech regulation because it demonstrates that schools may already punish the most serious types of off-campus student speech under the First Amendment as unprotected true threats, and thus, additional proactive measures should necessitate courts to apply particular caution.

### 3. *Special Circumstances: School Speech*

The U.S. Supreme Court has stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."<sup>171</sup> In addition to true threats, the Court has enumerated four other main circumstances when student speech does not enjoy First Amendment protection and may thus be constitutionally regulated by school officials.<sup>172</sup> These include when speech is: (1) materially and substantially disruptive to the school environment or at least creates a reasonably foreseeable risk of such disruption (*Tinker v. Des Moines*);<sup>173</sup> (2) plainly lewd or offensive at a school-sponsored event, regardless of the *Tinker* analysis (*Bethel School District v. Fraser*);<sup>174</sup> (3) school-sponsored, so as to be

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166. See, e.g., *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 624–25 (8th Cir. 2002) (recognizing that certain speech restrictions may not infringe one's First Amendment rights); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617–18 (5th Cir. 2004).

167. Steve Varel, *Limits on School Disciplinary Authority over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 449 (2013).

168. *Id.*

169. *Id.* at 448.

170. *Id.*

171. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

172. See Olivia A. Weil, *Preserving the Schoolhouse Gates: An Analytical Framework for Curtailing Cyberbullying Without Eroding Students' Constitutional Rights*, 11 AVE MARIA L. REV. 541, 546 (2013) (listing five main circumstances in which school officials may constitutionally regulate student speech).

173. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

174. *Bethel*, 478 U.S. at 680.

reasonably attributed as the school's own speech (*Hazelwood School District v. Kuhlmeier*);<sup>175</sup> or (4) pertains to illegal drug use (*Morse v. Frederick*).<sup>176</sup> The fragmented approach taken by the U.S. Supreme Court in each of these cases regarding on-campus speech creates particular problems as lower courts attempt to apply these standards to student speech occurring wholly off campus. Unlike on-campus speech, the U.S. Supreme Court has never considered a case dealing with wholly off-campus school speech.<sup>177</sup> Furthermore, Chief Justice Roberts hinted at the difficulties inherent in regulating off-campus speech in *Morse*, writing, "There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents."<sup>178</sup> He cited a footnote from a 2004 Fifth Circuit opinion that noted that the court was "aware of the difficulties posed by state regulation of student speech that takes place off-campus and is later brought on-campus either by the communicating student or others to whom the message was communicated."<sup>179</sup> In response, lower courts have developed differing approaches to address off-campus speech.<sup>180</sup>

Despite diverging approaches, each prior case in the lower courts has followed a similar, *reactive* format and is characterized by punishment imposed on students *after* cyberbullying speech has taken place and been disseminated online.<sup>181</sup> In each of these scenarios, the student first disseminated the speech and a third party (such as another student, teacher, police officer, or parent of another student) reported the speech to the school, which then imposed the challenged discipline.<sup>182</sup> Two examples of this reactive chain of events have been provided below for illustration purposes. The only case relevant to analyzing proactive efforts by the school is also highlighted, though no conclusion was reached regarding the merits of its First Amendment argument.

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175. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

176. *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

177. Clay Calvert, *Punishing Public School Students for Bashing Principles, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 222–23 (2009).

178. *Morse*, 551 U.S. at 401 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

179. *Porter*, 393 F.3d at 615 n.22.

180. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280 (5th Cir. 2014); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Nixon v. Hardin Cty. Bd. of Educ.*, 988 F. Supp. 2d 826 (W.D. Tenn. 2013); *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767 (N.D. Ind. 2011); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010); *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010); *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

181. See cases cited *supra* note 180.

182. *Id.*

a. Cases Analyzing Reactive Discipline

Schools have assumed a reactive role in all federal cases to date involving regulation of online student speech disseminated wholly off campus.<sup>183</sup> Regardless of the approach the school ultimately took to analyze the student speech punishment, the school only became aware of the student speech after the speech was disseminated by the student and later brought to the school's attention by a third party.

For example, in *Bell v. Itawamba County School Board*, an aspiring student rapper composed vulgar and violent lyrics to criticize two of the school's athletic coaches for sexually harassing other female students.<sup>184</sup> The song was composed off campus, recorded in a professional studio not affiliated with the school, and posted on the student's Facebook and YouTube page using his home computer.<sup>185</sup> The school was alerted to the lyrics after the wife of one of the athletic coaches was informed of the posting, which prompted the coach to alert the principal, and ultimately led to the student's suspension.<sup>186</sup> Holding that the *Tinker* standard should not be applied to off-campus speech, the court held that *Tinker* applied only in and out of the classroom while the student was on campus during authorized hours.<sup>187</sup> However, in reversing the student's suspension, the court noted that even if *Tinker* did apply, no reasonable forecast of a material and substantial disruption had been shown, and thus, the student's First Amendment rights had been violated.<sup>188</sup>

Even courts using alternate approaches have only analyzed reactive school punishments.<sup>189</sup> In *Wynar v. Douglas County School District*, a high school student engaged in a string of violent and threatening instant messages through MySpace.<sup>190</sup> The student sent these messages from home to his friends, bragging about his weapons and threatening to shoot specific classmates, which invoked images of the Virginia Tech massacre.<sup>191</sup> When the messages became increasingly violent, his friends reported the messages to the principal, who then questioned the student.<sup>192</sup> Although the court upheld the student's discipline, it declined to determine whether *Tinker* applied to all off-campus speech.<sup>193</sup> Instead, the court asked whether the conduct bore a sufficient nexus to the school, stating, "Given the subject and addressees of [the student's] messages, it is hard to imagine how their nexus to the school could have been more direct."<sup>194</sup> Thus, the court found that it should have been reasonably foreseeable to the student that his messages would reach

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183. *Id.*

184. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 282 (5th Cir. 2014).

185. *Id.*

186. *Id.* at 285–86.

187. *Id.* at 293–94.

188. *Id.* at 290–91.

189. Varel, *supra* note 167, at 448.

190. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1065–66 (9th Cir. 2013).

191. *Id.*

192. *Id.* at 1066.

193. *Id.* at 1069.

194. *Id.*

campus because of the alarming nature of the messages.<sup>195</sup>

b. Cases Relevant to Analyzing Proactive Efforts

The only case implicating aggressive school efforts to combat cyberbullying, *R.S. ex rel. S.S. v. Minnewaska Area School District No. 2149*,<sup>196</sup> resulted in settlement<sup>197</sup> and did not directly address the merits of First Amendment concerns inherent in demanding social media passwords and monitoring student speech.<sup>198</sup> Although this case occurred after the student had spoken, the school's actions and the court's response are relevant to analyze a potential predecessor to proactive monitoring efforts. In the case, the school disciplined a student for two Facebook posts expressing her dislike of a school employee after students reported the messages to the school principal.<sup>199</sup> Then, another male student's guardian reported to the school that her son and the student speaker had been communicating about "sexual topics" on the Internet.<sup>200</sup> Following this report, the student was called out of class twice, taken into the deputy sheriff's room in the administrative office, and forced to disclose her e-mail and Facebook usernames and passwords.<sup>201</sup> Feeling threatened, the student provided this information, and the administrators logged into her Facebook account to view her public postings and private messages to search for the "naughty" discussion with her classmate.<sup>202</sup> In denying the school's motion to dismiss,<sup>203</sup> the court did not analyze the school's demand of social media passwords for its First Amendment impact; but it is instructive that the court cited to a holding by the Eighth Circuit that school officials may not simply "reach out to discover, monitor, or punish any type of out of school speech."<sup>204</sup> The court did, however, conclude that under the Fourth Amendment, the student had a reasonable expectation of privacy in her private communications, and that the government did not have a legitimate interest to justify perusing the student's private communications.<sup>205</sup>

### III. ANALYSIS

While the issue of jurisdiction over off-campus speech remains undecided, it is critical that courts pay special attention to the dangers of proactive monitoring of student speech. Assuming *arguendo* that the *Tinker* standard will be used to analyze off-campus speech, as most lower courts have

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195. *Id.*

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

197. Brown, *supra* note 63.

198. *R.S. ex rel. S.S.*, 984 F. Supp. 2d at 1138–40.

199. *Id.* at 1133–34.

200. *Id.* at 1134.

201. *Id.*

202. *Id.*

203. *Id.* at 1148–49.

204. *Id.* at 1139.

205. *Id.* at 1142–43.



done, courts to date have only applied this framework in the context of *reactive* school discipline.<sup>206</sup> Each of those cases have fit within a similar chronological pattern: students challenge a punishment imposed upon them *after* their online speech was disseminated into the marketplace of ideas and reported to the school by a third party.<sup>207</sup>

However, these reactive cases do not raise the same prior restraint concerns because all government action is in *response* to speech that has already occurred, rather than through proactive surveillance akin to censorship.<sup>208</sup> At the time of this writing, no case had analyzed proactive measures or the impact that these novel tactics will have on the *Tinker* standard as applied to off-campus student speech. Cases involving proactive monitoring are even more troubling than the jurisdictional uncertainty they create, as they raise heightened concerns associated with presumptively impermissible prior restraints.

This Part will focus exclusively on proactive cyberbullying prevention efforts, which have been insufficiently analyzed in current jurisprudence. It will first explain that proactive online measures should be analyzed as a system of presumptively impermissible prior restraints occurring in an online public forum and thus, should be required to pass heightened scrutiny modeled from prior restraint doctrine. The Part will then conclude by demonstrating the host of First Amendment and other legal infringements on students' rights that will result without this heightened standard.

#### A. *Proactive Efforts as a Prior Restraint*

The underlying policy concerns rendering prior restraints presumptively unconstitutional directly parallel First Amendment concerns with proactive cyberbullying prevention policies, implicating that both should be evaluated under a similar heightened standard.<sup>209</sup> As discussed earlier, the core tenets of free speech protection specify that the government may not restrain expression prior to its dissemination, even though that same expression could be constitutionally punished after its dissemination.<sup>210</sup> This is because of the underlying presumption that prior restraint is more harmful than punishing the speech after the fact.<sup>211</sup> Proactive monitoring of online speech by schools challenges this exact presumption. These novel efforts diverge from the traditional pattern of punishment *following* a known student speech violation and transform it into a restraint on expression *before* dissemination through

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206. See cases cited *supra* note 180.

207. *Id.*

208. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969); see also *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 42 (10th Cir. 2013) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (“Generally, a ‘prior restraint’ restricts speech in advance on the basis of content and carries a presumption of unconstitutionality.”)).

209. See, e.g., James F. Shekleton, *The Campus as Agora: The Constitution, Commerce, Gadfly Stonecutters, and Irreverent Youth*, 31 J.C. & U.L. 513, 513 (2005).

210. Emerson, *supra* note 111, at 650; Redish, *supra* note 110, at 53.

211. *Id.*

monitoring surveillance or speech guidelines for private, off-campus speech.<sup>212</sup> Thus, these measures amount to a prior restraint via administrative regulation.<sup>213</sup> In addition to this functional similarity, the underlying policy rationales disfavoring prior restraints are identically applicable to proactive cyberbullying prevention efforts and further illustrate that these regulations amount to prior restraints on student speech.<sup>214</sup> Thus, both should be presumptively unconstitutional because they (1) are not the exclusive remedy to combat the harm; (2) strip the speaker of procedural protections characteristic of reactive litigation; and (3) amount to forbidden censorship on speech.

First, reactive regulation is sufficient to remedy the harm posed both under prior restraint cases and off-campus student speech cases.<sup>215</sup> In *Near v. Minnesota*, the Court highlighted that “for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications,” because the victims at issue could find remedies under other proceedings providing for redress.<sup>216</sup> Similarly, despite compulsory education laws beginning in 1852,<sup>217</sup> and school speech regulation reaching the U.S. Supreme Court in *Tinker* in 1969, the recent developments in technology have triggered the novel attempt to reach beyond conduct at the school (or affecting the school) and search through the wholly off-campus affairs of students.<sup>218</sup> Even earlier prior restraint cases within the school speech context have each involved speech actually disseminated *on* or near the school’s *campus*.<sup>219</sup> Additionally, victims of cyberbullying may still rely on tort law (e.g., libel, defamation) and criminal laws such as harassment and cyberstalking, which are sufficient to deter future impermissible conduct.<sup>220</sup> Just as prior restraint law operates on the presumption that punishment following dissemination will usually constitute sufficient deterrence against future violations,<sup>221</sup> schools must operate similarly and assume that students

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212. Samantha M. Levin, *School Districts as Weathermen: The School’s Ability to Reasonably Forecast Substantial Disruption to the School Environment from Students’ Online Speech*, 38 FORDHAM URB. L.J. 859, 870 (2011).

213. See *Taylor*, 713 F.3d at 42 (“[T]he District’s preapproval requirement resembles an administrative licensing scheme because it requires preapproval for student speech that is non school-related and involves distribution of more than 10 items of literature on school grounds.”).

214. *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 776 (9th Cir. 2014).

215. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 718–19 (1931) (highlighting that “for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications” because the victims at issue could find remedies under other proceedings providing for redress).

216. *Id.*

217. Vicky Grocke, *Compulsory Education*, U. NOTRE DAME, <https://www3.nd.edu/~rbarger/www7/compulso.html> (last visited Sept. 16, 2016).

218. See generally *Technology in the Classroom*, U.S. NEWS, <http://www.usnews.com/education/technology-in-the-classroom> (last visited Sept. 16, 2016) (“[P]roliferation of social media and technology has changed the way educators teach, how students learn, and the way teachers and students communicate.”).

219. See *supra* Section II.D.

220. King, *supra* note 28, at 852.

221. 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15:10 (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (“[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.”)). This preference is because “[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate

aware of these punishments will be sufficiently deterred to avoid impermissible speech suppression.

Second, like a prior restraint, proactive efforts to suppress student speech severely limit procedural safeguards.<sup>222</sup> Under a system of prior restraint, the decision to suppress speech is determined by an administrative—rather than by criminal—procedure<sup>223</sup> (without its associated constitutional guarantees of the presumption of innocence, burden of proof beyond a reasonable doubt, etc.).<sup>224</sup> Additionally, the decision to restrain rests with a single government official, negating the value of a jury to check government limitations on freedom of expression.<sup>225</sup> Similarly, preventative school monitoring tactics suppress speech at the school level, without the same procedural safeguards that would result from a trial against the cyberbully under tort law or criminal law.<sup>226</sup> Furthermore, the determination of what will be considered acceptable speech is vested in the hands of the school district administrators, who draft policies to execute the cyberbullying prevention legislation by a majoritarian legislature.<sup>227</sup> These administrative actions are then subject to only limited forms of judicial review, which is frequently before a tribunal linked to the school administrators or may even be unavailable in practice.<sup>228</sup> School decisions regarding prevention efforts are also generally conducted at the school level, without public appraisal and criticism, and only reach public knowledge if students protest<sup>229</sup> or bring a subsequent lawsuit against the school to challenge these actions. Moreover, these proactive measures often leave minor students, most susceptible to coercive environments,<sup>230</sup> without a choice but to obey.

Third, and most importantly, both prior restraints and proactive cyberbullying efforts amount to impermissible censorship on potentially innocent speech.<sup>231</sup> In *Near v. Minnesota*, the U.S. Supreme Court began with the basic principle that “[e]very freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom

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speech is often so finely drawn that the risks of freewheeling censorship are formidable.” *Se. Promotions*, 420 U.S. at 559 (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

222. *See, e.g.*, *Burch v. Barker*, 861 F.2d 1149, 1155 (9th Cir. 1988) (quoting THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970), *quoted in* WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* (6th ed. 1986)) (explaining that the procedure of obtaining a prior restraint does not require the same safeguards as the criminal process (used in after-the-fact punishment), and allows less opportunity for public appraisal and criticism).

223. Emerson, *supra* note 111, at 657.

224. *Id.*

225. *Id.*

226. *Id.*

227. Clark, *supra* note 32.

228. Emerson, *supra* note 111, at 657–58.

229. *See, e.g.*, Meza, *supra* note 74.

230. *See* *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (“The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.”); *see also* *J.D.B. v. North Carolina*, 564 U.S. 261, 262 (2011) (noting that within the interrogation context, “[c]hildren generally are less mature and responsible than adults, . . . they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, and they are more vulnerable or susceptible to . . . outside pressures than adults.” (internal citations and quotation marks omitted)).

231. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931).

of the press,” though he may be subject to punishment as a consequence of illegal speech.<sup>232</sup> Thus, under a system of subsequent punishment, the communication has already taken place before the government takes action, and so has already reached the market place of ideas—for whatever it may be worth.<sup>233</sup> However, if the communication is banned under a system of prior restraint, it never reaches the market place at all, or it must be withheld until it is approved (at which time it may have become obsolete).<sup>234</sup>

Furthermore, the very existence of prior restraints raises concerns of self-censorship, even if the prior restraint is never abused.<sup>235</sup> Because the determination of a prior restraint violation is at the discretion of a third-party administrator or judge, speakers may self-censor even completely innocent speech in fear of running afoul of the prior restraint. Similarly, when schools proactively monitor off-campus student speech, students may fear that their purported speech will fall within one of the broad categories alerting school officials. Students may thus avoid speaking altogether to avoid the uncertainty of discipline or calling attention to their speech.

Knowing that surveillance technology is often based on computerized algorithms “triggered” by buzzwords, students may also choose to completely avoid speech on certain topics to avoid discipline even though their speech would have been entirely innocuous.<sup>236</sup> Especially when school districts limit speech under vague guidelines such as anything deemed “inappropriate” by school administrators, self-censorship to avoid discipline is almost inevitable.<sup>237</sup> This chilling effect is particularly detrimental to children, as it prevents students’ social development because they are unable to receive necessary social feedback from their peers through discourse.<sup>238</sup> Moreover, given the increasing prevalence of citizen journalists contributing to the marketplace of ideas,<sup>239</sup> this self-censorship is especially concerning. Thus, like a prior restraint, students’ knowledge that their school is watching them constantly, on and off campus, whenever they post, will breed an anxious culture of self-censorship as students struggle to obey vague prohibitions by guessing what may or may not constitute impermissible speech at the whim of school administrators.<sup>240</sup>

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232. *Id.* at 713–14.

233. Emerson, *supra* note 111, at 657.

234. *Id.*

235. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

236. NCAC Staff, *A Machine of Paranoia: How Concerns for Student Safety May Chill Speech*, NAT’L COALITION AGAINST CENSORSHIP (Sept. 18, 2014), <http://ncac.org/blog/a-machine-of-paranoia-how-concerns-for-student-safety-may-chill-speech/> [hereinafter *A Machine of Paranoia*].

237. Gregory, *supra* note 74.

238. Anna Boksenbaum, Note, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y. CITY L. REV. 123, 170 (2005).

239. See Chris Measures, *The Rise of Citizen Journalism*, SOC. MEDIA TODAY (May 1, 2013), <http://www.socialmediatoday.com/content/rise-citizen-journalism>.

240. See *A Machine of Paranoia*, *supra* note 236.

### B. Heightened Prior Restraint Standard

The parallels between proactive cyberbullying prevention tactics and systems of prior restraint highlight that courts must pay special attention to preventive off-campus student speech regulation. Because prior off-campus speech cases have not dealt with proactive monitoring by schools, and cases dealing with prior restraints in schools have only dealt with speech actually disseminated on campus, neither is directly on point. This Section proposes a framework to analyze proactive regulation efforts in order to both respect schools' need to maintain an educational environment free from substantial disruption and preserve students' constitutional rights.

First, it is important to underscore that lower courts have taken different, yet similarly insufficient, approaches to analyze prior restraints within schools. Some have upheld prior restraints under *Tinker* if the school could reasonably forecast a material and substantial disruption, whereas others have first noted that schools are nonpublic, or limited public forums in some cases, and thus, "prior restraint of student speech . . . is constitutional if reasonable."<sup>241</sup> However, this relaxed inquiry into "reasonability" under both approaches is not enough to protect students' First Amendment rights in the context of prior restraints.<sup>242</sup>

Additionally, lower courts analyzing the reasonability of school prior restraints have only analyzed speech disseminated on campus. With off-campus cyberbullying, however, the speech is not disseminated on the school's campus (the nonpublic forum). Rather, it is disseminated off campus on the Internet, which is more similar to a traditional public forum.<sup>243</sup> A public forum includes streets, sidewalks, and parks—places that by long tradition or

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241. *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1532, 1539–40 (7th Cir. 1996).

242. *See Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)) ("The presumption is heavier against 'prior restraints,' and the protection therefore greater, because 'prior restraints on speech and publications are the most serious and the least tolerable infringement on First Amendment rights.'").

243. The Court has not clearly ruled on the forum analysis required for the Internet generally. Past cases dealing with prior restraints on student speech and the Internet have regulated student activity on the Internet when the activity takes place on campus. *See, e.g., Crosby v. S. Orange Cty. Cmty. Coll. Dist.*, 91 Cal. Rptr. 3d 161 (App. 4th Dist. 2009).

The Court has also issued dicta implying that the court may deem the Internet to be a public forum. Although the Internet was developed recently and has not been "time out of mind, . . . used for purposes of . . . communicating thoughts between citizens, and discussing public questions," *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939), Justice Kennedy indicated in a concurring opinion that "open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property. . . . Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 697–98 (1992) (Kennedy, J., concurring). *But compare* *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) ("The Court has rejected the view that traditional public forum status extends beyond its historic confines . . .") with *Reno v. ACLU*, 521 U.S. 844, 851–53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web). However, past cases analyzing the nature of the Internet forum have typically involved a particular website's host and analyzed the purpose of the particular website rather than the Internet generally. *E.g., Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000); *see also Pearson Liddell Jr. et al, This Little Piggy Stayed Home: Accessibility of Governmentally Controlled Internet Marketplaces*, 15 ALB. L.J. SCI. & TECH. 31, 48 (2004) (discussing cases that have applied the forum analysis to the Internet and websites).

government fiat are devoted to assembly and debate<sup>244</sup>—and content-based state regulations must withstand strict scrutiny, or be narrowly tailored to serve a compelling state interest.<sup>245</sup> Accordingly, if the Internet is classified as a traditional public forum, this already heightens the analysis of lower courts to uphold a prior restraint as school speech regulations must withstand strict scrutiny, rather than the reasonableness threshold required of content-based regulations in limited or nonpublic forums.<sup>246</sup>

Thus, regardless of approach, any analysis must begin with the “heavy presumption against [the] constitutional validity” of any system of prior restraints under *New York Times Co. v. United States*, requiring the government to carry a “heavy burden of showing justification for the imposition of such a restraint” with clear and convincing evidence.<sup>247</sup> Therefore, upon imposition of a policy involving proactive monitoring of off-campus speech, the government will face a presumption of unconstitutionality and must make an evidentiary showing to support the necessity of the regulation. Like prior restraints, the policy will not be invalid *per se*<sup>248</sup> but must surpass a heightened level of scrutiny in order to adequately protect students’ First Amendment rights. Next, understanding the unique characteristics of the school environment, the showing required by the government should conflate the *Tinker* test for a reasonably foreseeable material and substantial disruption and the examples of permissible prior restraints given in *New York Times*.<sup>249</sup> Thus, the government should be required to show that it was reasonably foreseeable that the publication would inevitably, directly, and immediately cause an occurrence of an event equivalent to jeopardizing national security within the school context.<sup>250</sup> By replacing the “material and substantial disruption” language from *Tinker* with the language from *New York Times* heightening the severity of the result, this amended standard requires that the disruption claimed by the school be serious enough to surpass heightened scrutiny and justify infringing on the students’ First Amendment rights.

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244. *Putnam Pit*, 221 F.3d at 842–43 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

245. *Id.*

246. *Id.* at 843.

247. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

248. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (“Labeling respondents’ action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional *per se*.”).

249. *See N.Y. Times*, 403 U.S. at 714; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

250. This standard recognizes the commonalities between Justices Stewart and White’s concurring opinions requiring “immediate, and irreparable damage to our Nation or its people” and Justices Brennan, Black, and Douglas’s requirement that the “publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea.” *N.Y. Times*, 403 U.S. at 726–30.

C. *Application to Proactive School Efforts*

The suggested standard would apply to lower courts analyzing school prior restraints directly under *Tinker* as well as those performing a forum analysis. Because the off-campus speech took place on the Internet at large, which is a public forum,<sup>251</sup> rather than a limited forum (as when speech is disseminated on campus), the content-based regulation must pass strict scrutiny.<sup>252</sup> However, like the general analysis for prior restraints, the proposed standard for proactive student monitoring efforts comes with a presumption of unconstitutionality and thus rises above the strict scrutiny standard, allowing for consistent application regardless of the court's forum analysis.

In practice, this heightened standard would have an impact on the nature of the policies crafted by school districts,<sup>253</sup> eliminating concerns of vagueness and punishment for innocent speech.<sup>254</sup> First, the requirement that the proactive policy may only be imposed to restrict speech that would directly cause an occurrence equivalent to jeopardizing national security within the school context would eliminate vague policies. In order to meet this strict standard, policies such as the one instituted in California's Lodi Unified School District forbidding "inappropriate" speech<sup>255</sup> would not pass constitutional muster because they provide no indication that regulation would be limited to speech directly causing such serious events. To demonstrate this level of gravity, school policies must specify that the school is only monitoring evidence of imminent shootings or violence at school, a student's planned invasion into the school's confidential files, or other specific incidents that it can prove would rise to an equivalent level of severity within the school context as a threat to national security. This would also be consistent with the accepted ability of schools to discipline true threats. For example, under a proactive monitoring scheme with adequate procedural safeguards, punishment for off-campus student speech threatening to get a gun and shoot students at school would still be upheld, as it was in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60* under the *Tinker* standard.<sup>256</sup> This heightened standard would also protect students from being monitored and disciplined for speech that is "harmlessly made in jest" such as the racy photos in *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*<sup>257</sup>

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251. See *supra* note 243 (discussing the Internet as a public forum).

252. See *Promotions*, 420 U.S. at 546.

253. See generally Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, 2011 B.Y.U. EDUC. & L.J. 75 (2011) (suggesting policies regarding personal digital devices).

254. While scholars have noted that legislative cyberbullying regulation may also raise First Amendment concerns regarding vagueness, overbreadth, and viewpoint discrimination, an in-depth analysis of those issues is beyond the scope of this Article. See generally Hayward, *supra* note 37, at 118–22 (discussing First Amendment challenges regarding cyberbullying regulations).

255. Gregory, *supra* note 74.

256. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 756–57 (8th Cir. 2011).

257. *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 772 (N.D. Ind. 2011); see also Adam Cohen, *Case Study: Can School Punish Students for Posting Racy Photos Online?*, TIME (Aug. 22, 2011), <http://content.time.com/time/nation/article/0,8599,2089729,00.html> (discussing the aforementioned Indiana case).

By applying a prior restraint standard to proactive student speech monitoring efforts, school social media policies would also be forced to include adequate procedural safeguards designed to obviate the dangers of censorship and ensure that students are aware of the policy's terms.<sup>258</sup> Under prior restraint law, a valid prior restraint must be:

[P]receded by notice to the persons restrained, and an opportunity for them to be heard, or, where prior notice and hearing are not practicable, the persons restrained must be afforded an opportunity for a prompt final judicial determination of the propriety of the restraint so that the deterrent effect of the . . . possibly erroneous restraint will be minimized.<sup>259</sup>

This requirement is consistent with earlier school prior restraint cases such as *Westfield High School L.I.F.E. Club v. City of Westfield*, requiring that policies contain narrow, objective, and reasonable standards to judge the material, provide a reasonably short time for the administrator to grant or deny the request to distribute literature, and include an expeditious review procedure of the school's decision.<sup>260</sup> With these requirements, uncertainty over the policy's parameters would be eliminated, which would reduce student self-censorship. Additionally, students would be given the opportunity for a prompt final judicial determination of the propriety of the restraint to avoid children feeling threatened and without a choice to hand over their personal information.<sup>261</sup>

Finally, application of this heightened standard would also be easily administrable by courts.<sup>262</sup> This proposed change is modest, requiring that courts utilize a standard almost identical to the analysis for prior restraints, which has been in effect for more than eighty years.<sup>263</sup> Initial cases would need to delineate exactly which imminent events rise to the level of being equivalent to threatening national security within the school context. However, this determination would be no more burdensome than determining what constitutes a "material and substantial disruption" under a direct application of the *Tinker* standard, because it is still a case-by-case inquiry, depending on the facts of each case.<sup>264</sup> Additionally, definitions of what constitutes a material and substantial disruption have still not been definitively delineated, resulting in equivalent confusion.<sup>265</sup>

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258. See 16B C.J.S. *Constitutional Law* § 940: Requirements of Valid Prior Restraint—Procedural Safeguards (2016) (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)).

259. *Id.* (citing *ISKCON, Inc. v. Schmidt*, 523 F. Supp. 1303 (D. Md. 1981); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *U.S. v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972)).

260. *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 125–26 (D. Mass. 2003).

261. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1134 (D. Minn. 2012).

262. For a more thorough explanation of the administrative ease of prior restraint law, see Emerson, *supra* note 111, at 648–49.

263. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (expanding the standard set in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 712 (1931)).

264. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

265. See *infra* notes 280–82 (illustrating existing lower court discrepancies regarding what activity rises to constitute a "material and substantial" disruption).



#### D. *Ramifications of Unfettered Proactive Efforts*

This Section underlines the importance of creating a heightened standard to analyze proactive cyberbullying regulation as a presumptively impermissible prior restraint on student speech by demonstrating the legal ramifications that will result without such a standard. The current inconsistent applications of school speech jurisprudence to off-campus student expression demonstrate that the present framework is ill suited to handle these novel, proactive efforts. Furthermore, if proactive regulations are analyzed under the current fragmented framework, they will dramatically expand the reach of *Tinker* to off-campus student speech and risk infringing on students' constitutional and legal rights.

##### 1. *Expansion of School Speech Jurisdiction*

Without a heightened standard to evaluate proactive regulations as prior restraints, schools allowing regular monitoring will have a detrimental impact on First Amendment protection for student speech. As articulated by the Eighth Circuit in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*:

School officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech. When a report is brought to them about a student threatening to shoot specific students at school, however, they have a “difficult” and “important” choice to make about how to react consistent with the First Amendment.<sup>266</sup>

To this point, it is illustrative to examine how proactive measures analyzed under only the present *Tinker* standard (and without a heightened prior restraint analysis) would burden vast amounts of protected speech under the current approaches to analyze off-campus student speech.<sup>267</sup>

First, it must be conceded that the impact on courts applying the Fourth Circuit's jurisdictional requirement that the content or nature of the off-campus speech have a sufficient “nexus” to the school<sup>268</sup> will be largely unaffected if used to analyze proactive school efforts. In *Kowalski v. Berkeley County Schools*, the school discovered a student's harassing MySpace webpage after parents became aware of the website and notified the school's vice principal.<sup>269</sup> In concluding that the punishment of the student did not offend the student's First Amendment rights, the court specified that the “nexus” of the student's speech to the school's pedagogical interests was sufficiently strong to justify the action taken by administrators on behalf of the student body's well-

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266. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 765 (8th Cir. 2011) (citing *Morse v. Frederick*, 551 U.S. 393, 401, 409 (2007)).

267. *Tinker*, 393 U.S. at 513–14; *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 772 (N.D. Ind. 2011) (analyzing proactive measures to prohibit off-campus student speech).

268. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068–69 (9th Cir. 2013) (citing *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011)).

269. *Id.* at 568.

being.<sup>270</sup> Because the content of the speech went against the high school's interest in the "order, safety, and well-being of its students," the nexus requirement was met based on the nature of the speech at issue.<sup>271</sup> Thus, because the "nexus" test focuses on the *nature* and *content* of the speech itself, and turns on whether the subject matter is sufficiently connected to the school such that it would be reasonably foreseeable to create a material or substantial disruption, the analysis is not affected by *how* the school discovered the activity. For example, if the school district in *Kowalski* had instituted monitoring programs like California's Glendale Unified School District,<sup>272</sup> and discovered the MySpace page after being alerted by a monitoring company, the content of the speech would remain constant, and the court would have likely reached the same outcome of finding a sufficient nexus, and would have thus upheld the discipline.

However, the proactive monitoring efforts would dramatically change jurisdictional outcomes under the Eighth Circuit's approach, which requires that it be "reasonably foreseeable that the speech will reach the school community."<sup>273</sup> Under this method of analysis, proactive monitoring would ultimately bring *all* student speech under the jurisdiction of the school, and thus subject to regulation. For example, in *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*, the school became aware of two students' shared blog that discussed, satirized, and vented about events at the high school after the "student body at large learned about [the website]."<sup>274</sup> In upholding discipline of the students, the Eighth Circuit focused on the fact that because the speech was "targeted" at the high school, the posts could "reasonably be expected to reach the school or impact the environment."<sup>275</sup> However, if the school had instituted proactive monitoring measures, the court would not have even reached the analysis of the "targeted" speech itself. Because students would be aware of the monitoring or investigatory procedures, *all* speech would be reasonably expected to reach the school community and would thus fall under the school's disciplinary jurisdiction. A similar test was used in *Wisniewski v. Board of Education of Weedsport Central School District*, where the Second Circuit upheld discipline of a student for sending instant messages from his home computer to other students using icons to represent killing the student's English teacher.<sup>276</sup> After a fellow student informed the English teacher about the icon, the school launched an investigation.<sup>277</sup> The court held that it was "reasonably foreseeable that the IM icon would come to the attention of school authorities," because of the threatening content and extensive distribution of the icon during a three-week circulation period.<sup>278</sup>

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270. *Id.* at 573.

271. *Id.*

272. Caesar, *supra* note 86.

273. *Wynar*, 728 F.3d at 1068–69 (quoting *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012)).

274. *S.J.W.*, 696 F.3d at 774.

275. *Id.* at 778.

276. *Wisniewski v. Bd. of Educ. of Weedsport Ctr. Sch. Dist.*, 494 F.3d 34, 35 (2d Cir. 2007).

277. *Id.*

278. *Id.* at 38–40.

However, had the school instituted proactive, suspicionless monitoring efforts, or had previously demanded the student's password, all speech would become "reasonably foreseeable . . . [to] come to the attention of school authorities," because the same school authorities would be actively scanning and analyzing this information for all of its students as a regular practice.<sup>279</sup> Thus, student speech would lose substantial protection under the jurisdictional limits of the *Tinker* standard used by the Eighth and Second Circuits.<sup>280</sup>

Additionally, courts looking to whether off-campus online speech was ultimately accessed on campus would see expanded jurisdiction. Although this issue has primarily arisen within the context of tangible student newspapers, some courts have upheld punishment for students publishing newspapers off campus so long as there is in fact on-campus distribution, regardless of who brought the speech to campus.<sup>281</sup> In *Boucher v. School Board of Greenfield*, the court upheld punishment of a student under *Tinker* where the student's newspaper had somehow made its way to campus, even though it was not by the student's own doing, focusing merely on the fact that there had been on-campus distribution "in fact."<sup>282</sup> Thus, courts using this view will be forced to find that in situations where the school is proactively monitoring students, all speech becomes distributed on campus "in fact"<sup>283</sup> from the moment school authorities access the speech from their office.

Furthermore, the impact of proactive monitoring may be illustrated under the facts of *Emmett v. Kent School District No. 415*.<sup>284</sup> In *Emmett*, the court held that the student had a substantial likelihood of success on the merits of his First Amendment violation where the school had disciplined him for creating a webpage with mock "obituaries" of his friends, which he created at home without any school resources.<sup>285</sup> Because the speech was created completely off campus without any school involvement, the court held that the "speech was entirely outside of the school's supervision or control."<sup>286</sup> This conclusion is extremely important because it equates off-campus speech to being outside of the school's supervision or control. However, proactive measures create the opposite conclusion for off-campus speech and expressly bring it within the supervision and control of the school. Thus, just as the Third Circuit warned in *Layshock v. Hermitage School District*, proactive monitoring allows the "state, in the guise of school authorities, [to] reach into a child's home and control his or her actions there to the same extent that it can control that child when he or

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279. *Id.* at 38.

280. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

281. *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998).

282. *Id.*

283. *But see J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932–33 (3d Cir. 2011) ("[T]he fact that another student printed [the online speech in question] and brought it to school at the express request of [the administration] does not turn [the student's] off-campus speech into on-campus speech."). The impact of proactive efforts on courts following the Third Circuit's approach in *Snyder* would likely remain unchanged.

284. *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000).

285. *Id.* at 1089–90.

286. *Id.* at 1090.

she participates in school-sponsored activities.”<sup>287</sup>

## 2. *Surpassing Tinker Parameters*

Analyzing proactive efforts by schools under the present, less rigorous framework would also result in discipline for student speech beyond the constitutionally permissible scope delineated in *Tinker*, and may result in violations of associated constitutional and legal rights of students.

For example, the proactive online student speech monitoring instituted by the Glendale Unified School District in California alerts third-party analysts based on terms indicating “controlled substances, self-harm, disruption of class or school activities, hazing, sexual harassment of peers or teachers, threats or acts of physical violence, use of fake identification, hate speech, racism, weapons and suicide or despair.”<sup>288</sup> Similarly, the SAFe proactive monitoring program in Alabama monitors for gang signs, threats of violence, images of guns, and threats of suicide on Facebook.<sup>289</sup> Internal documents explaining the SAFe program showed examples of four students, none on school grounds, posing on Facebook with handguns.<sup>290</sup>

However, the breadth of terms used in both monitoring programs reaches far beyond the scope of activity that schools may discipline under *Tinker*. Even under its broadest interpretation, *Tinker* still requires that school authorities “reasonably . . . forecast substantial disruption of or material interference with school activities . . .”<sup>291</sup> Additionally, the “substantial disruption” required for discipline under *Tinker* must be more than mere student trash-talking, phone calls from disgruntled parents, or students temporarily missing class.<sup>292</sup> Courts have enumerated serious issues that are indicative of substantial disruption to include a “decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school.”<sup>293</sup> Thus, the broad subjects monitored by the schools would run afoul of the type of substantial disruption that may be disciplined under *Tinker*, and allow the school to monitor constitutionally protected speech that may be morally disfavored or unpopular, but not disruptive.

For example, in *Nixon v. Hardin County Board of Education*, the student was disciplined for using Twitter to state that she was going to “‘shoot [another student] in the face,’ with an image of a girl’s face, a gun and hashtags ‘nolie’ and ‘hopeshereadsthis.’”<sup>294</sup> The court ultimately denied summary judgment for the school.<sup>295</sup> The court specified that the speech had no connection to the school whatsoever other than the fact both speaker and target of speech studied

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287. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011).

288. Caesar, *supra* note 86.

289. Stephens, *supra* note 81.

290. *Id.*

291. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

292. *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 782 (N.D. Ind. 2011) (citing *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1117–19 (C.D. Cal. 2010)).

293. *Id.* at 783–84 (citing *Zamecnik v. Indian Prairie Sch. Dist.*, 636 F.3d 874, 876 (7th Cir. 2011)).

294. *Nixon v. Hardin Cnty. Bd. of Educ.*, 988 F. Supp. 2d 826, 830 (W.D. Tenn. 2013).

295. *Id.* at 389.

there; the speech was not made at school, directed at the school, nor involved use of school time or equipment; and no disruption of school activities or impact on school environment had been shown.<sup>296</sup> However, despite the *Nixon* court's ruling, the image of the gun and threat of violence would have alerted school administration to the post under the terms of both Alabama's SAFE program and Glendale Unified School District's monitoring program, ultimately subjecting the student to discipline.<sup>297</sup>

Additionally, in *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*, the court held that a school could not constitutionally discipline two high school students for posting racy photos of themselves at a slumber party on MySpace, Facebook, and Photo Bucket.<sup>298</sup> In that case, all activity took place off campus and the school could not point to any student disruption during school activities, but rather, could only point to two parent complaints that raised the issue to the school's attention.<sup>299</sup> Therefore, the court said that, like *Tinker*, the photos at best "caused discussion outside of the classrooms, but no interference with work and no disorder."<sup>300</sup> The court concluded that punishing students based on the *disfavored nature* of what is nonetheless protected speech was unconstitutional as "such a distinction between the worthwhile and the unworthy is exactly what the First Amendment does not permit."<sup>301</sup> However, under policies like California's Lodi Unified School District's social media contract, which allowed schools to discipline students for "general inappropriate language of a profane or sexual nature" or "other inappropriate behavior as deemed so by [the school],"<sup>302</sup> this type of speech is likely to be targeted for the same disfavored nature prohibited by the court in *Smith-Green Community School Corp.*, opening student speakers to otherwise unconstitutional discipline.<sup>303</sup>

A similar analysis would also apply to monitoring for student suicide. Although prevention is desirable, it is uncertain that this type of activity would result in any material or substantial disruption to the school environment. For example, in the spring of 2013, Glendale Unified School District in California picked up on a post from a teenager who spoke of "ending his life" on social media.<sup>304</sup> After the monitoring service learned of the student's suicidal thoughts, the school administration intervened, claiming that it saved the child's life.<sup>305</sup> While this outcome may be positive, this mindset of using surveillance to keep kids safe is incorrect and may chill speech made in jest,<sup>306</sup> or speech that might not rise to a material or substantial disruption of school activities.

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296. *Id.*

297. Stephens, *supra* note 80; Caesar, *supra* note 86.

298. *T.V.*, 807 F. Supp. 2d at 772; *see also* Cohen, *supra* note 257 (discussing this case).

299. *T.V.*, 807 F. Supp. 2d at 783.

300. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)).

301. *Id.* at 784.

302. *Id.*

303. *Id.* at 790.

304. *A Machine of Paranoia*, *supra* note 236.

305. *Id.*

306. *Id.*

### 3. *Other Legal Violations*

Expanding the scope of school regulation through proactive monitoring efforts without requiring any form of heightened scrutiny also poses risks outside of the First Amendment. For example, these aggressive tactics may infringe on students' constitutional rights under the Fourth Amendment and other legal obligations accompanying the use of communication forums. Although an in-depth analysis of these rights is beyond the scope of this Article, noting these negative effects further emphasizes the need for courts to apply a rigorous prior restraint presumption of unconstitutionality to address these novel policies.

First, allowing proactive monitoring of student accounts by imposing a more lenient standard may violate students' Fourth Amendment right to privacy,<sup>307</sup> as schools collecting sensitive information about their students may subsequently put this private data in the hands of for-profit companies.<sup>308</sup> In response to the fear of misappropriating the information gathered through companies like Geo Listening (employed by Glendale Unified School District in California), some states have attempted to curb the ability of schools to retain this personal information. For example, Virginia and California have prohibited public institutions of higher education from selling information about students (including their names, addresses, and e-mail addresses).<sup>309</sup> Other states, such as Louisiana, Rhode Island, and Maine, protect students from having to give school officials access to their personal social media accounts.<sup>310</sup> Still, because many states do not yet have these measures, students will risk losing their privacy to overzealous school monitoring policies if not held to a heightened standard.

Additionally, mild regulation of blanket proactive efforts forcing students to share their passwords to social media sites and e-mail accounts risks violating students' other legal obligations. Because students with social media accounts must typically agree to the site's terms and conditions before proceeding, mandated monitoring or investigation efforts by the school may force students to violate their agreement with the account provider. For example, Facebook's Statement of Rights and Responsibilities Section 4.8 reads, "You will not share your password . . . , let anyone else access your account, or do anything else that might jeopardize the security of your account."<sup>311</sup> Thus, the present framework may result in forcing students to violate the terms of their social media agreements.

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307. Note that the word "privacy" is not actually used in the text of the U.S. Constitution; nonetheless, it has often been read to be included in "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV; *see also Your Fourth Amendment Right to Privacy*, TIME, [http://content.time.com/time/video/player/0,32068,1027506447001\\_2080296,00.html](http://content.time.com/time/video/player/0,32068,1027506447001_2080296,00.html) (last visited Sept. 16, 2016).

308. *A Machine of Paranoia*, *supra* note 236.

309. Natasha Singer, *With Tech Taking over in Schools, Worries Rise*, N.Y. TIMES (Sept. 14, 2015), <http://www.nytimes.com/2014/09/15/technology/with-tech-taking-over-in-schools-worries-rise.html>.

310. *Id.*

311. Matyszczyk, *supra* note 72 (citing *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Sept. 16, 2016)).

## IV. CONCLUSION

While lower courts continue to grapple with jurisdiction over off-campus student speech, they must pay particular attention to develop appropriate standards in the novel arena of proactive, preventative regulation. The presumption against systems of prior restraint in our country is rooted in a strongly held belief that punishment after dissemination is superior to suppression before the communication is issued because the communication is still able to reach the marketplace of ideas—for whatever it is worth. Despite the unique concerns of the school environment, it has remained constant that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>312</sup> Thus, because proactive monitoring tactics are akin to presumptively unconstitutional systems of prior restraint, they pose extreme risks for the violation of students’ constitutional rights and must be analyzed under a similar rigorous standard applied to administrative regulatory forms of prior restraints.

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312. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).