



**THIRD-PARTY STUDENT SURVEILLANCE:  
IS MONITORING STUDENT SPEECH GOING TO PREVENT  
THE NEXT SCHOOL SHOOTING?**

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ABSTRACT

*The frequency of school shootings in the United States is rising at an alarming rate and in addition, cyberbullying is further harming and victimizing schoolchildren. School districts across the country recognized this fact and sought to prevent these incidents of harm by hiring third-party surveillance companies to monitor the online, off-campus speech of their students. These companies provide school districts with the means to look for harmful online content in an effort to prevent future injury to students, whether the damage be mental or physical. These services, while arguably intrusive on a student’s privacy, have the potential to actually save lives and do not go beyond constitutional limits. This Note will analyze the constitutionality of these companies’ services and how school districts that utilize them can better protect the livelihood of their students.*

TABLE OF CONTENTS

I. INTRODUCTION ..... 216  
 II: A HISTORY OF MONITORING SOCIAL MEDIA ACCOUNTS ..... 219  
 III: AN OVERVIEW OF STUDENT FIRST AMENDMENT FREEDOMS ..... 222  
     A. *The Supreme Court on Student Speech* ..... 222  
     B. *Circuit Splits and the Supreme Court’s Failure to Analyze  
         Student Online Free Speech Rights*..... 223  
     C. *Educators, Too, Lack a National Standard* ..... 226

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IV: WHY SURVEILLING STUDENTS IS A REASONABLE SOLUTION FOR PROTECTING CHILDREN.....	227
A. <i>Social Monitoring Websites Do Not Encroach on Student         First Amendment Rights</i> .....	228
B. <i>This More “Invasive” Approach to Preventing Student         Harm is a Reasonable Means for Schools to Act         Preventatively Compared to Alternative Methods</i> .....	233
V: PROPOSED SOLUTIONS FOR CONCERNS SURROUNDING THE SERVICES OF THIRD-PARTY SURVEILLANCE COMPANIES .....	238
A. <i>School Districts Must Become Transparent</i> .....	239
B. <i>The Supreme Court Must Make a Clear Decision         Determining Student Speech Rights in the Digital Age</i> .....	241
C. <i>The Implementation of Research on Whether These         Companies are Making a Difference</i> .....	243
VI. CONCLUSION .....	244

## I. INTRODUCTION

On February 14, 2018, Nikolas Cruz opened fire at a Parkland, Florida high school, committing what is said to be “one of the worst mass shootings in US history.”<sup>1</sup> Taking the lives of seventeen adults and children, Cruz not only left the nation with another tragedy to grieve, but also left a troubling social media footprint that painted a “disturbing picture” of who this nineteen-year-old truly was.<sup>2</sup> Comments Cruz left on YouTube and other media outlets included, “I whana [sic] shoot people with my AR-15” and “I wanna [sic] die [f]ighting killing s\*\*t ton of people.”<sup>3</sup> Hours after the deadly Parkland shooting, third-party companies that monitor the social media accounts of students started reaching out to school districts to market their services.<sup>4</sup>

1. Elliott C. McLaughlin & Madison Park, *Social Media Paints Picture of Racist Professional School Shooter*, CNN, <https://www.cnn.com/2018/02/14/us/nikolas-cruz-florida-shooting-suspect/index.html> (last updated Feb. 15, 2018, 9:59 PM).

2. *Id.*

3. *Id.*

4. Aaron Leibowitz, *Could Monitoring Students on Social Media Stop the Next School Shooting?*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/social-media-monitoring-school-shootings.html>; cf. Jessica Contrera, *‘Why Did You Do This?’ His Brother Confessed to Gunning down 17 People in Parkland. But He’s the Only Family Zach Cruz Has Left*, WASH. POST (Jan. 25, 2019), [https://www.washingtonpost.com/news/local/wp/2019/01/25/feature/his-brother-confessed-to-gunning-down-17-people-in-parkland-but-hes-the-only-family-zach-cruz-has-left/?utm\\_term=.4d0b1d98bffe](https://www.washingtonpost.com/news/local/wp/2019/01/25/feature/his-brother-confessed-to-gunning-down-17-people-in-parkland-but-hes-the-only-family-zach-cruz-has-left/?utm_term=.4d0b1d98bffe) (telling the story of Cruz’s brother and the resulting aftermath for him); *Unprepared and Overwhelmed*, SUN

Social media monitoring companies like Geo Listening<sup>5</sup> and Social Sentinel<sup>6</sup> aim their services at not only protecting schools from shootings, but from cyberbullying and other student speech that could impact school safety. In 2013, after a fifteen-year-old student leapt to his death from the roof of his Glendale, California high school, his parents sued the Glendale Unified School District claiming that their son was bullied and that school officials failed to intervene.<sup>7</sup> The school district subsequently hired Geo Listening to monitor the social media accounts of “about 14,000 middle and high school students in an attempt to detect bullying, threats, depression, and substance abuse.”<sup>8</sup>

In the past five years, over “100 public school districts and universities” have hired companies like these in the hopes of preventing acts of violence before they happen based on what the companies detect on student social media accounts.<sup>9</sup> While hiring these third-party companies comes with controversy and serious questions regarding the legality of their businesses, these services may be needed now more than ever.<sup>10</sup>

The United States saw a total of 418 mass shootings in 2019, 337 in 2018, and 346 in 2017.<sup>11</sup> To date, there is no categorical definition of “mass shooting” in the United States.<sup>12</sup> The Gun Violence Archive defines a mass shooting as “four or more individuals being shot or killed in the same general time and location,” and the F.B.I. defines a “mass killing” as “the killing of three or more people in a public place,” and a “mass murderer” as “someone who has killed four or more people in the same location.”<sup>13</sup>

Everytown for Gun Safety Support Fund (“Everytown”), a non-profit organization that “seeks to improve [the nation’s] understanding of the

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SENTINEL: PROJECTS (Dec. 28, 2018), <http://projects.sun-sentinel.com/2018/sfl-parkland-school-shooting-critical-moments/#nt=oft09a-2gp1> (displaying a “minute-by-minute look” of the events that unfolded at Marjory Stoneman Douglas High School on February 14, 2018).

5. See GEO LISTENING, <https://geolistening.com/> (last visited Dec. 30, 2019).

6. See SOC. SENTINEL, <https://socialsentinel.com/> (last visited Dec. 30, 2019).

7. Stephen J.J. McGuire et al., *Geo Listening at the Glendale Unified School District*, 3 J. CASE RES. & INQUIRY 188, 188 (2017).

8. *Id.*

9. Leibowitz, *supra* note 4.

10. *See id.*

11. Courtland Jeffrey, *Mass Shootings in the U.S.: When, Where They Have Occurred in 2018*, ABC 15 ARIZONA, <https://www.abc15.com/news/data/mass-shootings-in-the-us-when-where-they-have-occurred-in-2018> (last updated Feb. 15, 2019, 4:25 PM); *Mass Shootings in 2019*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/reports/-mass-shooting> (last visited Dec. 30, 2019).

12. *See Jeffrey, supra* note 11.

13. *Id.*

causes of gun violence and the means to reduce it,”<sup>14</sup> began tracking gun use on school grounds in 2013 in response to the lack of information on the issue.<sup>15</sup> In its six years of tracking, Everytown estimated that each year, three million American children are exposed to shootings either in their schools, their communities, or their own homes.<sup>16</sup>

A main objection to school districts using third-party companies to monitor social media is that such use infringes student free speech rights.<sup>17</sup> Opponents argue that this form of “spying” on schoolchildren is an invasion of privacy that will result in a “chilling effect” upon students’ free speech.<sup>18</sup> Additionally, some view these programs as invasive and inappropriate, as they represent “an expansion of the schools’ ability to police what students are doing inside of school or on campus to their outside-of-school conduct.”<sup>19</sup>

While opponents express valid concerns, these objections should not prevent schools from hiring companies like Geo Listening and Social Sentinel because their services do not violate students’ First Amendment free speech rights. The Supreme Court recognizes that while students have free speech rights, those rights can be limited in a school setting.<sup>20</sup> Lower courts have also recognized that those rights can be limited off school grounds, too.<sup>21</sup> Traditionally, courts give great deference to schools

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14. EVERYTOWN FOR GUN SAFETY SUPPORT FUND, <https://everytownresearch.org/> (last visited Dec. 30, 2019).

15. *Gunfire on School Grounds in the United States*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (Feb. 11, 2019), <https://everytownresearch.org/gunfire-in-school/#12737>.

16. *See id.* (listing all school shootings, including their dates and locations, that occurred in the United States since 2013).

17. *See, e.g.*, Emily Siner, *Why Spying on Our Kids to Solve Cyberbullying Might Not Work*, NPR (Sept. 17, 2013, 1:26 PM), <https://www.npr.org/sections/alltechconsidered/2013/09/16/223185991/why-spying-on-our-kids-to-solve-cyberbullying-might-not-work>.

18. *See id.*

19. Lynn Jolicoeur & Lisa Mullins, *To Detect Threats and Prevent Suicides, Schools Pay Company to Scan Social Media Posts*, WBUR NEWS (Mar. 22, 2018), <http://www.wbur.org/news/2018/03/22/school-threats-suicide-prevention-tech>.

20. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 513 (1969) (“[C]onduct by the student, in class or out of it, which for any reason . . . 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.”); *see also* discussion *infra* Part IV.A.

21. *See D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011) (holding that because it was reasonably foreseeable that the out of school threats would create a risk of substantial disruption in the school environment, the threats were not protected speech under the First Amendment). *But see R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp. 2d 1128, 1134, 1142 (D. Minn. 2012) (holding that a school district violated a student’s Fourth Amendment rights by requiring the student to provide school officials with her email and Facebook login credentials because the student had a “reasonable expectation of privacy to her private Facebook information and messages”). *See also* discussion *infra* Part IV.A.

in deciding what is best for their students,<sup>22</sup> and this deference should follow when schools consider taking alternative initiatives to protect children from online harm. As long as schools take proper precautions when contracting with third parties, such as increasing transparency with families and following the requisite child privacy protection laws, these companies have the potential to truly make a difference in the well-being of American schoolchildren. Additional research on the success of these companies in preventing harm would also help schools demonstrate why third-party monitoring companies benefit the students.

In light of a national mass shooting epidemic and growing suicide rates,<sup>23</sup> contracting with third-party student surveillance companies is a legitimate means for school districts to achieve the ends of preventing future school shootings and cyberbullying. The action school districts are taking to monitor students' online activities is justified in light of the prevalence of gun violence and does not violate a student's First Amendment rights. Part II of this Note provides a history of social media monitoring and a clear definition as to what Geo Listening and Social Sentinel do for school districts. Part III discusses the legal history of student free speech rights and the current circuit split regarding off-campus student speech in the digital age. It also discusses the impact this split has on educators in deciding for what speech educators may discipline students. Part IV analyzes why surveilling students is a reasonable solution to protecting students from harm and why these services do not limit the constitutional freedoms of students. Part V recommends several solutions to current concerns regarding the services of third-party surveillance companies, including a requirement for school districts to become more transparent, a need for Supreme Court guidance on this issue in the digital age, and the encouragement to conduct active research that considers the success of these programs, thus far.

## II: A HISTORY OF MONITORING SOCIAL MEDIA ACCOUNTS

Social media is well-integrated into the lives of millions worldwide, so it is not surprising that social accounts are used to obtain information

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22. See *e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[T]he education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”).

23. See *Suicide Statistics*, AM. FOUND. FOR SUICIDE PREVENTION (2016), <https://afsp.org/about-suicide/suicide-statistics/> (last visited Dec. 30, 2019) (displaying various suicide rate statistics nationwide and describing how “7.4[%] of youth in grades 9-12 reported that they had made at least one suicide attempt in the past 12 months”). This source also shows graphical information of an evident incline in the suicide rates of 15-24-year-olds since 2000. See *id.*

on particular individuals. In fact, “70[%] of employers use social media to screen candidates during the hiring process, and about 43[%] of employers use social media to check on current employees.”<sup>24</sup> Law enforcement agencies also utilize social media to detect crime.<sup>25</sup> Not only are law enforcement agencies retrieving information from social media on their own to monitor targets, surveil communities, and retrieve evidentiary information, but some agencies hired third-party surveillance companies to do that work for them.<sup>26</sup>

GeoFeedia, a company dubbed “TweetDeck for cops,” made headlines after an ACLU investigation revealed that police agencies nationwide used its services to monitor certain protestors with outstanding warrants in order to detain those individuals.<sup>27</sup> GeoFeedia marketed its services specifically to law enforcement agencies.<sup>28</sup>

But despite the backlash for third-party surveillance use in terms of law enforcement, hundreds of schools across the country are signing contracts with other third-party surveillance companies such as Geo Listening and Social Sentinel in the hope that these services will benefit their student bodies.<sup>29</sup>

What does a third-party surveillance company do? Geo Listening, for example, is a monitoring service that processes, analyzes, and reports

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24. Saige Driver, *Keep it Clean: Social Media Screenings Gain in Popularity*, BUS. NEWS DAILY (Oct. 7, 2018, 2:23 PM), <https://www.businessnewsdaily.com/2377-social-media-hiring.html>.

25. See Jonah Engel Bromwich, Daniel Victor & Mike Isaac, *Police Use Surveillance Tool to Scan Social Media*, A.C.L.U. SAYS, N.Y. TIMES (Oct. 11, 2016), <https://www.nytimes.com/2016/10/12/technology/aclu-facebook-twitter-instagram-geofeedia.html>.

26. Rachel Levinson-Waldman, *Government Access to and Manipulation of Social Media: Legal and Policy Challenges*, 61 HOW. L.J. 523, 553 (2018).

27. Ashley Wong, *What is GeoFeedia? The Tool Police Say Could Have Warned Them to Capital Gazette Shooter*, USA TODAY, <https://www.usatoday.com/story/tech/2018/06/30/geofeedia-software-police-say-could-have-helped-track-capital-gazette-shooter/746009002/> (last updated July 1, 2018, 11:25 AM); see Jessica Guynn, *ACLU: Police Used Twitter, Facebook to Track Protests*, USA TODAY, <https://www.usatoday.com/story/tech/news/2016/10/11/aclu-police-used-twitter-facebook-data-track-protesters-baltimore-ferguson/91897034/> (last updated Oct. 12, 2016, 3:06 PM) (discussing the ACLU’s investigation into GeoFeedia and how law enforcement agencies used the company to help detect crime or other acts of violence).

28. See, e.g., Levinson-Waldman, *supra* note 26, at 549 (discussing First, Fourth, and Fourteenth Amendment concerns in regards to law enforcement agencies using social media monitoring technologies and their disproportionate effect on communities of color); Bromwich, *supra* note 25; Nicole Ozer, *Police Use of Social Media Surveillance Software Is Escalating, and Activists Are in the Digital Crosshairs*, MEDIUM (Sept. 22, 2016), [https://medium.com/@ACLU\\_NorCal/police-use-of-social-media-surveillance-software-is-escalating-and-activists-are-in-the-digital-d29d8f89c48#fowkro6dy](https://medium.com/@ACLU_NorCal/police-use-of-social-media-surveillance-software-is-escalating-and-activists-are-in-the-digital-d29d8f89c48#fowkro6dy).

29. See, e.g., Leibowitz, *supra* note 4; McGuire et al., *supra* note 7.

“the adverse social media from *publicly* available student posts” through a daily report.<sup>30</sup> In particular, the service “takes into account [the] frequency and severity” of student social postings in regards to various categories.<sup>31</sup> Social Sentinel has a similar process in which it scans social media for “potential threats” within a community.<sup>32</sup>

Both Geo Listening and Social Sentinel market their services to school districts that seek to prevent student harm stemming from online content. With 95% of American teenagers owning smartphones, and 45% of teenagers claiming to be online “on a near-constant basis,” the internet has a profound effect on student life.<sup>33</sup> As previously mentioned, Glendale Unified School District is one of the schools that hired Geo Listening and entered into a \$40,500 contract with the site to monitor the social media posts of its students, in part, as a response to several teenage suicides in the Glendale school district.<sup>34</sup>

Following suit, over a hundred public schools contracted with monitoring companies, and with the growing frequency of schoolground tragedies, the number of schools utilizing these services continues to increase.<sup>35</sup>

However, while there is growing support for sites like Geo Listening and Social Sentinel, there is also a significant amount of concern regarding these services.<sup>36</sup> Some concern arises from the lack of notice to students, parents, and local school boards about the implementation of the monitoring programs in their own school district.<sup>37</sup> More pressing issues arise concerning the privacy rights of students and their ability to engage in free speech off school grounds.<sup>38</sup> Lastly, extended liability could arise for these schools that sign these monitoring contracts, essentially “expand[ing] the traditional boundaries of their responsibility, and perhaps, experts say, their liability.”<sup>39</sup>

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30. *Schools*, GEO LISTENING, <https://geolistening.com/schools> (last visited Dec. 30, 2019) (emphasis added).

31. *Id.*

32. *Social Media Scanning*, SOCIAL SENTINEL, <https://www.socialsentinel.com/social-media-scanning/> (last visited Dec. 30, 2019).

33. Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RES. CTR. (May 31, 2018), <http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/>.

34. Catherine E. Mendola, *Big Brother as Parent: Using Surveillance to Patrol Students' Internet Speech*, 35 B.C. J.L. & SOC. JUST. 153, 171 (2015).

35. Leibowitz, *supra* note 4.

36. *See id.*

37. *See id.*

38. *See id.*

39. *Id.*

## III: AN OVERVIEW OF STUDENT FIRST AMENDMENT FREEDOMS

A. *The Supreme Court on Student Speech*

Over the years, the Supreme Court has addressed the rights guaranteed to students and their speech under the First Amendment several times. In the landmark case, *Tinker v. Des Moines Independent Community School District*, the Court held that an attempt to restrict students from wearing black arm bands in protest of the Vietnam War on school property infringed the students' First Amendment rights, famously remarking that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>40</sup> The Court came to its conclusion by determining that the school's regulation "could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."<sup>41</sup> This substantial disruption test, or the *Tinker* test, still guides courts today in determining whether a school's restriction of student speech is unconstitutional despite how many more outlets of speech are now available in comparison to those available in the 1960s.<sup>42</sup>

The Court in *Bethel School District v. Fraser* held that suspending a student for using lewd and sexually explicit language during a school assembly did not infringe on the student's constitutional rights, and, further, that schools may restrict speech that is contrary to the educational mission.<sup>43</sup>

The Court then held in *Hazelwood School District v. Kuhlmeier* that public schools can regulate, with some limitations, the content of student newspapers and other publications that the school pays for and bear its name.<sup>44</sup>

In *Morse v. Frederick*, a school principal suspended a student after the student displayed a banner at a school event that the principal believed promoted drug use.<sup>45</sup> The Court held that the principal's decision did not violate the student's rights, and, further, that schools can regulate speech that conflicts with anti-drug policies, or similar school policies, even if the speech does not directly disrupt the educational process.<sup>46</sup>

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40. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 514 (1969).

41. *Id.* at 513.

42. *See, e.g., Doe v. Valencia Coll.*, 903 F.3d 1220, 1231 (11th Cir. 2018).

43. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

44. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988).

45. *Morse v. Frederick*, 551 US 393 (2007).

46. *Id.* at 396, 409–10.



These cases, the latest of which the Supreme Court decided over ten years ago, control the regulation of student speech even in a new and expanding digital age.

*B. Circuit Splits and the Supreme Court's Failure to Analyze Student Online Free Speech Rights*

Despite the internet's prevalence in society today, and student-speech cases needing further Supreme Court guidance, the Supreme Court has yet to grant certiorari to any case involving a student's off-campus online speech.

Taylor Bell, then a high-school senior in Itawamba County, Mississippi, posted a rap to his *public* Facebook page, which alleged "misconduct against female students by Coaches W. and R."<sup>47</sup> Someone took a screenshot<sup>48</sup> of Bell's Facebook page, depicting his profile and the rap, which was available to anyone who wanted to listen to it.<sup>49</sup> One of the coaches mentioned in Bell's rap reported it to the school principal, who subsequently informed the school district superintendent.<sup>50</sup> The next day, the principal, the school district superintendent, and the school-board attorney questioned Bell about his rap,<sup>51</sup> and then sent him home for the rest of the day.<sup>52</sup> While at home, Bell finalized his rap and uploaded it to YouTube; when he returned to school the following week, the assistant principal removed him from class and suspended him "pending a disciplinary-committee hearing."<sup>53</sup> The day after the hearing, the disciplinary committee advised the school board to uphold "Bell's seven-day suspension" and place Bell in "the county's alternative school for the remainder of the nine-week grading period;" Bell subsequently filed an action with his mother claiming that "the school board, superintendent, and principal . . . violated his First Amendment right to free speech."<sup>54</sup>

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47. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015). The case contains a transcript of Bell's rap. *Id.* at 384–85.

48. A "screenshot" is "an image that shows the contents of a computer [or phone] display." *Screenshot*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/screenshot> (last visited Dec. 30, 2019).

49. *Bell*, 799 F.3d at 385.

50. *Id.*

51. *Id.* (discussing Bell's disciplinary hearing with the school, where Bell was questioned "about the rap recording, including the veracity of the allegations, the extent of the alleged misconduct, and the identity of the students involved."); *see also id.* at 385–89 (giving specific details as to the remaining history of Bell's case both within the school and within the judicial system).

52. *Id.* at 385.

53. *Id.*

54. *Id.* at 386–87.

Bell's case made it up to the Fifth Circuit, which ultimately held that Bell's conduct "reasonably could have been forecast to cause a substantial disruption" to the school environment and thus satisfied the *Tinker* test.<sup>55</sup> This holding extended *Tinker* to off-campus speech for the first time in the Fifth Circuit.<sup>56</sup> The majority's highly fact-specific test for determining when *Tinker* applies to off-campus student speech looks to when (1) "a student intentionally directs [speech] at the school community," and (2) "the speech is 'reasonably understood by school officials to threaten, harass, and intimidate a teacher.'"<sup>57</sup>

Bell petitioned the Supreme Court for certiorari, but on February 29, 2016, the Supreme Court denied the petition, leaving lower courts without "clear guidance on the constitutionality of school discipline resulting from students' off-campus electronic speech."<sup>58</sup>

Prior to Bell's case, the Supreme Court also denied certiorari to Blue Mountain School District after the Third Circuit upheld a student's First Amendment challenge.<sup>59</sup> In that case, James McGonigle, the principal of Blue Mountain Middle School in Pennsylvania, suspended J.S., an eighth-grade student, for ten days after the student created a fake Myspace profile of McGonigle.<sup>60</sup> Aside from her school-sanctioned punishment, McGonigle also considered pressing criminal charges against the student.<sup>61</sup> J.S. subsequently challenged several issues relating to her suspension, but what is important here is her First Amendment challenge.<sup>62</sup>

The Third Circuit held for J.S. on her First Amendment claim, stating, "Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school."<sup>63</sup> The Court concluded that holding differently would "significantly broaden school districts' authority over student

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55. *Id.* at 397.

56. See Michael Begovic, Comment and Casenote, *Mo Speech Mo Problems: The Regulation of Student Speech in the Digital Age and the Fifth Circuit's Approach in Bell v. Itawamba County School Board*, 84 U. CIN. L. REV. 499, 517 (2016).

57. Elizabeth A. Shaver, *Denying Certiorari in Bell v. Itawamba County School Board: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1575 (2017) (alteration in original).

58. *Id.* at 1580 (internal quotations omitted).

59. *Blue Mountain Sch. Dist. v. J.S.*, 565 U.S. 1156, 1156 (2012).

60. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920–22 (3d Cir. 2011).

61. *Id.* at 922.

62. *Id.* at 923.

63. *Id.* at 933.

speech and would vest school officials with dangerously overbroad censorship discretion.”<sup>64</sup>

The Ninth Circuit also addressed an online student speech case in which Landon Wynar, then a sophomore at Douglas High School, “engaged in a string of increasingly violent and threatening instant messages sent from home to his friends . . . .”<sup>65</sup> In the messages, Wynar “bragg[ed] about his weapons,” threatened to shoot certain classmates and others on a specific date, and talked about the Virginia Tech massacre.<sup>66</sup> The recipients of the messages alerted school officials who subsequently expelled Wynar for 90 days.<sup>67</sup> Wynar and his father brought suit alleging First and Fourteenth Amendment violations.<sup>68</sup>

In the opinion, the Ninth Circuit discussed how other circuits addressed the issue, but refrained from adopting any of the threshold tests other circuits apply.<sup>69</sup> The Second, Fourth, and Eighth Circuits, for example, applied *Tinker* to certain off-campus speech, but with “some additional threshold test,” such as a “nexus” test or a “reasonably foreseeable” test, “before applying *Tinker* to speech that originates off campus.”<sup>70</sup> Here, the Ninth Circuit focused its decision on the content of the speech, rather than the audience the speech was meant to target, stating, “The approach we set out strikes the appropriate balance between allowing schools to act to protect their students from credible threats of violence while recognizing and protecting freedom of expression by students.”<sup>71</sup> Even though the messages in this case were both directly within the nexus of the school, and reasonably foreseeable

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64. *Id.*

65. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064–65 (9th Cir. 2013).

66. *Id.* at 1065–66 (listing various messages found on Wynar’s Myspace page centering around a prospective school shooting).

67. *Id.* at 1066.

68. *See id.* at 1066–74 (discussing the First and Fourteenth Amendment claims).

69. *Id.* at 1068–70.

70. *Id.* at 1068–69. The Fourth Circuit requires the speech to have a sufficient “nexus” to the school. *Id.* at 1068 (quoting *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011)). The Eighth Circuit “requires that it be ‘reasonably foreseeable that the speech will reach the school community.’” *Id.* (quoting *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012)). And, while “[t]he Second Circuit has not decided ‘whether it must be shown that it was reasonably foreseeable that [the speech] would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability,’” it has “permitted schools to impose discipline based on the speech.” *Id.* (quoting *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007)) (citing *Doninger v. Niehoff*, 526 F.3d 41, 48 (2d Cir. 2008)). The Third and Fifth Circuits have not definitively answered whether *Tinker* applies to off-campus speech. *See, e.g.*, *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926, 930 (3d Cir. 2011); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004).

71. *Wynar*, 728 F.3d at 1070.

to reach campus, the actual content of the messages created “an identifiable threat of school violence,” deserving of disciplinary action despite being a form of off-campus speech.<sup>72</sup> The Court held that Douglas County did not violate the student’s First Amendment rights because it was “reasonable for school officials to forecast a substantial disruption of school activities” and, further, that the disciplinary measures the school took were just.<sup>73</sup> While the parties in this particular case did not petition the Supreme Court for review, other Ninth Circuit decisions involving off-campus student speech appealed to the Supreme Court.<sup>74</sup>

### C. *Educators, Too, Lack a National Standard*

As evidenced above, circuits are split on how to best address off-campus student speech and, for the most part, each has adopted some form of test in deciding related questions.<sup>75</sup> This split not only affects how the judicial system values a student’s free speech rights, but without a national standard, educational institutions are also split on how to value them.

Traditionally, a school administrator’s governance over students ended at the schoolhouse gates and what happened while a child was home was not under their jurisdiction, unless it was brought to their attention by some other means.<sup>76</sup> But each day, issues of online bullying, student complaints, and even cries for help arise off school grounds and, in turn, school administrators may feel obligated to catch these issues to protect their students.<sup>77</sup> Daniel A. Domenech, executive director of the

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72. *Id.* at 1069.

73. *Id.* at 1067, 1073.

74. *See, e.g.,* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1155 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017) (holding that the authority of schools to “discipline students for off-campus speech” has become a more prevalent question for the courts and here, the student’s off-campus speech “was tied closely enough to the school to subject him to the school’s disciplinary authority” in compliance with *Tinker*).

75. *See generally* Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 CASE W. RES. L. REV. 63, 89–91 (2014).

76. *See id.* at 68.

77. Somini Sengupta, *Warily, Schools Watch Students on the Internet*, N.Y. TIMES (Oct. 28, 2013), <https://www.nytimes.com/2013/10/29/technology/some-schools-extend-surveillance-of-students-beyond-campus.html>; *see, e.g.,* Lizette Alvarez, *Felony Counts for 2 in Suicide of Bullied 12-Year-Old*, N.Y. TIMES (Oct. 15, 2013), <https://www.nytimes.com/2013/10/16/us/felony-charges-for-2-girls-in-suicide-of-bullied-12-year-old-rebecca-sedwick.html?module=inline> (advising parents to monitor their own children’s online content after a 14-year-old and 12-year-old girl cyberbullied a fellow classmate into taking her own life); Jamiel Lynch, *Police Accuse Two Students, Age 12, of Cyberbullying in Suicide*, CNN (Jan. 24, 2018, 3:36 PM), <https://www.cnn.com/2018/01/23/us/florida-cyberstalking-charges-girl-suicide/index.html>;

American Association of School Administrators, describes the concern as “cumbersome and confusing” because school districts are unsure of whether a student has the right to their potentially problematic online speech or whether the speech is something that violates a districts’ individual rules and regulations that subjects students to repercussions.<sup>78</sup>

In 2011, the National School Boards Association issued a policy statement in an effort to “help inform policymakers and educators as they develop or reconsider policies addressing new digital media in the context of improved learning.”<sup>79</sup> While the statement primarily advocated for incorporating social media into a school’s curriculum, it also mentioned that while sexting, cyberbullying, inappropriate behavior, and students’ poor judgment on what to share online is mainly an external problem for schools, “educators and policymakers need to identify strategies to help students and parents minimize risk” and recognize the adverse effects of posting to these public and essentially limitless forums.<sup>80</sup>

But despite disagreements over how student online speech should be handled, the bigger question is: whose job is it to protect those harmed?

#### IV: WHY SURVEILLING STUDENTS IS A REASONABLE SOLUTION FOR PROTECTING CHILDREN

As school shootings and student suicide numbers increase, it makes sense for school districts to seek out ways to prevent these events from happening in their own jurisdictions. But what is not clear is whether utilizing third-party surveillance companies is a valid use of a school’s authority, funding, and resources. Despite parents’ potential concerns in school districts hiring outside social media monitoring companies, the benefits of employing them must prevail.

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Robert Salonga & Mark Gomez, *Audrie Pott Suicide: Grim Picture of Saratoga Teen’s Final Online Cries of Despair*, THE MERCURY NEWS, <https://www.mercurynews.com/2013/04/12/audrie-pott-suicide-grim-picture-of-saratoga-teens-final-online-cries-of-despair/> (describing a 15-year-old’s online “cries of despair” that occurred after her classmates sexually assaulted and photographed her, and when she brought the bullying to her school principal, the principal dismissed her claims and later stated that bullying had nothing to do with the student’s suicide) (last updated Sept. 21, 2016, 1:47 PM).

78. Sengupta, *supra* note 77.

79. CONSORTIUM FOR SCH. NETWORKING, MAKING PROGRESS: RETHINKING STATE AND SCHOOL DISTRICT POLICIES CONCERNING MOBILE TECHNOLOGIES AND SOCIAL MEDIA 3 (2011), [https://cdn-files.nsba.org/s3fs-public/reports/MakingProgress.pdf?0TcR\\_Fsnonb6ASi92tb1\\_6F6\\_iCA0SH](https://cdn-files.nsba.org/s3fs-public/reports/MakingProgress.pdf?0TcR_Fsnonb6ASi92tb1_6F6_iCA0SH) (emphasis omitted).

80. *Id.* at 5.

A. *Social Monitoring Websites Do Not Encroach on Student First Amendment Rights*

A school district does not impede its students' First Amendment rights when contracting with a surveilling third-party company.<sup>81</sup> Student free speech has been an important talking point within the American educational system for decades. However, as evidenced above, that freedom is not without its limits. *Tinker* recognized that students have First Amendment rights, but the standard set in *Tinker* allows for government regulation of student speech in ways that "adult" speech could not be regulated outside of a school setting. So, while students should deserve the same level of First Amendment freedoms as any other member of society, certain situations in school settings do call for a limit on those freedoms when other factors are more vital.<sup>82</sup>

First, the First Amendment itself does not protect all forms of speech, and a majority of the speech schools seek to prevent would arguably fall under one of those unprotected categories. The Supreme Court has identified several kinds of speech that do not qualify for First Amendment protections.<sup>83</sup> For example, speech that amounts to "fighting

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81. See generally Nisha Chandran, *Crossing the Line: When Cyberbullying Prevention Operates as a Prior Restraint on Student Speech*, 2016 U. ILL. J.L. TECH. & POL'Y 277, 285, 314 (2016) (describing the connection between the First and Fourth Amendments as "knowledge of unreasonable searches regarding personal communication often chills speech by causing speakers to self-censor" and arguing that "allowing proactive monitoring of students accounts" violates a student's Fourth Amendment right to privacy); R.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128, 1137, 1141, 1142 (D. Minn. 2012) (holding that a school district's requirement of a student to provide school officials with her email and Facebook login credentials because the student had a "reasonable expectation of privacy to her private Facebook information and messages" violated the student's Fourth Amendment rights).

82. See, e.g., Justin Driver, Opinion, *Do Public School Students Have Constitutional Rights?*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/opinion/public-school-constitution-rights.html> (criticizing the Supreme Court's failure to revisit cases relating to the First, Fourth, and Eighth Amendment rights of public-school students, leaving the nation with unclear guidance on addressing those constitutional issues); see also Brian Tashman, *Student Rights at School: Six Things You Need to Know*, ACLU (Sept. 1, 2017, 2:00 PM), <https://www.aclu.org/blog/juvenile-justice/student-rights-school-six-things-you-need-know> (listing six categories where a student's constitutional rights are limited at school—the rights being related to: speech, dress codes, immigration, disabilities, LGBT issues, and pregnancy discrimination).

83. See *Which Types of Speech Are Not Protected by the First Amendment?*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/about/faq/which-types-of-speech-are-not-protected-by-the-first-amendment/> (last visited Dec. 30, 2019) (listing obscenity, fighting words, defamation, child pornography, perjury, blackmail, "incitement to imminent lawless action," true threats, and "solicitations to commit crimes" as unprotected forms of speech).

words,” obscenity, and defamation are all unprotected forms of speech.<sup>84</sup> The Court has also ruled in favor of school districts several times when a student’s speech fell into one of those categories.<sup>85</sup> If a school’s main purpose in hiring third-party surveillance companies is to protect students, it follows that the allegedly chilled speech would likely fall into an unprotected category anyway.

In coming up with its algorithms, “Social Sentinel worked with experts in linguistics, mental health, and public safety” and looked back to the language of past school shooters in order to “understand similarities and patterns” as a way to “teach computers, to an extent, how to identify some of that nuance” in creating its “library” consisting of over 450,000 words.<sup>86</sup> While the system is not perfect, it serves as a means for schools to be “proactive” rather than having to react to “terrible events.”<sup>87</sup>

Social Sentinel describes itself as “an automated, easy-to-use, and powerful solution” that “provides a comprehensive view of [a] schools’ safety and wellness climate as told through the digital conversations occurring in and around it.”<sup>88</sup> The Supreme Court defined “true threats” as “statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>89</sup> The Court in *Virginia v. Black* recognized that “a prohibition on true threats ‘protects individuals from the fear of violence’ and ‘from the possibility that the threatened violence will occur.’”<sup>90</sup> If Social Sentinel is designed to address threats and “concerning language” then it is likely that any student speech the company brought to the attention of his or her school would not have a viable First Amendment claim.<sup>91</sup>

Further, cyberbullying, defined as “the electronic posting of mean-spirited messages about a person (such as a student) often done

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84. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. N.H.*, 315 U.S. 568 (1942) (fighting words).

85. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007); see also *id.* at 425 (Alito, J., concurring) (concluding that “public schools may ban speech advocating illegal drug use” because it presents a “unique threat to the physical safety of students”); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (concluding that a high school assembly was no place for sexually explicit language).

86. *Jolicoeur & Mullins*, *supra* note 19.

87. *Id.*

88. SOCIAL SENTINEL, <https://www.socialsentinel.com/who-we-are/> (last visited Dec. 30, 2019).

89. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

90. *Id.* at 360 (quoting *R. A. V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

91. See *One Central Platform*, SOCIAL SENTINEL, <https://www.socialsentinel.com/one-central-platform/> (last visited Nov. 6, 2019).

anonymously,” runs parallel to the kind of speech—like true threats or harassing statements—that the Supreme Court has deemed as unprotected categories of speech.<sup>92</sup> Harassment—whether online, verbal, or sexual—is also an unprotected form of speech under the First Amendment.<sup>93</sup> While state statutes differ in defining what constitutes harassment, it is generally defined as “creat[ing] an unpleasant or hostile situation . . . especially by uninvited and unwelcome verbal or physical conduct.”<sup>94</sup> In many cases of student deaths by suicide, the student not only was subject to some form of cyberbullying, but also was subject to harassing online attacks for months prior to the student’s death.<sup>95</sup> As cyberbullying is one of the key reasons schools are hiring third-party surveillance companies, any student speech found to constitute “cyberbullying” would also not likely be allotted any First Amendment protection.

A frequent commonality between student speech cases is a school administrator’s fear that the learning environment will be disrupted or otherwise hindered due to a student’s expression.<sup>96</sup> But a primary function of education is to introduce students to certain values and ideas that promote their development and functionality in society, often by encouraging student expression of those very teachings.<sup>97</sup> Because of this function, schools must weigh the burden of protecting the learning environment and protecting student freedoms.

Using resources third-party surveillance companies provide is not an unprecedented infringement of those freedoms, despite the limitations of speech they may consequentially impose. Even though schools may face First Amendment scrutiny when a student’s off-campus activity is

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92. *Cyberbullying*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/cyberbullying> (last visited Dec. 30, 2019).

93. See *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 142, 144–45 (Cal. 1999) (finding an injunction valid because it did “not constitute a prohibited prior restraint of speech, because defendants simply were enjoined from continuing a course of repetitive speech that had been judicially determined to constitute unlawful harassment in violation of the FEHA”).

94. *Harass*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/harass> (last visited Dec. 30, 2019).

95. See Associated Press, *2 12-Year-Olds Arrested for Cyber Bullying in Connection with Suicide of 12-Year-Old Girl*, ABC 13 (Jan. 25, 2018), <https://abc13.com/2-arrested-for-cyber-bullying-after-12-year-old-girls-suicide/2983420/> (describing various demeaning rumors the victim’s bullies started); Associated Press, *Cyberbullying Pushed Texas Teen to Commit Suicide, Family Says*, CBS NEWS (Dec. 2, 2016, 10:00 AM), <https://www.cbsnews.com/news/cyberbullying-pushed-texas-teen-commit-suicide-family/> (detailing the online harassment that the victim’s parents say led to her death).

96. Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CALIF. L. REV. 1269, 1308 n.201 (1991).

97. *Id.* at 1315.



involved, because they can arguably prohibit speech that lies outside the schoolhouse gates, these companies access exclusively *public* information.<sup>98</sup> Therefore, if a student's social profiles are private, the school's reach does not extend beyond those privacy filters.<sup>99</sup> If a student elects to keep his or her online presence public, a third-party software will not detect his or her posts unless the post contains certain pre-determined harmful content, such as words demonstrating self-harm, potential violence against others, or defamatory statements about classmates or teachers.<sup>100</sup>

While this may hinder a student's free speech rights to post publicly without consequence, it does not limit a student's speech in its entirety. Free speech protections are especially important in regard to public expression as opposed to private expression. If the student's public posting was harmful enough to result in school-sanctioned discipline, however, it is just as likely that the content would still reach the school because other students, parents, or even faculty members can report a student's off-campus speech to the school administrators.<sup>101</sup> The essential purpose of the third-party monitor is to create a connection between potentially harmful online student speech and the school.<sup>102</sup> This monitoring serves as a more effective means of protecting students, without relying on others to inform school administrators of harmful situations outside of their personal jurisdictions.<sup>103</sup>

There are valid concerns remaining that programs like Geo Listening's go beyond a school's role in keeping students safe, despite the company's limited access to student content.<sup>104</sup> However, without judicial

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98. See *Schools*, GEO LISTENING, <https://geolistening.com/schools/> (last visited Dec. 30, 2019).

99. See Justin W. Patchin, *Should Schools Monitor Students' Social Media Accounts?*, CYBERBULLYING RES. CTR. (Sept. 17, 2013), <https://cyberbullying.us/schools-monitor-students-social-media-accounts> (stating that a majority of students realize "that what they post in public spaces online is open for anyone to see").

100. McGuire et al., *supra* note 7 at 197.

101. See, e.g., *Doe v. Valencia Coll.*, No. 17-12562, 2018 U.S. App. LEXIS 25918, at \*6 (11th Cir. Sept. 13, 2018) (student, her boyfriend, and her son); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064-65 (9th Cir. 2013) (students); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 568 (4th Cir. 2011) (student and her parents); *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 756 (8th Cir. 2011) (student and "trusted adult"); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 208 (3d Cir. 2008) (school principal); *T.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 772 (N.D. Ind., 2010) (parent).

102. See, e.g., *Jolicoeur & Mullins*, *supra* note 19.

103. See Patchin, *supra* note 99 (weighing the positive and negative aspects of companies like Geo Listening).

104. Associated Press, *Privacy Breach or Public Safety? Teens' Facebook Posts Monitored by School District*, NBC NEWS (Sept. 16, 2013, 12:17 PM),

guidance, decisions regarding what off-campus online speech schools can regulate still ultimately remain in the hands of schools.<sup>105</sup> A student claim that the use of third-party surveillance companies violates constitutional freedoms is not strong, for if the student's online public speech alerted the student's school, there is a possibility that the speech fell into an unprotected category. However, not every form of speech a third-party company flags will necessarily be *unprotected* by the First Amendment. To make this distinction, the courts and schools should work to provide these companies with clear guidance on what speech is protected and what speech is not protected.

Lastly, utilizing a third-party company prevents potential biases in monitoring student speech that could arise if a school employee were instead to take on the role of observing online activity. Bias is a heavily litigated topic not only in school settings, but also in various aspects of everyday life.<sup>106</sup> Racial bias<sup>107</sup> in particular, finds an unfortunately large presence in American school districts. For example, a 2010 U.S. Department of Education's Office for Civil Rights report concluded that "more than 28% of Black male middle school students had been suspended at least once," which is nearly three times more than the suspension rate of white males.<sup>108</sup> In *T.E. v. Pine Bush Central School District*, the court held a school district liable under Title VI, after several students reported harassment from other students on the basis of their religion.<sup>109</sup> The court determined that the school had actual knowledge of

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<https://www.nbcnews.com/tech/nology/privacy-breach-or-public-safety-teens-facebook-posts-monitored-school-8C11167659>.

105. See Mendola, *supra* note 34, at 159–67 (discussing cases that exhibit discrepancies between the authority different school districts had in holding their students liable for off-campus actions).

106. See generally Jessica Blakemore, *Implicit Racial Bias and Public Defenders*, 29 GEO. J. LEGAL ETHICS 833 (2016) (public defenders); Kellie R. Lang et al., *Calling Out Implicit Racial Bias as a Harm in Pediatric Care*, 25 CAMBRIDGE Q. HEALTHCARE ETHICS 540 (2016) (doctors); Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017) (schools); L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 OHIO ST. J. CRIM. L. 73 (2017) (police officers).

107. The Huffington Post defines Racial bias as "a harmful aversion to, stereotyping of, or discrimination against a race." John Fitzgerald Gates, *5 Steps to Understanding Racial Bias*, HUFFPOST, [https://www.huffpost.com/entry/5-steps-to-understanding-racial-bias\\_b\\_7446510](https://www.huffpost.com/entry/5-steps-to-understanding-racial-bias_b_7446510) (last updated May 27, 2016).

108. DANIEL J. LOSEN, NAT'L EDUC. POLICY CTR., DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE (2011), <http://nepc.colorado.edu/publication/discipline-policies> (citing DANIEL J. LOSEN & RUSSELL SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS* (2010), [https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education\\_FINAL-2.pdf](https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf)).

109. *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 355–57 (S.D.N.Y. 2014).

the anti-Semitic harassment and failed to take reasonable steps to combat it.<sup>110</sup>

Studies and cases like these paint a clear picture that whether intentional or not, school systems are prone to different biases that may seriously affect which students are punished, and which students are protected. Giving teachers the responsibility of monitoring their own students' social media accounts could inevitably result in the disparate treatment of those very students. Employing a third-party company to use analytical data in detecting harmful online speech avoids the possibility of schools punishing students for who they are and prevents the student-teacher relationship from suffering.<sup>111</sup> Employees of companies like Geo Listening and Social Sentinel have no connection to the students they are monitoring.<sup>112</sup> Where a school has the ability to monitor a specific student's posts, these companies are only tasked with identifying harmful content.<sup>113</sup>

Although schools have the ultimate say in disciplining students for their off-campus speech, they can do so with the confidence that the reports companies like Geo Listening and Social Sentinel provide to them stem from a non-biased algorithm, with no personal connection to the individual students.<sup>114</sup> Bias can still remain in whom the school chooses to punish based on the student's harmful off-campus speech, but a third-party company would not flag a student's speech if it was not concerning in the first place.

*B. This More "Invasive" Approach to Preventing Student Harm is a Reasonable Means for Schools to Act Preventatively Compared to Alternative Methods*

Although seemingly invasive of student privacy, employing third-party surveillance companies to monitor student speech is a solution to the student harm caused online—a solution that is preventative, effective, and not financially burdensome to school districts.

First, while student and parental concerns regarding third-party companies are valid, the lack of liability bestowed upon schools for

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110. *Id.* at 362–63.

111. *See* Mendola, *supra* note 34, at 175–76.

112. *See, e.g.*, Service Brochure, GEO LISTENING, <https://geolistening.com/wp-content/uploads/2018/01/Geo-Listening-01-27-18.pdf> (last visited Dec. 30, 2019).

113. *See id.*

114. *See id.* (“Geo listening reviews public posts made to social networks and provides custom reports to school sites on a daily basis. These reports provide staff with timely information aligned to existing policies, so they may better respond to the social and emotional needs of their students.”).

inadequately preventing harm done to students is shocking. After the Parkland shooting, fifteen survivors brought suit against their high school for failing to prevent the shooting as a violation of their Fourteenth Amendment Due Process rights.<sup>115</sup> Yet, a federal judge dismissed the suit in its entirety, reasoning that the school had no duty to protect its students from Cruz's actions.<sup>116</sup> A primary issue in that case was whether the school "had a constitutional duty to protect [the students] from the actions of Cruz."<sup>117</sup> The judge concluded that "[f]or such a duty to exist on the part of [the school], [the students] would have to be considered to be in custody," and also that the Fourteenth Amendment "generally protects people from actions by the state, rather than requiring the state protect them from third parties."<sup>118</sup> Whereas in that case, Cruz was a third party.<sup>119</sup> Some parents who lost children in the shooting also brought suit only to find that Florida state law capped the school district's liability at \$300,000—for the entire event.<sup>120</sup> The Parkland victims are not alone in not having the ability to use the judicial system as a means to hold their school districts accountable. Two parents, whose children were murdered in the 2012 Sandy Hook Elementary School massacre, sued the elementary school and Newtown, Connecticut, only to also have superior court judge throw out their lawsuit.<sup>121</sup>

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115. Jason Hanna & Tina Burnside, *Judge Rejects Parkland Lawsuit, Saying Failure to Stop Shooting Didn't Violate 14th Amendment Rights*, CNN, <https://www.cnn.com/2018/12/18/us/florida-parkland-shooting-lawsuit/index.html> (last updated Dec. 18, 2018, 2:06 PM).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Erika Pesantes, *Parkland Shooting Families Outraged over Cap on School District Liability*, SUN SENTINEL (Apr. 27, 2018, 9:10 PM), <http://www.sun-sentinel.com/local/brow-ard/parkland/florida-school-shooting/fl-reg-florida-school-shooting-liability-reax-20180427-story.html>. Since February of 2018, the school district (the nation's sixth largest) "has received at least 103 notices of pending legal claims related to its role in the mass shooting at Marjory Stoneman Douglas High." Benjamin Herold, *Over 100 Pending Lawsuits Blame the Parkland Shooting on the School District. Do They Stand a Chance?*, EDUC. WEEK (Dec. 12, 2018), <https://www.edweek.org/ew/projects/a-broken-trust/parkland-lawsuits-blame-district.html>. The Florida legislature began discussing "[a] claims bill [that] would establish a new fund dedicated to victims' families, with families who agree to forego suing the district likely becoming eligible for a share of the available money." *Id.* (internal quotations omitted).

121. Dave Altimari, *Judge Throws Out Sandy Hook Parents' Lawsuit Against Town, School District*, HARTFORD COURANT (May 8, 2018, 3:55 PM), <https://www.courant.com/news/connecticut/hc-sandy-hook-town-lawsuit-dismissed-20180508-story.html>; see also Frankie Graziano, *Connecticut Supreme Court Grants Stay in Sandy Hook Lawsuit, Pending Appeal*, CONN. PUB. RADIO (May 13, 2019), <https://www.wnpr.org/post/connecticut-supreme-court-grants-stay-sandy-hook-lawsuit-pending-appeal> (describing how Connecticut's Supreme Court temporarily froze the proceedings the families of the Sandy Hook

2019] *THIRD-PARTY STUDENT SURVEILLANCE* 235

Each school district differs in its approach to social media monitoring, and there are different standards of liability for lawsuits relating to the cyberbullying of children or on-campus shootings.<sup>122</sup> But regardless of the school's liability cap or protocols, it is difficult for victims of school violence to even have their day in court because the type of claim that would be most beneficial to the facts of their case is sometimes hard to ascertain, which often results in the dismissal of complaints in their entirety.<sup>123</sup> Schools often can avoid liability through qualified immunity or through just the fact that they were not the *main* cause of the harm.<sup>124</sup> Without reliable legal recourse, the services of third-party surveillance companies work to prevent those situations that often result in costly and time-consuming litigation for both school districts and those affected by such situations.

Second, relying on parents to monitor online activity is an ineffective way for schools to further protect students. While there are various means parents can utilize to monitor or regulate the internet access of their children, statistics show "that 71% of teens admit to hiding online

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shooting victims brought against the "Remington Arms Company based on its marketing of the AR-15 Bushmaster . . ." Remington has since "petitioned the U.S. Supreme Court to make a ruling on whether families can bring a case against it" and its motion to stay its current Connecticut litigation "has been granted by the state's high court" leaving the families without the authority to "subpoena internal documents from the company as they build their case.").

122. See, e.g., *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632–33 (1999) (discussing specific situations where a school board may be held liable towards a student in a private cause of action); *Howlett v. Rose*, 496 U.S. 356, 360 (1990) (reiterating that Florida school boards can benefit from sovereign immunity); *Scott ex rel. Scott v. Montgomery Cty. Bd. of Educ.*, No. 96–2455, 1997 U.S. App. LEXIS 21258, at \*12 (4th Cir. July 9, 1997) (articulating that causation "must be shown to establish liability" of that Maryland school board); *Eisel v. Bd. of Educ.*, 597 A.2d 447, 456 (Md. 1990) (holding that school counselors have a duty to attempt to prevent student suicides when on notice of "student's suicidal intent").

123. See Herold, *supra* note 120 (listing numerous suits parents and victims of various school shootings filed including: wrongful death claims, negligence by the school, and misconduct by the school).

124. See, e.g., *Kelly v. Lewis*, 471 S.E.2d 583, 585–86 (Ga. Ct. App. 1996) (explaining how "the basis of official or qualified immunity" covers discretionary acts (unless willful, wanton, or outside the scope of the defendant's authority), and "not negligent ministerial acts"); see *id.* at 587 (affirming the dismissal of a complaint against a school district); see also *Scott*, 1997 U.S. App. LEXIS 21258, at \*17–18 (granting summary judgment to a school board for a mother's various state and federal claims against a school district, including wrongful death, when the mother was unable to produce sufficient evidence to show that the school board's "alleged failures caused her son to commit suicide"). *But see* *M.S.D. of Martinsville v. Jackson*, 9 N.E.3d 230, 248 (Ind. Ct. App. 2014) (concluding that a school district failed to meet "its burden of showing that it is entitled to discretionary function immunity").

activities from their parents.”<sup>125</sup> Studies have also shown that while “a majority of parents have personally monitored their teen’s web history or social media profile,” only 39% of parents use “parental controls or other technological means to block, filter or monitor their teen’s online activities,” and only roughly 16% of parents restrict their teen’s cell phone use.<sup>126</sup> With parents monitoring less than half of teenage online-activity within the home, it makes sense for school districts to want to take the more “invasive” step to combat harmful speech.

Third, this approach to harm prevention can actually be cost-effective for school districts. Shawsheen Valley Technical High School in Billerica, Massachusetts pays Social Sentinel \$10,000 a year to use its services.<sup>127</sup> While Glendale Unified School District’s contract with Geo Listening sat at \$40,500, it was only a small fraction of the district’s overall \$287 million budget.<sup>128</sup> Critics say that schools should look to hire professional counselors in lieu of third-party companies.<sup>129</sup> One argument is that schools should use the funding that goes towards contracting with these companies instead to train or hire additional school staff to monitor student websites or to become well-versed in social media themselves.<sup>130</sup> However, with guidance counselors receiving a median national salary of \$55,410 a year, employing a company with the means and advanced technology to accomplish the job is far more efficient for schools than hiring a single counselor to do that very same job in addition to the traditional work guidance counselors perform.<sup>131</sup>

While a counselor may be more effective in gauging a student’s behavior at school and any other internal problems relating to the general student body, the harm students suffer from is not always caused

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125. Tim Elmore, *Parent’s Guide to Social Media Use for Kids*, PSYCHOL. TODAY (Mar. 15, 2018), <https://www.psychologytoday.com/us/blog/artificial-maturity/201803/parent-s-guide-social-media-use-kids> (providing a list of apps parents can use to monitor the online activity of their teens).

126. Monica Anderson, *How Parents Monitor Their Teen’s Digital Behavior*, PEW RES. CTR.: INTERNET & TECH. (Jan. 7, 2016), <http://www.pewinternet.org/2016/01/07/how-parents-monitor-their-teens-digital-behavior/>.

127. Jolicoeur & Mullins, *supra* note 19.

128. *See* Mendola, *supra* note 34, at 171; Steven Dickinson & Karineh Savarani, *2018–19 Adopted Budget*, GLENDALE UNIFIED SCH. DIST. 3 (June 19, 2018), <https://www.gusd.net/cms/lib/CA01000648/Centricity/domain/6/board%20meeting%20presentations/2018-06-19.1819AdptdBdgt.pdf>.

129. Mendola, *supra* note 34, at 189.

130. *See id.* at 180, 189–90 (suggesting that schools should employ young counselors that may be tasked with “specializ[ing] in social media” and, further, that schools should use “budgetary resources to educate students on correct Internet usage” and to train teachers in social media in an effort to “bridge the gap between students and adults”).

131. *How Much Does a School Counselor Make?*, U.S. NEWS: MONEY, <https://money.usnews.com/careers/best-jobs/school-counselor/salary> (last visited Dec. 30, 2019).

by current students. With respect to school shootings, *former* students perpetrated several.<sup>132</sup> By targeting a certain geographic location, third parties are scanning content in that school's geographical boundary, not just that of specific students.<sup>133</sup> Thus, if a non-student posted threats about a certain student or school, the guidance counselor is not going to necessarily know of that, but a complex system of specific online filters likely will. If a student is not bullied at school by other students but suffers from physical or emotional abuse at home, the guidance counselor may not see that either.<sup>134</sup> Yet, if that same student posts about his or her troubles online, once again, an online analytical system has a greater chance of catching it because its reach is substantially broader. Although the role guidance counselors play in ensuring student happiness and their overall well-being remains of the utmost importance, with the ever-changing advancements in technology, it is justifiable to allow better-equipped resources to contribute to that maintenance.

Lastly, and quite significantly, courts traditionally give schools a great amount of deference in deciding what is best for students. The Supreme Court acknowledges that while they do not "suggest that public schools . . . have such a degree of control over children as to give rise to a constitutional 'duty to protect,'" schools do, for many purposes, "act *in*

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132. See, e.g., *State v. Sawyer*, 187 A.3d 377, 380–81 (Vt. 2018) (alleged attempted school shooting); Alaine Griffin & Josh Kovner, *Raising Adam Lanza: Who Was Nancy Lanza?*, FRONTLINE (Feb. 17, 2013), <https://www.pbs.org/wgbh/frontline/article/raising-adam-lanza/> (Sandy Hook shooting); Ray Sanchez, 'My School Is Being Shot up,' CNN, <https://www.cnn.com/2018/02/18/us/parkland-florida-school-shooting-accounts/index.html> (last updated Feb. 18, 2018, 2:54 PM), (Parkland shooting).

133. See Bromwich, *supra* note 25.

134. A 2000 study estimated that 4–16% of children in "high-income nations, including the United States" are physically abused and only one in ten of those cases of abuse are actually confirmed. Tiffany Sharples, *Study: Most Child Abuse Goes Unreported*, TIME (Dec. 2, 2008), <http://content.time.com/time/health/article/0,8599,1863650,00.html>. Another study found that childhood sexual abuse is strongly associated with suicidal risks and that childhood "physical and emotional abuse indirectly predicted suicidal ideation through their association with anxiety." Yong-Chun Bahk et al., *The Relationship Between Childhood Trauma and Suicidal Ideation: Role of Maltreatment and Potential Mediators*, 14(1) PSYCHIATRY INVESTIGATION 37, 41 (2016). Educators are the most likely to submit reports of abuse at 16.2%, yet one study indicated that only 51% of educators receive "training on reporting child maltreatment." CYNTHIA CROSSON-TOWER, U.S. DEPT. OF HEALTH & HUM. SERVS., THE ROLE OF EDUCATORS IN PREVENTING AND RESPONDING TO CHILD ABUSE AND NEGLECT 9 (2003), <https://www.childwelfare.gov/pubpdfs/educator.pdf>. The same study indicated that the main reasons educators are so vital in detecting child abuse is because of their "close and consistent contact with children," their "professional and legally mandated responsibility for reporting suspected maltreatment," and finally because "school personnel have a unique opportunity to advocate for children, as well as provide programs and services that can help children and strengthen families." *Id.*

*loco parentis*.<sup>135</sup> Public schools have a recognized responsibility for the students, which is evidenced by various factors including some as personal as physical examinations and requirements of students to be vaccinated before starting school.<sup>136</sup> One of the key components of First Amendment jurisprudence when it comes to the free speech rights of students is that “student expression may not be suppressed unless school officials reasonably conclude that it will ‘materially and substantially disrupt the work and discipline of the school.’”<sup>137</sup>

Precedent suggests that if a school is acting reasonably in its decision, that decision will be upheld. Thus, it should follow that a school, in choosing to hire a third-party surveillance company, is acting within constitutional limits as long as that decision is based in reason. Given a nationwide epidemic of gun violence and noting the traditional deference courts have given schools in protecting children, schools have a substantially pertinent reason for engaging in contracts to surveil students’ online speech.

#### V: PROPOSED SOLUTIONS FOR CONCERNS SURROUNDING THE SERVICES OF THIRD-PARTY SURVEILLANCE COMPANIES

Companies like Geo Listening and Social Sentinel are monitoring students across the nation, forming a sense of a “Big Brother” presence.<sup>138</sup> Some of the main concerns regarding these services revolve around student privacy interests, the potential for wasting school resources, a lack of transparency by school districts to parents, and the possibility for student posts, which were not intended to be taken seriously, to result in on-campus repercussions.<sup>139</sup> But these concerns do not have to remain unresolved. There are avenues school districts, state legislatures, and the judicial system can take to allow third-party companies to do their jobs without fear of student and parental backlash.

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135. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986)).

136. *Id.* at 656.

137. *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

138. *See, e.g.*, Siner, *supra* note 17.

139. *See, e.g.*, Curt Brown, *ACLU Wins Settlement for Sixth-Grader’s Facebook Posting*, STAR TRIBUNE (Mar. 25, 2014, 11:24 PM), <http://www.startribune.com/minnewask-a-student-wins-70k-from-school-over-facebook-post/252263751/>.



*A. School Districts Must Become Transparent*

In order to avoid future litigation, school districts utilizing the services of monitoring companies must update their policies to reflect why school funding is allocated towards monitoring students off school grounds. When Glendale Unified School District began to use Geo Listening in 2013, the school district “had neither sought nor received consent from either students or their parents – nor had anybody informed parents of the monitoring.”<sup>140</sup> Glendale was under the impression that consent was not required based on the Children’s Online Privacy Protection Act (“COPPA”).<sup>141</sup>

COPPA enables school districts to contract with third-party websites “to offer online programs solely for the benefit of their students and for the school system . . . .”<sup>142</sup> COPPA was enacted to give parents control over what information third parties collect from their children, particularly children under the age of thirteen, online.<sup>143</sup> Schools can consent to the “collection of kids’ information” for educational purposes in lieu of a parent, but the Act places limits on this ability.<sup>144</sup> Although a school can consent to collecting and distributing a student’s information without parental permission, the parent may at any time revoke that consent and direct a school district to delete any personal information collected.<sup>145</sup> However, COPPA advises schools to give parents notice regarding the type of information third parties collect and the purpose for its use, but that notice is a suggestion, not a requirement.<sup>146</sup> COPPA further encourages schools to ensure that third-party services are deleting the information collected on students when it is no longer needed for an educational purpose.<sup>147</sup> Title 16 of the Code of Federal Regulations further governs this area<sup>148</sup> and under § 312.10, it provides data retention and deletion requirements for website operators.<sup>149</sup>

Unsurprisingly, parents of Glendale students “were surprised to learn that their children’s posts were being monitored.”<sup>150</sup> However,

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140. McGuire et al., *supra* note 7, at 202.

141. *Id.*

142. *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#General%20Questions> (last updated Mar. 20, 2015).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. 16 C.F.R. §§ 312.1–312.13 (2019).

149. 16 C.F.R. § 312.10 (2019).

150. McGuire et al., *supra* note 7, at 202.

students offered mixed reviews of the new system, with some in support of the protection and some against it.<sup>151</sup> In response to Glendale's contract with Geo Listening, California enacted a law that would require a school district "to notify parents before it monitored social media posts, and prohibited schools and [third] parties from keeping student information for more than a year or sharing it with outside parties."<sup>152</sup>

While Glendale no longer uses Geo Listening's services, the popularity of the company—and others like it—continues to rise throughout the country.<sup>153</sup> Accordingly, state legislatures should take preventative action, as California's did, to ensure that schools are transparent about using students' online personal information and data. Based on Glendale's experience with Geo Listening and federal guidelines, schools employing third-party companies should also give notice to parents and students alike about not only *what* information third parties collect, but also *why* it is collected. Although the notice may not yield a positive reaction from parents and their children, it will at the very least avoid claims that a school district failed to be transparent.

Most importantly, schools should make clear and public the criteria for sanctions based on online speech. This notice would further demonstrate transparency and serve as a reminder that students engaging in political speech, or other disfavored yet permissible kinds of speech, are not subject to having their voices limited.<sup>154</sup> For example, Huntsville City Schools in Alabama hired a "consulting firm for a surveillance program" in 2013, which ultimately "led to the expulsion of 14 students, 12 of them African-American."<sup>155</sup> A Southern Poverty Law Center investigation revealed that one of those students "had been accused of 'holding too much money' in photographs" (i.e. displaying the money), and another student's suspension arose from her posting a photo on Instagram of her wearing "a sweatshirt with an airbrushed image of her father, a murder victim."<sup>156</sup> According to the school's investigation behind her post, officials concluded that "the sweatshirt's colors and the

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151. *Id.* at 202–03.

152. *Id.* at 206.

153. *See* Leibowitz, *supra* note 4.

154. *See* Tom Simonite, *Schools Are Mining Students' Social Media Posts for Signs of Trouble, But Should They?*, WIRE (Aug. 20, 2018 6:00 AM), <https://www.wired.com/story/algorithms-monitor-student-social-media-posts/> (discussing Desmond Patten, a professor at Columbia and a former consultant for Social Sentinel, and her concern that this technology could adversely affect black youth and subject their online content to "greater scrutiny from school administrators.").

155. Leibowitz, *supra* note 4.

156. *Id.*

student's hand symbol were evidence of gang ties."<sup>157</sup> With a set criteria for what constitutes impermissible speech, school officials would have set boundaries of permissible speech, thus avoiding over-punishing students for speech the students' did not consider problematic. Students, too, would know which kinds of speech could subject them to punishment and if wrongfully punished for permissible speech, the student would have a defense.

The Supreme Court has long held that "the government may not regulate speech based on its substantive content or the message it conveys."<sup>158</sup> Public schools, as actors of the state, must also refrain from discriminating against certain speakers based on their viewpoints.<sup>159</sup> While a disinterested third party conducts the surveillance, the ultimate decision of whether to act on a student's online post resides with the school's administrators.<sup>160</sup> This responsibility could, in turn, lead to schools punishing students for speech that was either actually protected, or wrongly interpreted by the school's officials. Engaging in an active method of transparency would prove beneficial to not only concerned students and parents, but also to the school in that students can learn and understand their rights prior to the school subjecting a student to potential punishment for his or her speech. If a school district explains how the monitoring system works and what content the system will flag, students will know and understand when and if the school targets their speech unjustly—or justly.

*B. The Supreme Court Must Make a Clear Decision Determining Student Speech Rights in the Digital Age*

Without a ruling from the Supreme Court on any issue related to student speech in the digital age, it is difficult to argue for states to take any kind of affirmative action regarding the legality of these social surveillance companies. The last case the Supreme Court heard relating

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157. *Id.* (describing Lilly Leif's, a graduate of a Glendale High School, encounter with Geo Listening's service and how "she was summoned to the assistant principal's office after using an expletive in a post about her biology class"). Leif also recounted how several students were asked to delete messages promoting a school fund-raiser at pizza and ice cream establishments called "Blaze Pizza" and "Baked Bear" for the "apparent allusions to marijuana." *Id.*

158. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).

159. *See id.* at 844.

160. *See How Schools Across the Country Are Working to Detect Threats Made on Social Media*, NPR: ALL THINGS CONSIDERED (May 21, 2018, 4:19 PM), <https://www.npr.org/2018/05/21/613117571/how-schools-across-the-country-are-working-to-detect-threats-made-on-social-medi> [hereinafter NPR: ALL THINGS CONSIDERED].

to student speech was decided in 2007.<sup>161</sup> Since then, the world of technology has expanded astronomically. From the introduction of the iPad in 2010, to the unveiling of Google Chrome in 2008, to even the 2008–2009 spread of GPS use on smartphones, means of communication have significantly altered, which should signal that it is time to set the record straight regarding a school's ability to hold students accountable for their off-campus online speech.<sup>162</sup>

A Supreme Court ruling would give an answer to the circuit splits discussed previously,<sup>163</sup> thereby allowing schools to fully understand the extent of their reach on online student speech and incorporate that information into their transparency. Why the Supreme Court has denied certiorari to multiple student online speech cases<sup>164</sup> in recent years is unknown, but it should not deter students who want a clearer guiding light towards their individual rights from receiving that answer.

If the Court were to issue a ruling setting forth the constitutional parameters of school authority in this area, it would allow for the enactment of legislation that could provide concrete guidelines for schools in their use of these technologies, like California's legislature did.<sup>165</sup> With mandated statutes and policies, schools could better inform parents and students of their rights and provide a reason for why they chose to contract with companies like Geo Listening and Social Sentinel as a means to combat cyberbullying and gun violence. With a clear constitutional test, followed by statutory intervention, more school districts could be ready to hire monitoring companies, knowing they are protected by the law and that their contracts would not infringe on the rights of their students.

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161. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

162. See Avery Hartmans, *These 18 Incredible Products Didn't Exist 10 Years Ago*, BUS. INSIDER (Aug. 23, 2018, 9:20 AM), <https://www.businessinsider.com/18-tech-products-that-didnt-exist-10-years-ago-2017-7> (listing other tech-based products such as Snapchat, Spotify, WhatsApp, Instagram, and even 4G LTE, which did not exist when *Morse v. Frederick* was decided).

163. See discussion *supra* Part III.B.

164. See, e.g., *C.R. v. Eugene Sch. Dist.*, 4J, 835 F.3d 1142 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016); *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012).

165. See CAL. EDUC. CODE § 49073.6 (West 2019) (effective Jan. 1, 2015).

C. *The Implementation of Research on Whether These Companies are Making a Difference*

Another possible solution to these concerns is for some entity, whether it is the school district, the third-party company, or even a governmental body, to research and record how these programs have performed thus far. Glendale began using Geo Listening in 2013, but then dropped its contract in 2017 because students were more frequently using social platforms that existed beyond the scope of Geo Listening's access, thereby rendering the company's service insufficient.<sup>166</sup> But the school district used Geo Listening for five years, and any information or statistics from those few years would prove beneficial to other schools considering these services themselves.<sup>167</sup>

Another criticism about these companies is that there is no research confirming whether or not the services work.<sup>168</sup> Social Sentinel, for example, admitted that it cannot show how effective its service is, but reported that clients have seen the technology "prevent someone from getting hurt."<sup>169</sup> Shawsheen Technical High School's superintendent would likely agree with those clients, considering Social Sentinel's services proved worthwhile early on in the school's use.<sup>170</sup> Social Sentinel alerted the school "that one of our students' mental health condition was deteriorating, maybe to the point that that student's life could have been in danger."<sup>171</sup> Acting on the alert's information, school counselors got the teenager help after discovering the student's imminent suicide plan.<sup>172</sup> The town of Arlington, Massachusetts saw similar results with its use of Social Sentinel, after intervening and helping a student when the service alerted the school to a student's post indicating suicidal thoughts.<sup>173</sup> Others agree that a research study would prove useful to determining whether schools utilizing these services see changes in student behavior, or to developing a statistical map of "how many suicides really could be prevented using something like this."<sup>174</sup>

As third-party companies continue to gain popularity, a firm research plan—whether it consists of a case study, or just an analysis of data collected from schools currently using these services—would only prove

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166. See Leibowitz, *supra* note 4.

167. See *id.*

168. See *id.*

169. NPR: ALL THINGS CONSIDERED, *supra* note 160.

170. Jolicoeur & Mullins, *supra* note 19.

171. *Id.* (internal quotations omitted).

172. *Id.*

173. *Id.*

174. Patchin, *supra* note 99.

beneficial to both schools and those affected by the services' algorithms in securing an idea of whether or not this protective measure is ultimately preventing student harm.

## VI. CONCLUSION

The United States Constitution grants no explicit right for the American public to feel safe. The Supreme Court imposes no exclusive duty upon schools to protect the children in their custody. The internet provides no undeniably adequate means to ensure the safety of children who use it. So, while the nation continues to grieve the lives lost in each subsequent mass shooting, parents continue to mourn their child who died by suicide, and the internet continues to gain control over the human mind, do we just wait and see what tragedy will strike next? Do students go to school each day, practice their fire, bomb, and active shooter drills, and hope that the alarm will only ever sound for preparation? Do parents continue to buy their children bulletproof backpacks, and do schools continue to increase security and install bulletproof classroom doors? Do children continue to suffer in the shadow of their cell phones, just to have their cries for help go unnoticed?

The livelihood of American children has changed exponentially due to the advent of the digital age, the surge in gun violence, and the detrimental consequences of cyberbullying. Although those children have many advocates, more must be done to protect them. School districts nationwide are justified in wanting to do more for their students, and fair in realizing that the extent of the internet's reach is beyond what just parents, teachers, or counselors can handle on their own. While implementing stronger protective measures such as security cameras, "hard corners,"<sup>175</sup> and safety drills can help keep schools safe, they cannot fend against the harm done behind a computer screen.<sup>176</sup>

Third-party surveillance companies provide schools with the resources to take an extra step in securing the safety of students. Their services do not abridge the free speech rights of students, and even if they did, schools reserve the right to make decisions regarding what is truly in the best interest of the student body as a whole. And that decision

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175. Hard corners are marked areas in schools that are not visible from doorways. David Fleshler et al., *Breaking Down the Plan for School Safety After Parkland Shooting*, SOUTH FLA. SUN SENTINEL (Jan. 3, 2019, 12:05 PM), <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-cb-msd-commission-report-20190103-story.html>.

176. *See id.* (listing other recommendations state commissioners gave to improve school security including arming teachers, a greater focus on the mental health of students, a push for crime reporting, and suggestions for change in school disciplinary decisions).

should include whether the risks to student liberty are worth sacrificing to protect student lives.

A year after the tragedy at Marjory Stoneman Douglas High School, Florida schools continue to consider various means of preventing future school shootings.<sup>177</sup> Nikolas Cruz, now twenty years old, sits in jail “charged with 17 counts of first-degree murder and 17 counts of attempted murder.”<sup>178</sup> But the classmates of those who lost their lives to Cruz’s actions did not wait for someone to give them justice; they instead took action to advocate for their protection, their safety, and their autonomy—refusing to let their friends become just another statistic.<sup>179</sup>

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177. *Id.*

178. Associated Press, *Florida School Massacre Suspect Nikolas Cruz Back in Court for Hearing*, CBS MIAMI (Jan. 8, 2019, 5:00 PM), <https://miami.cbslocal.com/2019/01/08/florida-school-massacre-suspect-nikolas-cruz-court-hearing/> (discussing the recent state of Cruz’s case and the prosecutor’s denial of Cruz’s offer to “plead guilty in exchange for a life prison sentence”).

179. See Barack Obama, *Cameron Kasky, Jaclyn Corin, David Hogg, Emma Gonzalez and Alex Wind*, TIME 100, <http://time.com/collection/most-influential-people-2018/5217568/parkland-students/> (last visited Dec. 30, 2019).