

# FACEBOOK IS OFF-LIMITS? CRIMINALIZING BIDIRECTIONAL COMMUNICATION VIA THE INTERNET IS PRIOR RESTRAINT 2.0

DOUGLAS B. MCKECHNIE\*

## INTRODUCTION

It is nearly universally “[r]ecognize[d] [that] the global and open nature of the Internet [is] a driving force in accelerating progress towards development in its various forms.”<sup>1</sup> At the same time, the Internet has opened a forum for a hitherto non-existent criminality—cybercrime. In 2011, the FBI’s Internet Crime Complaint Center received in excess of 300,000 complaints, an increase in online criminal activity for the third year in a row.<sup>2</sup> With the ubiquitous Internet access that pervades modern society and its potential for abuse by criminal elements, state governments have laudably sought to prevent one form of exploitation that lurks in cyberspace—sexual predators who prey on children.<sup>3</sup> Through a series of laws, states have tried to minimize the possibility of children’s exposure to Internet users who have been convicted of crimes against minors<sup>4</sup> and, more often, sexual assault of a minor.

One of many attempts to rein in children’s exposure to online sexual predators is through criminal statutes forbidding state sex offender registrants access to certain Internet platforms.<sup>5</sup> Louisiana, Indiana, and Nebraska are three

---

\* Associate Professor of Law, Appalachian School of Law; J.D., University of Pittsburgh School of Law; B.A., Ohio University.

1. U.N. GAOR, 20th Sess., agenda item 3 at 2, U.N. Doc. A/HRC/20/L.13 (June 29, 2012), available at <http://geneva.usmission.gov/2012/07/05/internet-resolution/>.

2. Press Release, Fed. Bureau of Investigation, IC3 2011 Internet Crime Report Released (May 10, 2012), <http://www.fbi.gov/sandiego/press-releases/2012/ic3-2011-internet-crime-report-released>.

3. See, e.g., COUNCIL OF STATE GOVT’S, LEGISLATING SEX OFFENDER MANAGEMENT: TRENDS IN STATE LEGISLATION 2007 AND 2008, at 22-25 (2010), available at <http://csg.org/policy/documents/SOMLegislativeReport-FINAL.pdf>.

4. The Internet restrictions are not limited solely to persons who have committed sexual assault. For example, Nebraska’s law forbids a person convicted of “[k]idnapping of a minor” from accessing, among other Internet platforms, social networking sites. NEB. REV. STAT. § 28-322.05 (2013).

5. The Internet platforms that are banned by the statutes discussed below include social networking sites, chat rooms, peer-to-peer networks, and instant messaging. See, e.g., IND. CODE § 35-42-4-12(e) (2013); LA. REV. STAT. ANN. § 14:91.5 (2013); NEB. REV. STAT. § 28-322.05 (2013). The Internet is “[a]n interconnected system of networks that connects computers around the world via the TCP/IP protocol.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 915 (4th ed. 2000) [hereinafter AMERICAN HERITAGE DICTIONARY]. A platform is “[t]he basic technology of a computer system’s hardware and software that defines how a computer is operated and determines what other kinds of software can be used.” *Id.* at 1345. Therefore, an Internet platform is a programmable, computer-based system that is customizable by “third-party

states that have enacted such statutes, and each has seen its statute challenged on First Amendment grounds, among other legal theories.<sup>6</sup> At the time of this writing, two federal district courts have ruled on the merits of those challenges—one of which the Seventh Circuit overturned<sup>7</sup>—and one court is proceeding with discovery.<sup>8</sup> Each statute and the reviewing courts' decisions are discussed in Part I below. A recurring First Amendment doctrine used to analyze the constitutionality of the states' statutes is the content-neutral doctrine.<sup>9</sup> As a result, Part II of this Article discusses the content-neutral doctrine and suggests why it is inapplicable. Part III suggests that the appropriate analytical framework to apply to these laws is the prior restraint doctrine. This Article suggests that the statutes are prior restraints on speech and, thus, are unconstitutional because they prevent communication regardless of the content. This Article's analysis only applies to those who are registered sex offenders, subject to the statutes discussed below, have completed their sentences, and are no longer subject to supervised release.<sup>10</sup>

## I. STATE STATUTES BANNING REGISTERED SEX OFFENDERS FROM ACCESSING CERTAIN INTERNET PLATFORMS

### A. Louisiana

1. *Unlawful Use or Access of Social Media, LSA-R.S. 14:91.5*.—On March 25, 2011, Representative Ledricka Thierry of the Louisiana House of Representatives prefiled Louisiana House Bill No. 55.<sup>11</sup> The Act aimed to criminalize sex offenders' use or access of social media.<sup>12</sup> More specifically, the Act sought to “prohibit certain convicted sex offenders from using or accessing

---

developers for mutual . . . benefit,” such as E-bay, Flickr, and Google. Rajiv Jayaraman, *So What Is an Internet Platform?*, KNOLSKAPE, <http://www.knolskape.com/blog/so-what-is-an-internet-platform/> (last visited July 7, 2013).

6. IND. CODE § 35-42-4-12 (2013); LA. REV. STAT. ANN. § 14:91.5 (2013); NEB. REV. STAT. § 28-322.05 (2012).

7. *Doe v. Prosecutor, Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

8. *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010).

9. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (“[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so.”).

10. “Probationers and parolees have limited constitutional rights during their terms of conditional release[,]” but “[t]he Constitution affords standard First Amendment protection to offenders who are no longer on probation, parole, or supervised release.” Jasmine S. Wynton, Note, *Myspace, Yourspace, but Not Theirspace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859, 1879, 1887 (2011).

11. H.R. 55, 2011 Reg. Sess. (La. 2011) (Enrolled Act No. 26).

12. *Id.*

social networking websites, chat rooms, and peer-to-peer networks.”<sup>13</sup> After some revision, Governor Bobby Jindal signed it into law on June 14, 2011.<sup>14</sup>

The Act originally contained four parts.<sup>15</sup> Section A articulated the actions that the Act criminalized.<sup>16</sup> Pursuant to section A, it was unlawful for those convicted of committing certain crimes to use or access “social networking websites, chat rooms, and peer-to-peer networks.”<sup>17</sup> In particular, persons forbidden from using or accessing social media included registered sex offenders who were also convicted of “indecent behavior with juveniles,”<sup>18</sup> “pornography involving juveniles,”<sup>19</sup> “computer-aided solicitation of a minor,”<sup>20</sup> “video

---

13. *Id.*

14. LA. REV. STAT. ANN. § 14:91.5 (2012); *Doe v. Jindal*, 853 F. Supp. 2d 596, 599 (M.D. La. 2012).

15. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

16. *Id.*

17. *Id.*

18. *Id.*

Indecent behavior with juveniles is the commission of any of the following acts with the intention of arousing or gratifying the sexual desires of either person: (1) Any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons. Lack of knowledge of the child’s age shall not be a defense; or (2) The transmission, delivery or utterance of any textual, visual, written, or oral communication depicting lewd or lascivious conduct, text, words, or images to any person reasonably believed to be under the age of seventeen and reasonably believed to be at least two years younger than the offender. It shall not be a defense that the person who actually receives the transmission is not under the age of seventeen.

LA. REV. STAT. ANN. § 14:81 (2013).

19. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

(1) It shall be unlawful for a person to produce, promote, advertise, distribute, possess, or possess with the intent to distribute pornography involving juveniles. (2) It shall also be a violation of the provision of this Section for a parent, legal guardian, or custodian of a child to consent to the participation of the child in pornography involving juveniles.

LA. REV. STAT. ANN. § 14:81.1 (A) (2013).

20. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

Computer-aided solicitation of a minor is committed when a person seventeen years of age or older knowingly contacts or communicates, through the use of electronic textual communication, with a person who has not yet attained the age of seventeen where there is an age difference of greater than two years, or a person reasonably believed to have not yet attained the age of seventeen and reasonably believed to be at least two years younger, for the purpose of or with the intent to persuade, induce, entice, or coerce the person to engage or participate in sexual conduct or a crime of violence . . . , or with the intent to engage or participate in sexual conduct in the presence of the person who has not yet attained the age of seventeen, or person reasonably believed to have not yet attained the age of seventeen.

LA. REV. STAT. ANN. § 14:283(A)(1) (2013).

voyeurism,<sup>21</sup> or convicted of a sex offense . . . in which the victim . . . was a minor<sup>22</sup> (“offenders”). Section B permitted parole or probation officers and courts to grant leave to offenders to use or access social media.<sup>23</sup>

Section C defined the social media that offenders were forbidden from using.<sup>24</sup> This included “chat room[s],” which were defined as “any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users.”<sup>25</sup> The forbidden social media also included “peer-to-peer network[s],” which were defined as “connection[s] of computer systems whereby files are shared directly between the systems on a network without the need of a central server.”<sup>26</sup> Finally, the forbidden social media included “social networking website[s],” which were defined as websites with either or both of the following attributes: “(a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users[; or] (b) Offers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging.”<sup>27</sup> Section D described the sentencing guidelines for violations of the Act.<sup>28</sup>

2. *Doe v. Jindal*.<sup>29</sup>—Two months after Jindal signed the Act into law, two registered sex offenders filed a complaint challenging the law,<sup>30</sup> along with a motion for a temporary restraining order.<sup>31</sup> The Middle District of Louisiana denied the plaintiffs’ motion for a temporary restraining order,<sup>32</sup> and, after various pretrial briefs, the case moved to a hearing on the merits,<sup>33</sup> which was followed

---

21. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

Video voyeurism is: (1) The use of any camera, videotape, photo-optical, photo-electric, or any other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping a person where that person has not consented to the observing, viewing, photographing, filming, or videotaping and it is for a lewd or lascivious purpose; or (2) The transfer of an image . . . by live or recorded telephone message, electronic mail, the Internet, or a commercial online service.

LA. REV. STAT. ANN. § 14:283(A) (2013).

22. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted). *See* LA. REV. STAT. ANN. §§ 14:91.5(A), 15:541(5), (12) (2013).

23. H.R. 55, 2011 Reg. Sess. (La. 2011) (enacted).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*; *see also* LA. REV. STAT. ANN. § 14:91.5(c) (2013).

29. 853 F. Supp. 2d 596 (M.D. La. 2012).

30. *Id.* at 599.

31. *Doe v. Jindal*, No. 11-554-BAJ-SCR, 2011 WL 3664496, at \*1 (M.D. La. Aug. 19, 2011) (denying *Doe*’s motion for a temporary restraining order).

32. *Id.* at \*3.

33. *Jindal*, 853 F. Supp. 2d at 599.

by post-trial briefs.<sup>34</sup>

The plaintiffs relied on two constitutional arguments—First Amendment overbreadth and Fourteenth Amendment vagueness.<sup>35</sup> First, the plaintiffs argued that the Act was facially overbroad because, in addition to the criminal activity the Act sought to prohibit, it also criminalized a substantial amount of otherwise protected speech.<sup>36</sup> The plaintiffs argued they would be unable to legally access various news websites, shopping websites, video sharing websites, email, and some federal and state websites, among others.<sup>37</sup> Access to these websites would violate the law, the plaintiffs argued, because they “offer a mechanism for communication among users.”<sup>38</sup> While the plaintiffs conceded that the state’s interest in protecting children on the Internet, they argued that the Act posed a greater intrusion on their First Amendment rights than was reasonably necessary.<sup>39</sup> In addition, the plaintiffs argued that the Act violated the Due Process Clause of the Fourteenth Amendment because the Act’s language failed to provide reasonable notice of constitutes violating conduct.<sup>40</sup>

In response, the defendants argued that the plaintiffs never sought to take advantage of Section B, the parole officer/judicial leave section of the Act, described above.<sup>41</sup> As a result, the defendants argued, the implementation of the Act, its application to the plaintiffs, and the First Amendment implications were unknowable.<sup>42</sup> The defendants also argued that regulations providing interpretation and guidance for the Act’s operation demonstrated that “the Act [was] not targeted at the sort of general media websites [the] plaintiffs fear[ed] it [would] reach.”<sup>43</sup>

After analyzing and rejecting standing challenges the defendants raised, the court addressed the plaintiffs’ First Amendment overbreadth argument. First, the court noted the guiding principles for an overbreadth analysis: “a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”<sup>44</sup> Following that standard, the court found that, while Louisiana’s interest in protecting children was undoubtedly legitimate, the Act was nevertheless unconstitutionally overbroad.<sup>45</sup> The court reasoned that the Act imposed a far-reaching ban on many more websites than were necessary in light of the state’s

---

34. *Id.*

35. *Id.* at 599-600.

36. *Id.* at 603.

37. *Id.* at 600.

38. *Id.* at 600-01.

39. *Id.* at 603.

40. *Id.* at 600-01, 604.

41. *Id.* at 600-01.

42. *Id.* at 601.

43. *Id.*

44. *Id.* at 603 (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010)).

45. *Id.* at 604-05.

interest.<sup>46</sup> For example, access to “news and information websites, in addition to social networking websites such as MySpace and Facebook” would be banned along with access to ill-defined “chat rooms” that could include the court’s own website.<sup>47</sup> Also problematic was the Act’s application to both intentional and mistaken access of those sites.<sup>48</sup> In the end, the court found the Act was not drawn narrowly enough to both accomplish its legitimate goals and avoid running afoul of the First Amendment.<sup>49</sup> While the defendants conceded that the Act could be interpreted in a way that banned the plaintiffs from accessing some of the websites that the court mentioned, the defendants argued that the regulations were narrowed, thereby saving, the Act.<sup>50</sup> In rejecting the defendants’ argument, the court noted that the regulations applied only to sex offenders who are under Louisiana probation officers’ supervision but were silent regarding offenders, like the plaintiffs, who were subject to supervision in other jurisdictions.<sup>51</sup>

In a related discussion, the court also found the Act to be unconstitutionally vague.<sup>52</sup> The court reasoned that the Act failed to sufficiently explain which websites were prohibited.<sup>53</sup> The Act’s attempt to describe and define forbidden websites was insufficient, particularly in light of the punishment for accessing those websites.<sup>54</sup> In addition, the Act’s vagueness was particularly troubling as it forced the plaintiffs to avoid “accessing many websites that would otherwise be permissible for fear that they may unintentionally and unknowingly violate the law[,]” thus having a chilling effect on First Amendment activity.<sup>55</sup>

### B. Indiana

*1. Application of Section; Use of Internet Social Networking Site or Chat Room Program.*—In 2008, the Indiana General Assembly passed Indiana Code section 35-42-4-12, which outlawed registered sex offenders’ or violent offenders’ knowing or intentional use of certain social networking sites, instant messaging programs, and chat room programs.<sup>56</sup> While the statute excluded some who might otherwise fall into the defined category of those forbidden from accessing social networking sites and chat rooms,<sup>57</sup> it applied to sex or violent

---

46. *Id.* at 603.

47. *Id.* at 604.

48. *Id.*

49. *Id.* at 605.

50. *Id.* at 603, 605.

51. *Id.* at 605.

52. *Id.* at 605-06.

53. *Id.* at 606.

54. *Id.*

55. *Id.*

56. IND. CODE § 35-42-4-12(e) (2013).

57. For example, the statute did not apply to registered sex or violent offenders who were dating their victim or were in an ongoing personal relationship with their victim. *Id.* § 35-42-4-12(a).

offenders who, for example, were found to be sexually violent predators or convicted of such crimes as child molestation, possession of child pornography, or kidnapping where the victim was younger than eighteen.<sup>58</sup> Any person who fell into these categories was forbidden from accessing social networking websites, instant messaging programs, and chat room programs when the offender knew that those Internet platforms allowed minors to access or use the platform.<sup>59</sup>

For the purposes of the statute, “instant messaging” programs and “chat room” programs were defined as “software program[s] that require[] a person to register or create an account, a username, or a password to become a member or registered user of the program and allow[] two (2) or more members or authorized users to communicate over the Internet in real time using typed text.”<sup>60</sup> A “social networking web site” was defined as

an Internet web site that: (1) facilitates the social introduction between two (2) or more persons; (2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members; (3) allows a member to create a web page or a personal profile; and (4) provides a member with the opportunity to communicate with another person.<sup>61</sup>

“[E]lectronic mail program” and a “message board program[s]” were excluded from the definitions of instant messaging programs, chat room programs, and social networking sites.<sup>62</sup> Offenders had an affirmative defense to prosecution under the statute if they did not know that the banned websites or programs allowed minors to access or use them and “upon discovering that the web site or program allow[ed] [minors, the offender] immediately ceased further use or access of the web site or program.”<sup>63</sup>

2. *Doe v. Prosecutor, Marion County, Indiana*.<sup>64</sup>—On January 17, 2012, a registered sex offender filed a complaint challenging the constitutionality of the statute<sup>65</sup> and, three months later, filed a motion seeking a preliminary injunction banning enforcement of Indiana Code section 35-42-4-12.<sup>66</sup> The motion was consolidated with a bench trial on the merits of the complaint.<sup>67</sup> In its decision following trial, the U.S. District Court for the Southern District of Indiana found that the statute was content-neutral, narrowly tailored enough to leave open

---

58. *Id.* § 35-42-4-12(b).

59. *Id.* § 35-42-4-12(e)-(f).

60. *Id.* § 35-42-4-12(c).

61. *Id.* § 35-42-4-12(d).

62. *Id.*

63. *Id.* § 35-42-4-12(f).

64. No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013).

65. *Id.* at \*1.

66. *Id.*

67. *Id.*

alternative channels of communication, and not overly broad.<sup>68</sup>

The court began by noting the phenomenon of the very Internet platforms the statute purported to regulate.<sup>69</sup> For example, Facebook, one of the most prolific social networking sites, has garnered “901 million active users, including 526 million daily active users,” within only eight years, and it “is available in more than 70 languages.”<sup>70</sup> Indeed, the court noted, social networking sites have become integrally intertwined with communication in modern society.<sup>71</sup> They not only tie different Internet platforms together, including news and current affairs websites, but have been credited, in part, with “animat[ing] numerous social movements, providing activists with a powerful launch pad to communicate with their fellow citizens.”<sup>72</sup> The court continued that the interconnectedness provided an opportunity for sexual predators to prey on children and use the various Internet platforms to commit terrible crimes.<sup>73</sup> The court added that this misuse of the Internet and the undeniable fact that “the virtual world can be [a] dangerous place[] for vulnerable minors” led states to enact statutes like Indiana Code section 35-42-4-12.<sup>74</sup>

The court then analyzed the statute’s constitutionality and, more specifically, whether the statute violates the First Amendment.<sup>75</sup> The court found the First Amendment’s content-neutral doctrine to be the appropriate analytical framework because the statute was “‘justified without reference to the content of the regulated speech.’”<sup>76</sup> The court noted that content-neutral regulations are constitutional so long as they are “*narrowly tailored to serve a significant governmental interest*,” and they “*leave[] open ample alternative channels for communication of the information*.”<sup>77</sup>

First, the court found that the statute was narrowly tailored to serve the state’s legitimate interest in protecting minors online.<sup>78</sup> While the plaintiff conceded that the state’s interest was legitimate, he argued that its means of achieving that goal regulate more speech than is necessary.<sup>79</sup> For example, the statute prevents offenders from “making comments about current events on the *Indianapolis Star* web site; participating in political discussions in certain chat rooms; advertising for businesses using certain social networking sites; or sharing photos and having

---

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at \*2.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at \*5. The court conducted a brief analysis and found that the statute clearly implicates First Amendment rights. *Id.*

76. *Id.* at \*6 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Indeed, the plaintiff conceded that statute is content-neutral. *Id.*

77. *Id.* (quoting *Ward*, 491 U.S. at 791).

78. *Id.* at \*6-7.

79. *Id.* at \*7.



group discussions with family members through Facebook.”<sup>80</sup> While the court agreed that the statute prevented offenders from accessing some websites, it found those websites included only a small subset of the Internet regularly used by minors, and offenders could still legally access the rest.<sup>81</sup>

Within the context of the “narrowly tailored” analysis, the court also rejected the plaintiff’s argument that the statute was needlessly duplicative because an existing state statute made it illegal to solicit a child through the Internet.<sup>82</sup> The court reasoned that the two “statutes serve different purposes.”<sup>83</sup> The statute criminalizing the solicitation of a child through the Internet was aimed at punishing those who have committed a crime.<sup>84</sup> However, the statute before the court “aim[ed] to *prevent* and *deter* the sexual exploitation of minors by barring certain sexual offenders from” accessing banned websites.<sup>85</sup> This was particularly necessary because “the risk of recidivism by sex offenders has been described by the United States Supreme Court as ‘frightening and high.’”<sup>86</sup> The court continued, “[M]any sex offenders [will] have difficulty controlling their internal compulsions . . . [and] *might* sign up for social networking with pure intentions, only to succumb to their inner demons when given the opportunity to interact with potential victims.”<sup>87</sup>

In the second prong of its analysis, the court rejected the plaintiff’s argument that the statute prevented him from accessing various means of communication.<sup>88</sup> The court found the plaintiff could still access countless alternative forms of communications and recited a list of both Internet and non-Internet based forms of communication he could still use.<sup>89</sup> Indeed, the court quipped, “[C]ommunication does not begin with a ‘Facebook wall post’ and end with a ‘140-character Tweet.’”<sup>90</sup> The court reasoned that even without access to Facebook and Twitter, the plaintiff still has an adequate number of ways to communicate his ideas.<sup>91</sup>

On appeal, the Seventh Circuit Court of Appeals reversed, finding the Indiana statute unconstitutional.<sup>92</sup> Agreeing with the district court’s finding that the law satisfied the content-neutral requirement, the Seventh Circuit determined the statute was not narrowly tailored.<sup>93</sup> The Seventh Circuit noted that Indiana “has

---

80. *Id.*

81. *Id.*

82. *Id.* at \*8 (citing IND. CODE §§ 35-42-4-6(a)(4), 35-42-4-13(c) (2012)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003)).

87. *Id.* at \*8 (emphasis added).

88. *Id.* at \*9.

89. *Id.* at \*9-10.

90. *Id.* at \*10.

91. *Id.*

92. *Doe v. Prosecutor, Marion Cnty.*, 705 F.3d 694, 695 (7th Cir. 2013).

93. *Id.*

other methods to combat unwanted and inappropriate communication between minors and sex offenders.”<sup>94</sup> Despite its reversal the Seventh Circuit did “not foreclose the possibility that keeping certain sex offenders off social networks advances the state’s interest.”<sup>95</sup> The state legislature is left free “to craft constitutional solutions to [the] modern-day challenge.”<sup>96</sup>

### C. Nebraska

1. *Unlawful Use of the Internet by a Prohibited Sex Offender.*—On May 29, 2009, the Nebraska governor signed Nebraska Revised Statute section 28-322.05 into law,<sup>97</sup> which became effective on January 1, 2010.<sup>98</sup> The statute, like those discussed above, seeks to outlaw the use of certain websites and Internet-based forms of communication.<sup>99</sup> In particular, any registered sex offender who has also been convicted of crimes listed in the statute<sup>100</sup> is forbidden from “knowingly and intentionally use[ing] a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use” the site.<sup>101</sup> Section 28-322.05, unlike its Louisiana and Indiana counterparts, does not define the terms “social networking web site,” “instant messaging,” or “chat room.”<sup>102</sup> However, Nebraska Revised Statute section 29-4001.01, which was included with the same legislation, defines the three types of Internet platforms that section 28-322.05 proscribes.<sup>103</sup>

First, section 29-4001.01 defines “[c]hat room” as a “web site or server space on the Internet or communication network primarily designated for the virtually instantaneous exchange of text or voice transmissions or computer file attachments amongst two or more computers or electronic communication device users.”<sup>104</sup> It also defines “[i]nstant messaging” as “a direct, dedicated, and private communication service, accessed with a computer or electronic communication device, that enables a user of the service to send and receive virtually instantaneous text transmissions or computer file attachments to other selected users of the service through the Internet or a computer communications

---

94. *Id.* at 699.

95. *Id.* at 701.

96. *Id.* at 702.

97. Legis. B. 285 § 1, 101 Leg., 1st Sess. (Neb. 2009).

98. NEB. REV. STAT. § 28-322.05 (2013).

99. *Id.*

100. The enumerated crimes include, among others, “[k]idnapping of a minor,” “[s]exual assault of a child[,]” and “[v]isual depiction of sexually explicit conduct of a child.” *Id.* §§ 28-322.05(1)(a)-(c), (f).

101. *Id.* § 28-322.05(1).

102. *Id.*

103. *Id.* § 29-4001.01(3), (10), (13); *Doe v. Nebraska*, 734 F. Supp. 2d 882, 907 (D. Neb. 2010).

104. NEB. REV. STAT. § 29-4001.01(3) (2011).

network.”<sup>105</sup> Finally, it defines a “[s]ocial networking web site” as

a web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator’s permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator’s profile.<sup>106</sup>

2. *Doe v. Nebraska*.<sup>107</sup>—In late 2009 and early 2010, numerous plaintiffs filed four separate state and federal complaints challenging Nebraska’s Sex Offender Registration Act.<sup>108</sup> Among other things, the plaintiffs alleged Nebraska Revised Statute section 28-322.05 violated the First and Fourteenth Amendments.<sup>109</sup> The United States District Court for the District of Nebraska consolidated the cases,<sup>110</sup> and, after various non-dispositive decisions,<sup>111</sup> the parties filed cross-motions for summary judgment.<sup>112</sup> The court granted portions of both the defendant’s and plaintiffs’ motions for summary judgment but denied both parties’ motions for summary judgment regarding the constitutionality of the statute.<sup>113</sup> Initially, and conceptually related to their First Amendment claim, the plaintiffs argued that the statute was overly vague pursuant to the Fourteenth Amendment.<sup>114</sup> However, the court held that neither party was able to demonstrate how the state would enforce the portion of the statute criminalizing the knowing use of a banned Internet platform because it permits access by minors.<sup>115</sup>

In their First Amendment claim, the plaintiffs argued that the statute’s “partial

---

105. *Id.* § 29-4001.01(10).

106. *Id.* § 29-4001.01(13).

107. 734 F. Supp. 2d 882 (D. Neb. 2010).

108. *Id.* at 892-94.

109. *Id.* at 906-07, 910-11.

110. *Id.* at 892.

111. *See, e.g.*, *Doe v. Nebraska*, No. 8:09CV456, 2009 WL 5184328, at \*1, \*5, \*8-10 (D. Neb. Dec. 30, 2009) (denying preliminary injunction against Nebraska’s Sex Offender’s Registration Act, but enjoining defendants from enforcing statutes against those convicted of sex offenses who have completed their sentences, are not on parole, probation, or court-ordered supervision); *Doe*, 734 F. Supp. 2d at 882 (granting a motion to vacate a state court’s Ex Parte Temporary Restraining Order).

112. *Doe*, 734 F. Supp. 2d at 892.

113. *Id.* at 896-98.

114. *Id.* at 908. The court, however, noted that it would consider the plaintiffs’ vagueness argument pursuant to the Due Process Clause of the Fifth Amendment, which is applicable to the states through the Fourteenth Amendment. *Id.* at 908-09.

115. *Id.* at 909-10.

ban on Internet use by certain offenders . . . violates [their] speech rights.”<sup>116</sup> The court rejected the parties’ motions for summary judgment on the First Amendment claim due to a lack of undisputed material facts.<sup>117</sup> First, the court established that the statute and its restriction undoubtedly implicate First Amendment interests, and registered sex offenders retain First Amendment rights to speak through the Internet.<sup>118</sup> When applying the First Amendment, the court couched its decision in the context of the “content-neutral regulation” doctrine.<sup>119</sup> While the court did not discuss the “significant governmental interest” prong,<sup>120</sup> it held that a trial was necessary to determine whether the statute was narrowly tailored.<sup>121</sup> The court proffered its own examples of why a trial was necessary.<sup>122</sup> For example, the court queried whether an offender would violate the statute by accessing “a [web]site that allows users to connect with individuals who speak different languages for the purposes of enhancing language learning as native speakers and to help non-native speakers improve their language skills” simply because teens can access the site as well.<sup>123</sup> Similarly, the court asked whether a twenty-three-year-old male convicted of child molestation for having sex with a fourteen-year-old female would be subject to the statute where there was no evidence he used a computer to commit the crime.<sup>124</sup> As a result of these uncertainties, the court found a trial and findings of fact were necessary to rule on the plaintiffs’ First Amendment challenges.<sup>125</sup>

*D. Common Themes Among the Statutes and Cases Reviewing Them*

*1. Statutory Common Themes.*—Through the social networking statutes discussed above, the states seek to create yet another tool to fight the threat posed by online sexual predators and to protect minors. In particular, the states seek to prevent individuals who have already demonstrated a propensity to commit crimes, as evidenced by their prior convictions and obligation to register as sex offenders, from accessing certain parts of the Internet: social networking sites, chat rooms, peer-to-peer sites, and instant messaging services. The states have determined that these types of websites and services create particularly threatening and easily accessible Internet forums for sexual predators to misuse.<sup>126</sup>

---

116. *Id.* at 910; *see also* NEB. REV. STAT. § 28-322.05 (2013).

117. *Doe*, 734 F. Supp. 2d at 911.

118. *Id.*

119. *Id.* at 912.

120. *Id.* Presumably, the plaintiffs would concede that the government has a legitimate, significant interest in protecting children from online sexual predators.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 911, 937.

126. *See, e.g.*, IND. CODE § 35-42-4-12 (2013); KY. REV. STAT. ANN. § 17.546(2) (West 2013); NEB. REV. STAT. § 28-322.05 (2013).

States certainly have an interest in protecting their citizens, particularly minors, from sexual predators, whether online or in the corporeal world. However, because of their unique attributes, these banned websites have been singled out as online environments that enable the predators' crimes. While the states use different definitions to describe the banned Internet platforms, common themes quickly emerge. Most generally, the platforms facilitate bidirectional<sup>127</sup> communication. This contrasts with other kinds of websites such as commercial pages dedicated solely to selling products, or unidirectional<sup>128</sup> information websites that simply present material to educate a reader. Whether anonymously or through personal profiles, each banned platform allows users to communicate with individuals or groups of people who have also chosen to join the same Internet platform. The potential means of communication include mediums as simple as instantaneous text<sup>129</sup> and voice messaging between users,<sup>130</sup> as well as more technology-savvy mediums like user profiles<sup>131</sup> and file sharing.<sup>132</sup> Whether simple or advanced, each of these means of communication represents a way for users to connect, share, and interact with one another's ideas.

When reviewing the specific Internet platforms carved out as impermissible, states have criminalized websites that fall into two basic categories: (1) "social networking sites" and (2) Internet platforms that facilitate instant communication.<sup>133</sup> First, states have defined "social networking" websites as sites that not only allow users to create passive, unidirectional profiles containing biographical information others can view, but also as a way for users to communicate among themselves.<sup>134</sup> Second, states have defined "chat rooms," "instant messaging," and, relatedly, "peer-to-peer networks," as Internet websites, programs, or communication networks that allow users to communicate instantaneously, most commonly through typed text in real time or, perhaps less

---

127. For the purposes of this Article, "bidirectional" means "[m]oving or operating in two usually opposite directions: bidirectional data flow." AMERICAN HERITAGE DICTIONARY, *supra* note 5, at 178.

128. For the purpose of this Article, "unidirectional" means "[m]oving or operating in one direction only." *Id.* at 1880.

129. *See, e.g.*, <http://pidgin.im/> (last visited July 6, 2013) (chat service enabling users to send and receive instant, written messages to and from numerous messaging programs).

130. *See, e.g.*, PIDGIN, <http://support.google.com/chat/?hl=en> (last visited July 6, 2013) (service through Google that facilitates, among other things, computer to computer voice and video communication).

131. *See, e.g.*, FACEBOOK, <https://www.facebook.com/>; LINKEDIN, <http://www.linkedin.com/>; TWITTER, <https://twitter.com/> (last visited July 6, 2013).

132. *See, e.g.*, 4SHARED, <http://www.4shared.com/> (last visited July 6, 2013) (file sharing service that permits the user to, among other things, share documents, photographs and media files).

133. For example, several state statutes prohibit a sex offender's use of "social networking sites." *See* IND. CODE § 35-42-4-12 (2013); KY. REV. STAT. ANN. § 17.546(2) (West 2013); NEB. REV. STAT. § 28-322.05 (2013).

134. *E.g.*, IND. CODE § 35-42-4-12(d) (2013).

commonly, through voice or file sharing.<sup>135</sup> As discussed above, the common thread connecting these two types of banned Internet platforms is the user's ability to engage in bidirectional communication.

While bidirectional communication is both the large-scale and small-scale commonality among the banned websites, the statutes also share the same goal: prevention. Each statute identifies a subgroup of people based on their status as convicted criminals and, more specifically, as sex offender registrants.<sup>136</sup> The underlying presumption implicit in the statute is that this identified subgroup is more dangerous and more likely to recidivate than other criminals. In an effort to prevent the recidivism by way of the Internet, the statutes forbid the identified subgroup from accessing Internet platforms that would allow them to communicate with minors, among others.<sup>137</sup> Therefore, the statutes preclude registered sex offenders from accessing these platforms because of the offenders' previous criminal activities.<sup>138</sup> The punishment the statutes provide is not based on the criminality of specific, constitutionally unprotected speech that takes place on the banned Internet platforms.<sup>139</sup> Instead, it is based on the act of speaking itself. Thus, the statutes' objective and effect are to stop a particular speaker from speaking because of his or her past actions.

2. *Common Themes Among the Cases.*—While the statutes discussed above proscribe certain individuals from accessing Internet platforms that facilitate bidirectional communication and attempt to prevent speech based on the speaker's status, common themes can also be found among the cases interpreting these statutes. From a constitutional perspective, two of the courts subjected the statutes to vagueness arguments, whether pursuant to the Fifth Amendment or Fourteenth Amendment.<sup>140</sup> In addition, each court subjected its respective statute to First Amendment scrutiny.<sup>141</sup> In that regard, two courts applied a content-neutral analysis, and the third applied an overbreadth analysis.<sup>142</sup> While these two First Amendment principles have their own analytical framework, they also share similar concerns and considerations.

---

135. *E.g., id.* § 35-42-4-12(c).

136. *See, e.g., id.* § 35-42-4-12; KY. REV. STAT. STAT. § 17.546(2); NEB. REV. STAT. § 28-322.05.

137. *See, e.g.,* IND. CODE § 35-42-4-12; KY. REV. STAT. ANN. § 17.546(2); NEB. REV. STAT. § 28-322.05.

138. *See, e.g.,* NEB. REV. STAT. § 28-322.05 (listing the numerous offenses that will require an individual to register).

139. *See, e.g., id.* § 28-322.05(1) (punishing one "who knowingly and intentionally uses a social networking web site" that minors are able to access).

140. *Doe v. Jindal*, 853 F. Supp. 2d 596, 599 (M.D. La. 2012); *Doe v. Nebraska*, 734 F. Supp. 2d 882, 908-09 (D. Neb. 2010).

141. *Doe v. Prosecutor, Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at \*5 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (7th Cir. 2013); *Jidal*, 853 F. Supp. 2d at 605; *Doe*, 734 F. Supp. 2d at 910-11.

142. *See Doe*, 2012 WL 2376141, at \*6 (applying content-neutral analysis); *Doe*, 734 F. Supp. 2d at 912 (same); *see also Jindal*, 853 F. Supp. 2d at 603-05 (applying an overbreadth analysis).

As discussed above, the court in *Doe v. Prosecutor, Marion County*<sup>143</sup> correctly stated that the content-neutral doctrine is applicable not when a regulation of speech is based on the speech's content, but when a regulation is of the "time, place, and manner" available to the speaker to speak.<sup>144</sup> When faced with those sorts of statutes, courts consider whether (1) there is a significant government interest at stake, (2) the statute is narrowly tailored to serve that interest, and (3) the regulation "leave[s] open ample alternative channels of communication."<sup>145</sup> Underlying the content-neutral regulation analysis is an examination of whether the challenged law is broader than necessary in relation to its goals, thus encompassing and preventing more speech than necessary. The principle's aim is to force the state to, as exactly as possible, only proscribe speech in as limited a number of situations as possible when trying to achieve its legitimate goals.<sup>146</sup>

The other First Amendment principle applied in analyzing the statutes discussed above—overbreadth—asks a very similar question and has a very similar goal as that of content-neutral analysis. As correctly articulated in *Doe v. Jindal*,<sup>147</sup> the overbreadth analysis requires a court to invalidate a law when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."<sup>148</sup> The overbreadth doctrine permits a facial challenge to a law even though the law's application in the case before the court would be constitutional.<sup>149</sup> Laws struck down for overbreadth are unconstitutional not because of their underlying goals, but because they could impermissibly be applied to and punish a substantial amount of protected speech.<sup>150</sup> While these laws could be applied constitutionally, they are not sufficiently targeted—they are not narrowly tailored.<sup>151</sup> Indeed, the very means by which courts save unconstitutionally overbroad statutes from being invalidated is by narrowing their construction.<sup>152</sup>

---

143. *Doe*, 2012 WL 2376141, at \*1.

144. *Id.* at \*6.

145. *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (alteration in original) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

146. *See, e.g., United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (noting that the First Amendment disfavors content-based restrictions of speech except for "in a few limited areas." (internal quotation marks omitted) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992))).

147. 853 F. Supp. 2d at 596.

148. *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

149. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

150. *See New York v. Ferber*, 458 U.S. 747 (1982) ("insist[ing] that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face").

151. *City of Hous. v. Hill*, 482 U.S. 451, 465 (1987); *see also Stevens*, 130 S. Ct. at 1591-92 (noting need for legislatures to draft narrowly tailored laws).

152. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 112-14 (1990) (where, although an Ohio child pornography statute was overbroad as written, the Ohio Supreme Court saved it by narrowly

These principles examine the contours of a statute: whether a statute crosses a constitutional line and goes too far in attempting to regulate unprotected speech or conduct the state has an otherwise legitimate right to regulate. The courts have been more apt to rely on the content-neutral doctrine to analyze the constitutionality of the social networking statutes. Moreover, the overbreadth doctrine is only necessary when the party challenging the statute must raise the constitutional claims of third-parties not immediately before a court. Therefore, the discussion below focuses only on the content-neutral doctrine and why it is inapplicable to the social networking statutes.

## II. THE CONTENT-NEUTRAL DOCTRINE IS THE WRONG ANALYTICAL APPROACH TO STATUTES THAT CRIMINALIZE BIDIRECTIONAL COMMUNICATION VIA THE INTERNET

### A. *The Content-Neutral Doctrine*

The content-neutral doctrine calls for the application of two distinct, yet related, analytical frameworks.<sup>153</sup> First, the content-neutral doctrine is applied to content-neutral laws that regulate behavior that could be expressive in nature, under some circumstances. This expression through action is often referred to as “symbolic speech.”<sup>154</sup> The Supreme Court has considered a law that regulates behavior because of the message associated with the behavior, and a desire to inhibit the message animates the law, as content-based.<sup>155</sup> However, the Supreme Court will uphold a law that regulates behavior upon a challenge pertaining to its inhibiting effect on expression if the governmental interest in regulating the behavior is unrelated to suppressing the expression with which the behavior could be associated.<sup>156</sup> As a result, when these types of laws do not attempt to regulate the expressive nature of an activity because of its content, but by some other legitimate governmental reason, courts consider these regulations to be content-neutral, instead of content-based, restrictions.<sup>157</sup> To be sure, the social networking statutes discussed above do not regulate behavior that could constitute symbolic speech; therefore, the concomitant content-neutral principle is not applicable. Instead, the content-neutral principle referred to by the district court in *Doe v. Prosecutor, Marion County, Indiana*,<sup>158</sup> arises out of a different, second

---

construing it).

153. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 650-54 (1991).

154. *See, e.g.*, *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

155. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989).

156. *See O’Brien*, 391 U.S. at 378-79, 381 (finding the punishment for destroying a draft card furthered a legitimate government interest unrelated to the potential expressive nature of the act).

157. The Supreme Court also has applied this content-neutral analysis in the context of public broadcasting over television airways. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

158. No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at \*6 (S.D. Ind. June 22, 2012), *rev’d*,



branch of the “content-neutral” tree.

While content-neutral laws may regulate behavior without reference to, and irrespective of, the behavior’s expressive features, content-neutral laws may also regulate fundamentally expressive activities when there is a legitimate governmental interest in “public safety, health, welfare or convenience.”<sup>159</sup> On their face, these laws are applied to all speakers, regardless of their message, and limit expression based on of the government’s need to enforce “reasonable police and health regulations of [the] time and manner of” expression.<sup>160</sup> The applicable doctrine and analysis of these sorts of content-neutral laws requires a court to determine whether the law is “justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information.”<sup>161</sup> Because the laws analyzed under this doctrine do not regulate speakers based on the content of their speech, the Supreme Court has noted that content-neutral laws regulating the time, place, and manner of expression do not call for strict scrutiny.<sup>162</sup>

As these content-neutral laws seek to ensure public convenience and well-being, this version of the content-neutral doctrine is applied when the government aims to regulate expressive activities in quintessential public forums, such as public streets and sidewalks.<sup>163</sup> Indeed, it is the government’s unique, mandated duty to ensure the safe and orderly use of public forums as “liberty itself would be lost in the excesses of unrestrained abuses.”<sup>164</sup> Intermediate scrutiny of these regulations is appropriate because the nature of the law is not to regulate a speaker based on his or her identity or message but to regulate activities that take place in public spaces to ensure an expedient and orderly use of those public spaces.<sup>165</sup> It is this time, place, and manner analysis that the district court in *Doe v. Prosecutor, Marion County* used to analyze the Indiana statute and uphold it as constitutional.<sup>166</sup>

---

705 F.3d 694 (7th Cir. 2013).

159. *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939).

160. *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943).

161. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

162. *Id.* at 798-99. The time, place, and manner analysis has developed “into a . . . fairly lenient standard [with] [t]he government interest and tailoring requirements [coming] quite close to the rational basis standard applied to regulations that do not affect fundamental rights at all.” *Williams*, *supra* note 153, at 644.

163. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994).

164. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

165. *Cf.* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 150 (1981) (“While governmental attempts to regulate the content of expression undoubtedly deserve strict judicial review, it does not logically follow that equally serious threats to [F]irst [A]mendment freedoms cannot derive from restrictions imposed to regulate expression in a manner unrelated to content.”).

166. *Doe v. Prosecutor, Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at

*B. Why a Content-Neutral/Time, Place, and Manner Analysis Is Inapplicable*

As discussed above, the content-neutral doctrine applied in *Doe v. Prosecutor, Marion County* grew out of the government's exclusive and essential obligation to regulate public forums—not only so that society can function, but also to ensure that citizens can exercise the liberties an organized society values. The laws calling for a content-neutral analysis are those that regulate expressive activity, not based on the speaker's identity, but instead aim to ensure the community's unobstructed use and enjoyment of the world around it. By narrowly regulating the time, place, or method through which a speaker can communicate his or her message, while ensuring there are other avenues for the speaker to express his or her message, the government can balance the competing interests of non-speakers' enjoyment of their environs and the speaker's right to speech. These same interests, however, are neither the impetus nor the scheme of the social networking statutes.

Instead, the social networking statutes are designed to prevent an identified and defined group of would-be speakers from accessing Internet platforms that facilitate bidirectional communication. Unlike time, place, and manner restrictions, the schemes criminalizing this access do not aim to balance the speakers' rights with the orderly and convenient use of the community environs, be they corporeal or even ethereal. Indeed, time, place, and manner restrictions are not created because of, or formulated to deal with, the inherent dangerousness—perceived or otherwise—of a speaker, the content of his or her message, or the message's effect on the listener.<sup>167</sup> However, that is precisely the impetus and scheme of social networking statutes; they identify a group based on the members' previous illegal actions and criminalize a form of bidirectional communication because of the potential dangers that communication could pose. The lynchpin of a content-neutral time, place, and manner regulation—ensuring orderliness and convenience—is nowhere to be found.

The Supreme Court has held the content-neutral doctrine applicable in some circumstances when, as with the social networking statutes, a group is identified, defined, and its speech restricted because of its members' past actions and concern for continued lawlessness.<sup>168</sup> For example, in *Madsen v. Women's Health Center, Inc.*, a group of abortion protesters challenged an injunction limiting their expressive activities near an abortion clinic.<sup>169</sup> The Supreme Court found that the injunction significantly regulated the time, place, and manner of the abortion protesters' expressive activities on public property; yet, the regulation was content-neutral and, in part, constitutional.<sup>170</sup> In determining what

---

\*6 (S.D. Ind. June 22, 2012), *rev'd*, 705 F.3d 694 (2013).

167. *See, e.g.,* *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-50 (1981).

168. *See Madsen*, 512 U.S. at 758.

169. *Id.*

170. *Id.* at 775-76. The Court found that noise restrictions and a thirty-six-foot buffer zone

doctrine to apply to the injunction in light of its effect on expressive activities, the Court rejected the call to apply either of two stricter analyses: content-based restriction doctrine or prior restraint doctrine.<sup>171</sup>

The Court reasoned that the challenged injunction was specifically directed at the abortion protesters because of their repeated flouting of a narrower court order enjoining them from blocking access to an abortion clinic.<sup>172</sup> While the challenged, broader injunction singled out the abortion protesters, all of whom shared the same message, suppressing the message's content was not the injunction's genesis.<sup>173</sup> Moreover, the scheme of the injunction was not designed to prevent the abortion protesters' speech because of their identity as abortion protesters.<sup>174</sup> Instead, the Court noted that a content-neutral analysis was appropriate because any group whose history of prior actions was similar to the protesters' activities would have been subjected to the same sort of injunction.<sup>175</sup> Indeed, there was a history of previous, specific, and ongoing activities giving rise to the extensive—but tailored—regulation of the time, place, and manner in which they could protest.<sup>176</sup> The regulation grew out of the identified group's past actions within the context of the specific dispute before the court,<sup>177</sup> not a general disagreement with the group or its message and a need to prevent the members from speaking. In approving the singling out of the protesters and an injunction limiting their expressive rights, the Court noted the unique situation of crafting an injunction to address the specific, past, and continuing objectionable practices of a party compared “with the drafting of a statute addressed to the general public.”<sup>178</sup>

While the social networking statutes initially appear to be content-neutral regulations, akin to the injunction in *Madsen*, they are motivated by different interests and the means by which they accomplish their goals, and, thus, their impact on speech is different.<sup>179</sup> First, in *Madsen*, the court issued its injunction based on the specific activities in which the protesters were engaged.<sup>180</sup> As part of their protests, the protesters were violating a standing order to avoid blocking

---

around an abortion clinic entrances and driveway did not burden more speech than necessary. *Id.* at 776. It also found that a private property thirty-six-foot buffer zone, an “images observable” provision, a 300-foot no-approach zone around the clinic, and a 300-foot buffer zone around close-by residences were unconstitutional because the provisions were broader than necessary to accomplish the permissible goals of the injunction. *Id.* at 760, 775-76.

171. *Id.* at 765-66.

172. *Id.* at 760-62.

173. *Id.* at 762.

174. *Id.* at 762-63.

175. *Id.* at 763. The Court referred to the applicable doctrine as a “heightened” version of the content-neutral doctrine. *Id.* at 764-65.

176. *Id.* at 765.

177. *Id.* at 762-63.

178. *Id.* at 762.

179. *See id.*

180. *See id.*

access to an abortion clinic.<sup>181</sup> Therefore, the trial court expanded and more strictly enforced limitations on a group within the context of an existing dispute between two parties regarding access to an abortion clinic.<sup>182</sup> Indeed, the restrictions were a direct response to the protesters' defined, continuing impermissible activity and were time, place, and manner restrictions custom-made to stop that ongoing, impermissible activity.<sup>183</sup> The injunction was motivated by the need to ensure safe, orderly, and convenient use of and access to the abortion clinic.<sup>184</sup> The social networking statutes, however, are not motivated by defined, ongoing impermissible activities that require the government to criminalize expression related activity. Instead, the social networking statutes are motivated by a desire to prevent a group from engaging in bidirectional Internet communication based on the possibility that some group members may recidivate and engage in unprotected speech. Unlike the injunction in *Madsen*, social networking statutes draw no link between their prohibitions and an identifiable, ongoing pattern of unprotected speech or illegality.<sup>185</sup>

Moreover, the injunction in *Madsen* accomplished its goals by creating a scheme that balanced protesters' rights with those of the abortion clinic's patients.<sup>186</sup> While it restricted the time, place, and manner of speech, the abortion protesters were nevertheless able to engage in speech near the locus of their protest and reach their desired audience.<sup>187</sup> The social networking statutes, however, constitute a complete prohibition on accessing certain forms of bidirectional communication over the Internet. They define a group and entirely preclude that group from communicating via certain proscribed Internet platforms. There is no way for the group to legally connect or communicate with specific, inimitable communities of people who access the verboten Internet platforms; thus, those unique audiences are wholly unreachable. Indeed, the Internet's unique means of facilitating communication and forming incorporeal communities highlights why the time, place, and manner analysis is impractical outside of the corporeal world. Therefore, while the content-neutral doctrine may seem applicable to the social networking statutes because their prohibitions are absolute, regardless of the content of the speaker's message, the goal, scheme, and effect of the statutes reveal that applying the doctrine is unworkable, and thus ill-suited to determine the statutes' constitutionality.

---

181. *Id.* at 758.

182. *See id.*

183. *See id.* at 762.

184. *Id.*

185. *See id.*

186. *See id.*

187. *Id.* at 768-70.

### III. CRIMINALIZING THE USE OF INTERNET PLATFORMS BECAUSE OF THEIR BIDIRECTIONAL COMMUNICATIVE FUNCTION IS PRIOR RESTRAINT

#### A. *The Prior Restraint Doctrine*

From this country's founding through the development of modern free speech jurisprudence, no other principle has been so immutable, so revered, and so sacrosanct as the First Amendment's rejection of prior restraints on speech.<sup>188</sup> Even as modern First Amendment jurisprudence developed in the early twentieth century, and the Supreme Court wrestled with its contours and limitations, no principle was more zealously recognized and singled out as entirely presupposed.<sup>189</sup>

A prior restraint prohibits the expression of ideas prior to their dissemination.<sup>190</sup> Prior restraint was, and is, such an anathema to the principles of free speech because of its power to not simply punish speech, but to prevent it. Indeed, while the government retains the right to punish constitutionally unprotected speech after it is disseminated, that punishment is doled out after (1) the speech occurs; (2) society has had an opportunity consume the ideas; and (3) the speaker receives the protections afforded him or her through the judicial process.<sup>191</sup> It has often been noted that statutes criminalizing and punishing unprotected speech are not prior restraint because the criminal penalty is "subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted."<sup>192</sup> Prior restraint, however, excludes the speaker's ideas entirely from the marketplace of ideas.<sup>193</sup> A criminal statute "'chills' speech," whereas "prior restraint 'freezes' it."<sup>194</sup> Thus, the Supreme Court has called prior restraint "the most serious and the least tolerable infringement on First Amendment rights."<sup>195</sup>

No clear doctrine has emerged regarding the appropriate analysis of a prior restraint on speech;<sup>196</sup> however, the Supreme Court has set an extraordinarily high

---

188. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-14 (1931); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732 (1833).

189. *See, e.g., Schenck v. United States*, 249 U.S. 47, 51-52 (1919); *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 462, (1907).

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

191. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); Redish, *Proper Role, supra* note 190, at 59.

192. *Stuart*, 427 U.S. at 559.

193. *See Planned Parenthood Comm. of Phx., Inc. v. Maricopa Cnty.*, 375 P.2d 719, 725 (Ariz. 1962 (in banc)).

194. *Stuart*, 427 U.S. at 559.

195. *Id.*

196. *See, e.g., N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (illustrating a case in which the Supreme Court was unable to agree on an example permissible prior restraint); Redish, *Proper Role, supra* note 190, at 54.

bar for establishing the constitutionality prior restraint—the highest bar in First Amendment jurisprudence.<sup>197</sup> The Court has characterized prior restraints as presumptively unconstitutional<sup>198</sup> and only permissible when the speech would immediately imperil the nation’s security.<sup>199</sup> While the Court has yet to articulate a specific analytical paradigm, both the Court and commentators have identified prior restraint’s two forms: administrative and judicial prior restraints.<sup>200</sup> Administrative prior restraints are “government limitation[s], expressed in statute, regulation, or otherwise, [which] undertake[] to prevent future publication or other communication without advance approval of an executive official.”<sup>201</sup> The punishment for failure to comply with these licensing schemes lies not in whether the form or content of the expression is constitutionally protected, but in whether the speaker has complied with the advanced approval scheme.<sup>202</sup> These non-judicial restrictions have been described as the most intolerable form of prior restraint because of their similarity to the historically reviled English licensing schemes<sup>203</sup> and the potential for the scheme to become a means of overly broad censorship.<sup>204</sup> Judicial prior restraints, which most commonly take the form of restraining orders and permanent injunctions, are “court orders that actually forbid speech activities.”<sup>205</sup> Injunctions and judicial orders restraining speech are of particular concern because of the collateral bar rule which requires “persons subject to an injunctive order . . . to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.”<sup>206</sup> Modern commentators and Supreme Court precedent have singled out these two restrictions as virtually the sole manifestations of prior restraint<sup>207</sup> and contrasted

---

197. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *N.Y. Times Co.*, 403 U.S. at 717, 720, 726-7, and 730 (Black, Douglas, Brennan, and Stewart, JJ., concurring).

198. *Bantam Books, Inc.*, 372 U.S. at 70.

199. See *N.Y. Times Co.*, 403 U.S. at 714-40 (Black and Douglas, Marshall, Stewart, White, JJ., concurring) (indicating a national security exception as the only prior restraint some of the Justices might tolerate). See *id.* at 726-27 (Brennan, J., concurring) (“[O]nly 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.”); *id.* at 730 (Stewart and White, JJ., concurring) (noting that prior restraint may be tolerable when “disclosure of [information would] surely result in direct, immediate, and irreparable damage to our Nation or its people”).

200. *Alexander v. United States*, 509 U.S. 544, 550 (1993); Redish, *Proper Role*, *supra* note 190, at 54.

201. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 655 (1955).

202. *Id.*

203. Redish, *Proper Role*, *supra* note 190, at 57.

204. See *Freedman v. Maryland*, 380 U.S. 51, 56, 58 (1965); Redish, *Proper Role*, *supra* note 190, at 75-77.

205. *Alexander*, 509 U.S. at 550.

206. *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 386 (1980).

207. *Alexander*, 509 U.S. at 550; Redish, *Proper Role*, *supra* note 190, at 57.

these forms of regulation with, as described above, content-based expression-restricting statutes that restrict speech through subsequent punishment.<sup>208</sup>

However, seemingly lost to history is the recognition that prior restraints do not always appear as administrative or judicial schemes. When the Supreme Court was first developing its modern prior restraint doctrine, it took a more expansive view of what sorts of government restrictions could constitute prior restraint.<sup>209</sup> For example, in *Grosjean v. American Press Co.*, the Court considered whether a tax upon the gross receipts of newspapers and periodicals with a weekly circulation exceeding 20,000 constituted a prior restraint.<sup>210</sup> In finding the tax a prior restraint, the Court established that prior restraints need not only appear in preapproved forms.<sup>211</sup> Indeed, the Court stated “the First Amendment . . . was meant to preclude the . . . government . . . from adopting any form of previous restraint upon printed publications, or their circulation, including that which had . . . been effected by . . . wellknown [sic] and odious methods.”<sup>212</sup> Recounting its recent, seminal prior restraint decision in *Near v. Minnesota* from six years earlier, the Court went on to note that the First Amendment was meant to “prevent previous restraints on publication; and the [C]ourt [in *Near*] was careful not to limit the protection of the right to any particular way of abridging it.”<sup>213</sup> Finally, the Court not only refused to limit the potential forms of prior restraint but also the universe of speakers protected from prior restraint.<sup>214</sup> Lest there be any confusion, the Court specified that prior restraints were not only impermissible censorship of the press, “but *any action of the government* by means of which it might *prevent* such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.”<sup>215</sup>

Prior restraint is easily identified in its typical forms of judicial orders and licensing schemes. However, not allowing or recognizing other types of prior restraint is a doctrinaire adherence to form over substance. It allows for the application of a less speech-protective doctrine—like the content-neutral doctrine—to a governmental restriction of expression. It fails to apply the most exacting standard of constitutional law to the freezing of speech by means other than judicial orders and licensing schemes. Here, the question should not be whether the prior restraint arrived in the form of an injunction or licensing scheme. Instead, the question must be whether the expression was prohibited “prior to a full and fair hearing in an independent judicial forum to determine whether the challenged expression is constitutionally protected.”<sup>216</sup>

---

208. *Alexander*, 509 U.S. at 553.

209. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 249-50 (1936).

210. *Id.* at 240.

211. *Id.* at 249.

212. *Id.*

213. *Id.*

214. *Id.* at 249-50.

215. *Id.* (emphasis added) (internal quotation marks omitted).

216. Redish, *Proper Role*, *supra* note 190, at 75.

*B. The Social Networking Statutes Are a Prior Restraint on Bidirectional Communication and Violate the First Amendment.*

The Internet has had a revolutionary—and hitherto incomprehensible effect—on communication.<sup>217</sup> It has transformed and democratized communication such that it transcends the corporeal boundaries associated with the human experience of expression and association.<sup>218</sup> At no other time in history have so many people instantaneously been able to share ideas, opinions, and knowledge.<sup>219</sup> While previous forms of mass communication have been unidirectional and concentrated in the hands of a few, the Internet has dispersed the means to express ideas and enabled their bidirectional exchange.<sup>220</sup> The Internet has become the “new marketplace of ideas[,]”<sup>221</sup> and bidirectional communication via the Internet has become an essential part of modern communication.<sup>222</sup>

This democratization of the channels of human communication also has facilitated the creation of previously unimaginable communities.<sup>223</sup> Internet communities, like Internet communication, transcend geographical and physical boundaries.<sup>224</sup> These communities are inherently voluntary associations where users can enter and leave as they wish,<sup>225</sup> providing any number of community members with a forum to easily communicate information to others with shared interests or shared identities.<sup>226</sup> As a result, the composition of any particular Internet-based community is unique and cannot be replicated.<sup>227</sup> It is because of these revolutionary, communicative, and interconnected characteristics—and their potential for abuse—that the social networking statutes prohibit certain bidirectional communication via the Internet. This prohibition constitutes a prior restraint. To be sure, the social networking statutes share all of the repugnant qualities of prior restraint in its recognized forms.

The statutes do not prohibit expression based on its content. The content of the prospective, as yet unarticulated speech is irrelevant. Instead, the social

---

217. Douglas B. McKechnie, *The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer*, 64 HASTINGS L.J. 469, 471 (2013).

218. *Id.* at 471-72.

219. *Id.*

220. *Id.*

221. *Id.* at 486 (quoting *Reno v. ACLU*, 521 U.S. 844, 885 (1997)).

222. *See, e.g.*, *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (noting the Internet is an “important medium of communication, commerce, and information-gathering”); *see also Doe v. Prosecutor, Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at \*1-2, \*10 (S.D. Ind. June 22, 2012), *rev’d*, 705 F.3d 694 (7th Cir. 2013).

223. McKechnie, *supra* note 217, at 485.

224. *Id.* at 485-86.

225. *Id.* at 488.

226. *Id.* at 486-90.

227. *Id.* at 487-88.



networking statutes aim to stop communication before it occurs.<sup>228</sup> The statutes ignore the substance of the speech and criminalize the act of communicating itself. Subsequent punishment schemes criminalize unprotected speech based on its content and allow the speaker an independent judicial forum that can adequately decide whether the First Amendment protects the expression at issue.<sup>229</sup> However, in the social networking statutes' scheme, whether the content of the speech is protected is inconsequential. Instead, like speaking in violation of a court order or before gaining advanced approval under a licensing scheme, the social networking statutes' punishment lies in the act of engaging in expression.<sup>230</sup> Thus they are not a subsequent punishment of speech.

Criminalizing the act of expression is the quintessential description of prior restraint.<sup>231</sup> The social networking statutes do no less than freeze expression before it takes place on certain Internet platforms. While administrative prior restraints present the intolerable possibility that licensure regulations will be misapplied and result in an abuse of the censor's power, it is conceivable that some expression will be permitted—however inconsistently that may be. Paradoxically, the social networking statutes result in an even more impenetrable freezing of speech. As discussed above, there is no opportunity for the speaker, *after* he or she has spoken, to persuade an independent judicial body that the content of his or her expression was protected. In addition, the social networking statutes provide no opportunity, *prior* to expression, to seek out a regulator's approval of the speech. Thus, while administrative prior restraint is unacceptable because of expression's subjection to the censor's whim, with only the possibility that the speaker may be permitted to speak, the social networking statutes leave no hope, indeed no chance at all, that expression will be permitted. The only option is to refrain from communicating. The only analysis is a post-expression analysis of whether the speaker engaged in expression. Therefore, the threat of punishment does not simply chill the speaker's desire to communicate, it “freezes” it.”<sup>232</sup>

The social networking statutes also freeze communication in a way similar to the “collateral bar rule” that accompanies injunctions. Injunctions are inherently suspect when they enjoin speech since the “collateral bar rule” permits punishment for violating a court's order without considering whether the order was constitutionally permissible in the first instance.<sup>233</sup> The way the social

---

228. See, e.g., IND. CODE § 35-42-4-12 (2013) (prohibiting registered sex offenders from using social networking sites); KY. REV. STAT. ANN. § 17.546(2) (2013) (same); LA. REV. STAT. ANN. § 14:91.5 (2013) (same); NEB. REV. STAT. § 28-322.05 (2013) (same).

229. See Redish, *Proper Role*, *supra* note 190, at 77.

230. See, e.g., *In re State Farm Lloyds*, 254 S.W.3d 632, 634 (Tex. Ct. App. 2008) (finding a gag order was “presumptively unconstitutional,” as a prior restraint on speech).

231. See, e.g., LA. CONST. art. I, § 7 (“No law shall curtail or restrain the freedom of speech or of the press.”).

232. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

233. See, e.g., *United States v. Terry*, 802 F. Supp. 1094, 1101 (S.D.N.Y. 1992) (finding no punishment warranted).

networking statutes function mimics the “collateral bar rule.” The speaker who is subjected to the social networking statutes is punished for violating the statutes’ command that he or she not speak—the content of the speaker’s expression and whether it is constitutionally protected are irrelevant. The speaker has no opportunity to defend himself or herself by demonstrating that the content of the speech was, in fact, protected. Like violating a court order enjoining speech and being punished for the act of speaking, not its content, the social networking statutes forbid some forms of bidirectional communication via the Internet and punish the act of communication, not its content.

The concern for high rates of sex offender recidivism is undeniably legitimate. Indeed, the Supreme Court has noted that sex offenders are more likely to recidivate than other offenders.<sup>234</sup> However, while the possibility that sex offender may recidivate is palpably alarming, the Framers of the Constitution and First Amendment jurisprudence leave no room for preemptively prohibiting a citizen’s free speech rights because of previous criminal acts.<sup>235</sup> As the Court held in *Near*, a speaker’s past criminal actions do not authorize the government to apply a prior restraint on future speech.<sup>236</sup> The government may not use a prior restraint scheme to enforce its presumption that a speaker who has been convicted of engaging in criminal acts will misuse his or her right to speak in the future.<sup>237</sup> Even when the previous crimes were speech related, the First Amendment compels courts to consider each act of communication as distinct unto itself.<sup>238</sup> If any future, discrete communication is indeed unprotected, those crimes may be punished.<sup>239</sup> “The prospect of crime, however, by itself does not justify laws suppressing protected speech.”<sup>240</sup> The social networking statutes run afoul of these First Amendment principles.

The social networking statutes single out a viscerally reviled and intuitively indefensible group of people based on their past crimes. The statutes then carve out certain forms of bidirectional communication on the Internet and punish any communication via those channels.<sup>241</sup> The states’ goal is to forbid access to those singled-out forms of communication because of the prospect that the individuals in the group will misuse the sites to further a criminal end.<sup>242</sup> While the Southern District Court in *Doe v. Prosecutor, Marion County*, noted that “the vast majority of the [I]nternet is still at [their] fingertips[,]”<sup>243</sup> the government has nevertheless

---

234. *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003).

235. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931).

236. *See id.*

237. *Id.*

238. *Id.* at 718.

239. *Id.* at 712-13.

240. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

241. *See, e.g.*, IND. CODE § 35-42-4-12 (2013); LA. REV. STAT. ANN. § 14.91.5 (2013); NEB. REV. STAT. § 28-322.05 (2013).

242. *See Doe v. Jindal*, 853 F. Supp. 2d 596, 603 (M.D. La. 2012).

243. *Doe v. Prosecutor, Marion Cnty.*, No. 1:12-cv-00062-TWP-MJD, 2012 WL 2376141, at \*7 (S.D. Ind. June 22, 2012), *rev’d*, 705 F.3d 694 (7th Cir. 2013).

imposed a prior restraint on the use of banned bidirectional communication platforms. The unique communities those platforms create, which may amount to millions of users, are entirely inaccessible for those who belong to the defined group—sexual offenders. The group members cannot deliver or receive communication within those communities and, furthermore, cannot identify other members of the communities in order to disseminate their ideas by some other means. Prior restraint is no less dangerous when it is only the despised members of society who are subjected to it or only applied to a particular medium of communication.

The tempting argument to which the Southern District Court in *Doe v. Prosecutor, Marion County* fell prey is that the Internet is a vast media universe with countless other access points.<sup>244</sup> However, just as a ban on publishing a newspaper in only one city would leave open the rest of the country for the publisher to disseminate his or her ideas, the publisher is nevertheless silenced as to that particular city. The prior restraint is no more tolerable simply because the publisher may still exercise his or her right to publish elsewhere. Likewise, the ban on accessing certain proscribed bidirectional communication platforms comes with the modern form of silencing communication with those specific audiences. Certainly, the speaker can go elsewhere, but silencing his or her expression of opinion robs the speaker and the inaccessible audiences of the opportunity to exchange error for truth or the opportunity to gain a clearer perception of truth.<sup>245</sup>

The potential for criminal exploitation of bidirectional communication via the Internet is undeniable. However, a prior restraint on communication is intolerable in almost any form or amount; it is presumptively unconstitutional.<sup>246</sup> As discussed above, the bar is so high for a prior restraint to be constitutional that the Court has suggested a prior restraint on speech would only be tolerable under the most extreme circumstances.<sup>247</sup> Thus, no expression, save the sort that poses the most immediate and irreparable damage to the country, could be subject to the prior restraint levied by the social networking statutes, on however small a scale. Whatever the proper bounds of policing the Internet may be,<sup>248</sup> they are exceeded by statutes that single out a group of speakers to completely prevent the dissemination of their ideas and reception of the ideas of others via certain bidirectional communication platforms.<sup>249</sup>

---

244. *Id.* at \*2.

245. JOHN STUART MILL, ON LIBERTY 87, 118 (David Bromwich & George Kale eds., 2003).

246. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-71 (1963).

247. *Id.*

248. Policy makers have a variety of creative alternatives to both protect a citizen's unfettered right to free speech via the Internet while, at the same time, protecting potential victims from cybercrime. Although those policy ideas are beyond the scope of this article, one solution may be to require sex offenders to include a conspicuous notice in their online representations that they are a registered sex offender. *See, e.g.*, LA. REV. STAT. § 15:541.2(D) (2013).

249. *Cf.* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

## CONCLUSION

The Internet has revolutionized our lives. It has opened its users to the world and each other. With the Internet's openness and interconnectivity comes the potential for misuse and criminal activity. Governments are struggling to keep up with these swift changes in the human experience brought by the Internet. To that end, some states have identified a group of people based on their previous criminal activity and banned them from accessing some Internet platforms that facilitate bidirectional communication. Courts struggle with the implications of such bans and finding the appropriate constitutional doctrines through which to view them.

The First Amendment principles regarding prior restraints on speech provide the answer. While a rejection of prior restraints on speech is one of the earliest, immutable First Amendment values,<sup>250</sup> it is no less applicable to today's modern forms of communication. Indeed, the government's attempt to ban access to certain forms of bidirectional communication via the Internet has the same effect as the well-established and recognizable forms of prior restraint. It punishes the act of speaking, not the content of the speech. As a result, while these statutes are directed at a group who is easily reviled and distrusted, they nevertheless violate a fundamental tenet of the First Amendment—a tenet that was vigorously defended at the beginning of the First Amendment's evolution and must be vigorously applied to modern forms of communication as the prior restraint doctrine 2.0.

---

250. *See* *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 733 (1931).