First Amendment Rights or the Best Interests of the Child?: The Tension Between Parents' and Children's Rights in Non-Disparagement Agreements

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INTRODUCTION

Non-disparagement agreements and clauses represent a common feature of negotiated marital settlements in the Commonwealth of Massachusetts.[1] A non-disparagement clause is a provision often found in divorce and child custody agreements that requires one or more parties to refrain from making negative comments about another.[2] Courts typically consider non-disparagement clauses as a part of their legal obligation to decide divorce and child custody proceedings under the best interests of the child standard.[3] However, a recent decision by the Supreme Judicial Court of Massachusetts (hereinafter "SJC") in *Shak v. Shak* has called the constitutionality and continued legitimacy of non-disparagement orders into question.[4] Non-disparagement orders are sometimes difficult to enforce, not because of constitutional concerns, but rather because of the difficult nature of proving disparagement.[5] Prior to the decision in *Shak*, many family law experts considered non-disparagement orders to be constitutionally supported by a parent's right to control the upbringing of

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[1] *See* Mass. Continuing Legal Educ., Inc., *Marital Separation Agreements*, *in* TRYING DIVORCE CASES IN MASSACHUSETTS § 12.6.1 (Donald G. Tye ed., 6th ed. 2020).

[2] Maurice Robinson, *The Holidays and Non-Disparagement Clauses*, FAM. KIND (Dec. 1, 2014), https://perma.cc/4NR5-C7L3.

[3] *Id.*

[4] 144 N.E.3d 274, 280 (Mass. 2020).

[5] Robinson, *supra* note 2.

his or her child.[6]

This Comment will illustrate that although the SJC followed Massachusetts and federal precedent regarding the prior restraint doctrine in *Shak*, the SJC's holding that the non-disparagement order in *Shak* was an unconstitutional prior restraint is wrong. The holding is improper because it both misapplied the standard for determining the existence of a compelling interest and because the alternatives it suggested are not reasonable alternatives for one going through a contentious divorce proceeding. Part I discusses how both the U.S. Supreme Court and Massachusetts courts have defined and applied the law of prior restraints and defined First Amendment speech protections. Part II explains the facts, procedural history, and the SJC's analysis in *Shak v. Shak*. Part III articulates the complexity of the prior restraint doctrine that the SJC overlooked. Part IV argues that the child's age and the permanent nature of social media caused the SJC to incorrectly find that the state did not have a compelling interest in protecting the Shaks' child from disparaging language. Part V asserts that reasonable alternatives do not exist because the trial court's order as written was narrowly tailored. Part VI suggests that the SJC's precedent will cause confusion in other jurisdictions.

I. Background

A. *U.S. Supreme Court Prior Restraint Jurisprudence*

The free speech clause of the First Amendment of the U.S. Constitution protects people's right of expression from government restriction because of the expression's message, idea, subject matter, or content.[7] Prior restraints represent one example of a heavily disfavored government restriction on speech.[8] Because prior restraints are judicial orders prohibiting certain forms of communications before they happen, courts consider these instruments to be one of the most extreme judicial remedies.[9] Consequently, courts place a heavy presumption against the validity of prior restraints.[10] Even though courts do not consider prior restraints to be unconstitutional per se, courts will only uphold their constitutionality in the most extreme of

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[6] Jennifer M. Paine, *Non-Disparagement Clauses: How Do I Enforce It?*, DADS DIVORCE, https://perma.cc/497E-9YBP (last visited Feb. 9, 2022).

[7] U.S. CONST. amend. I.; Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002).

[8] *See generally* Alexander v. United States, 509 U.S. 544, 550 (1993) (noting a variety of decisions where courts declined to enforce government restrictions on speech).

[9] *Id.*; Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[10] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).

circumstances.[11]

The U.S. Supreme Court formulated a three-part test to determine when prior restraints could be constitutionally permissible.[12] First, a court must determine the nature and extent of the speech in question.[13] Second, a court must determine whether other measures would be likely to mitigate the effects of unrestrained speech.[14] Third, a court must determine how effectively a restraining order would operate to prevent the threatened danger.[15] Additionally, the Supreme Court outlined three safeguards that prior restraints must possess to be constitutional.[16] These constitutional safeguards include placing the burden of proof on the censor, limiting prior restraints for only a particular brief period, and assuring a prompt judicial decision.[17]

B. *Massachusetts Prior Restraint Jurisprudence*

In comparing U.S. constitutional principles to Massachusetts law, the Massachusetts Constitution offers the same protection of free speech as the U.S. Constitution.[18] Similar to the U.S. Supreme Court's tests, the SJC will only permit the prior restraint of speech if (1) there is a compelling state interest that the prior restraint would advance and if (2) there is no less restrictive alternative to serving that interest.[19] Further, the SJC has ruled that prior restraints require a particularly heavy burden to pass constitutional muster.[20] In *Commonwealth v. Barnes*, the SJC also emphasized the heavy presumption against the validity of prior restraints.[21] On the whole, the SJC is not reluctant to declare prior restraints on speech as unconstitutional.[22]

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[11] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).

[12] *Neb. Press Ass'n*, 427 U.S. at 562.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559–60 (1975).

[17] *Id.* at 560.

[18] Care & Protection of Edith, 659 N.E.2d 1174, 1176 (Mass. 1996).

[19] *Id.* at 1177.

[20] George W. Prescott Publ'g Co. v. Stoughton Div. of the Dist. Court Dep't of the Trial Court, 701 N.E.2d 307, 309 (Mass. 1998).

[21] 963 N.E.2d 1156, 1165 (Mass. 2012).

[22] *E.g.*, *id.* (recognizing that stopping the publication of reports of juvenile records and proceedings is an unconstitutional prior restraint); *George W. Prescott Publ'g Co.*, 701 N.E.2d at 309 (recognizing that prohibiting internet streaming of court cases is an unconstitutional prior

The U.S. Supreme Court has ruled that protecting children's well-being and mental health can be a compelling state interest to overcome the unconstitutional presumption against prior restraints.[23] To evaluate the strength of this compelling interest, Massachusetts courts utilize the best interest of the child standard.[24] Though not an exhaustive list, some factors that a court can consider include: the minor's age, the minor's psychological maturity and understanding, the nature of the speech attempting to be restrained, the desires of the child, and the interests of the parents.[25] The SJC narrowly applies this standard, as it requires a detailed showing that a particular action has caused specific harm to the child.[26]

When applying the second prong of the SJC's test for determining the validity of prior restraints, the SJC will declare a prior restraint to be unconstitutional if any reasonable alternative is available.[27] Courts have considered voluntary agreements between private parties, court orders such as protective orders, and civil causes of action as reasonable alternatives that will defeat the constitutionality of prior restraints.[28] Ultimately, Massachusetts jurisprudence on both the constitutional and family law aspects of prior restraints will only find prior restraints constitutional in the most extreme of circumstances.[29]

II. *Shak v. Shak*

A. *Factual and Procedural History*

Ronnie and Masha Shak were married for fifteen months and had one child together.[30] When the child was a one-year-old, Masha filed for

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restraint); *Care & Protection of Edith*, 659 N.E.2d at 1176 (recognizing that preventing father from publicly commenting about court and department proceedings is an unconstitutional prior restraint).

[23] Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 607 (1982).

[24] *Barnes*, 963 N.E.2d at 1167.

[25] *Id.*

[26] Felton v. Felton, 418 N.E.2d 606, 607 (Mass. 1980).

[27] *Barnes*, 963 N.E.2d at 1165.

[28] *See* Shak v. Shak, 144 N.E.3d 274, 280 (Mass. 2020) (stating that a voluntary non-disparagement agreement or a harassment prevention order are viable alternatives to court imposed non-disparagement orders); *see also* Roman v. Trustees of Tufts Coll., 964 N.E.2d 331, 341 (Mass. 2012) (establishing the requirements for intentional infliction of emotional distress); White v. Blue Cross & Blue Shield of Mass., Inc., 809 N.E.2d 1034, 1036 (Mass. 2004) (establishing the requirements for defamation).

[29] *See* Care & Protection of Edith, 659 N.E.2d 1174, 1177 (Mass. 1996).

[30] *Shak*, 144 N.E.3d at 276.

divorce.[31] She also filed an emergency order to remove Ronnie from the house due to his violent behavior and substance abuse problems, fearing for the child's safety.[32] A probate and family court judge temporarily granted Masha sole custody of the child and ordered Ronnie to vacate the marital home.[33] Masha then filed for various orders, including an order prohibiting Ronnie from disparaging her, or the ongoing litigation, on social media.[34] After a hearing on these orders, the judge issued specific non-disparagement clauses applicable to both parties, which read, "Neither party shall disparage the other -- nor permit any third party to do so -- especially when within hearing range of the child. . . . Neither party shall post any comments, solicitations, reference or other information regarding this litigation on social media."[35]

After Ronnie allegedly posted disparaging remarks about Masha and the litigation on social media, which was accessible to Masha's rabbi and business clients, Masha filed a civil contempt order alleging that Ronnie violated the non-disparagement provisions.[36] Ronnie answered that he did not receive timely notice of the judge's order and that the hearing judge lacked the authority to issue non-disparagement orders in the first place because they functioned as a prior restraint on his speech.[37]

A second judge failed to find Ronnie in contempt because he found the orders as written to be an unconstitutional restraint on speech.[38] The judge then reissued the orders with a narrower focus, stating:

> 1) Until the parties have no common children under the age of [fourteen] years old, neither party shall post on social media or other Internet medium any disparagement . . . consist[ing] of comments about the party's morality, parenting of or ability to parent any minor children. . . . 2) While the parties have any children in common between the ages of three and fourteen years old, neither party shall communicate, by verbal speech, written speech, or gestures any disparagement to the other party if said children are within [one hundred] feet of the communicating party or within any other farther distance where the children may be in

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Shak*, 144 N.E.3d at 276.

[37] *Id.*

[38] *Id.*

a position to hear, read, or see the disparagement.[39]

Masha then reported two questions on direct review to the SJC, but the Court declined to answer those questions and instead focused on deciding the correctness of the trial judge's non-disparagement orders.[40]

B. *The SJC's Holding and Analysis*

The SJC began its analysis by identifying that the state's desire to protect the mental and emotional well-being of the Shak's child could constitute a compelling state interest.[41] However, the Court clearly stated that state interest alone is not enough to warrant a prior restraint on parents' disparaging speech.[42] Next, the SJC evaluated whether the Shak's child suffered sufficient harm from the disparaging speech to necessitate a prior restraint on Ronnie's speech.[43] The SJC emphatically decided that the extreme level of harm that would justify a non-disparagement order against the child's parents did not exist in the present case.[44] The Court focused its analysis on Masha's failure to present evidence that the child suffered any harm directly because of Ronnie's disparaging remarks.[45] Specifically, the SJC reasoned that because the child was too young to understand any spoken disparagement or read and comprehend written disparagement on social media, the potential harm to the Shaks' child did not justify the issuance of prior restraint orders.[46] Additionally, the SJC rejected any potential argument about future harm the child may experience as being too speculative.[47] To support the previous finding, the SJC also stated that nothing in the Shaks' child's mental or physical condition suggested that he was overly susceptible to disparaging remarks.[48] Ultimately, the Court concluded that Masha did not prove a compelling interest specific enough to justify a prior restraint on Ronnie's speech.[49]

Even though the SJC asserted that its analysis of the constitutionality of

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[39] *Id.* at 276–77.

[40] *Id.* at 277.

[41] *Id.* at 279.

[42] *Shak*, 144 N.E.3d at 279.

[43] *Id.* at 279–80.

[44] *Id.* at 280.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Shak*, 144 N.E.3d at 280.

[49] *Id.*

the prior restraint order ended when the Court determined that a compelling state interest did not exist, it went on to discuss why the order was not narrowly tailored to achieve its stated purpose.[50] First, the SJC emphasized that nothing in the holding or ruling would affect non-disparagement orders that parents voluntarily entered into without court involvement.[51] Next, the SJC stated that parents still have other judicial remedies to deal with disparaging speech including harassment prevention orders, defamation lawsuits, and intentional infliction of emotional distress lawsuits.[52] In addition to these judicial remedies, the SJC suggested that other judicial proceedings, such as how judges take disparaging language into account during child custody hearings, can serve as a natural check against parents disparaging one another.[53] The SJC concluded its analysis of alternatives to non-disparagement orders by asserting that the most effective alternative to these orders is for parents to cooperate for the sake and well-being of their child.[54]

Ultimately, the SJC held in *Shak v. Shak* that the trial judge's non-disparagement orders were unconstitutional under both the U.S. Constitution and Article 77 of the Massachusetts Constitution and thus should be vacated.[55] The holding was specific to the particular non-disparagement order, as the SJC did not hold that all non-disparagement orders in divorce and child custody proceedings are unconstitutional per se.[56] However, the SJC also held that non-disparagement orders that serve as a prior restraint on parental communications in family law litigation matters will only be held as constitutional in the most exceptional of circumstances.[57]

ANALYSIS

The SJC wrongfully decided *Shak v. Shak* despite applying the traditional prior restraint doctrine soundly because the particular circumstances of the case, especially the child's countervailing constitutional rights, the child's very young age, the permanent nature of social media communications, and

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Shak*, 144 N.E.3d at 280.

[55] *Id.*

[56] *See id.*

[57] *Id.* at 279–80.

the lack of practical feasibility for suggested alternatives, should have compelled the Court to exercise discretion and flexibility in applying the prior restraint doctrine.

III. The SJC's Characterization of Prior Restraints Was Too Simplistic

A. *Prior Restraints Are Not Simply or Easily Defined*

The Supreme Court of the United States cemented the concept of prior restraints as a leading concern in free expression litigation in *Near v. Minnesota ex rel. Olson*.[58] Even though the Court articulated four limitations to the prior restraint doctrine, the Court's opinion did not define exactly what constitutes a prior restraint.[59] The SJC in *Shak* utilized a definition of prior restraint that the Supreme Court advanced in *Alexander v. United States*, defining it as an "administrative and judicial order[] forbidding certain communications when issued in advance of the time that such communications are to occur."[60] The SJC then unequivocally declared an injunction on speech, such as a non-disparagement order, as a prior restraint by definition.[61]

However, prior restraints are not that clearly defined, which may lead to an over classification of limitations on speech as prior restraints.[62] According to constitutional law expert Michael Meyerson, prior restraints are most offensive to freedom of speech when the preemptive restriction on speech also violates separation of powers principles.[63] The theory behind this definition of prior restraints is that a branch of the government cannot overstep its constitutional bounds by restricting speech.[64] However, judicial orders that regulate a party's speech or conduct in the courtroom should *not* be considered a prior restraint because the judge is acting within his or her constitutional duties.[65]

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[58] Michael I. Meyerson, *Rewriting* Near v. Minnesota*: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1087 (2001); *see* 283 U.S 697, 715–16 (1931).

[59] *Near*, 283 U.S. at 716 (stating that the four limitations are: (1) troop movement during wartime, (2) obscenity, (3) incitement to violence, and (4) protection of private rights); s*ee* Meyerson, *supra* note 58, at 1106.

[60] 144 N.E.3d at 278 (quoting Alexander v. United States, 509 U.S. 544, 550 (1993)).

[61] *Id.*

[62] *See, e.g.*, Meyerson, *supra* note 58, at 1106–07; Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989).

[63] *See* Meyerson, *supra* note 58, at 1107.

[64] Meyerson, *supra* note 58, at 1107.

[65] Meyerson, *supra* note 58, at 1107–08.

Even though the non-disparagement order in *Shak* fits Meyerson's definition of prior restraints, it is not as obvious as the SJC suggests it is.[66] The probate and family court judge issued the non-disparagement order as a remedy for Masha, which is within the judiciary's constitutional mandate.[67] The SJC's decision reflects the trend of classifying all preemptive restrictions on speech as prior restraints without deeply probing whether they actually share other characteristics of prior restraints.[68] The lack of explanation for this classification increases confusion in applying the prior restraint doctrine.[69] The SJC's decision to gloss over and simplify the prior restraint doctrine weakens its overall argument because its decision lacks a robust explanation of how restricting a private person's personal communications should be considered a prior restraint where the judge acted within his or her constitutional mandate.[70]

B. *The SJC Ignored Other Constitutional Concerns Invoked by Non-Disparagement Orders*

Prior to the decision in *Shak*, family law practitioners and legal experts presumed a parent's constitutional right to control the upbringing of his or her child allowed the judicial enforcement of non-disparagement orders.[71] The Supreme Court of the United States has historically recognized a parent's right to control the upbringing of his or her child as a part of his or her liberty interest protected under the Fifth and Fourteenth Amendments.[72] In the case of the Shaks, though the non-disparagement order may infringe on Ronnie's freedom of speech, removing it also equally impedes on Masha's right to control her child's upbringing.[73] Other jurisdictions recognize that disparaging conduct can affect a parent's ability to raise a child, thus violating the parent's constitutional liberty interest.[74] A parent's

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[66] *See* 144 N.E.3d at 279; Meyerson, *supra* note 58, at 1096 (proposing a definition of prior restraints that restricts speech prior to communication or formulating rules on speech in contravention of the proper constitutional chronological order).

[67] *See Shak*, 144 N.E.3d at 276; Meyerson, *supra* note 58, at 1096.

[68] *See Shak*, 144 N.E.3d at 279; Scordato, *supra* note 62, at 8.

[69] Scordato, *supra* note 62, at 8 (arguing that because of this confusion, only governmental physical action aimed to stop speech violates the prior restraint doctrine).

[70] *See Shak*, 144 N.E.3d at 279; s*ee also* Meyerson, *supra* note 58, at 1107.

[71] *See* Paine, *supra* note 6.

[72] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[73] *See Shak*, 144 N.E.3d at 276.

[74] *See, e.g.*, Borra v. Borra, 756 A.2d 647, 650 (N.J. Super. Ct. Ch. Div. 2000) (finding the

constitutional right to free speech is not absolute, especially when one parent's free speech rights impedes the other parent's constitutional liberty rights.[75]

Additionally, a child's constitutional right to his or her own welfare, reflected in the best interests of the child standard, can supersede a parent's freedom of speech rights.[76] Courts in both Washington and New Jersey, for example, have found that one parent's disparagement of the other parent can indirectly harm their child.[77] In Washington, an appeals court found that the father's continued labeling of the mother as insane harmed their children because the harm to the mother's reputation negatively affected the children's opinion of their mother. [78] Similarly, a trial court in New Jersey found that a husband's objection to his ex-wife's country club application would harm their children because they had shared the membership for many years and ending it would upset their daily lives.[79] New Jersey recognizes that parental rights, though fundamental, are not absolute.[80] Though Massachusetts jurisprudence does not reflect these principles exactly, previous cases recognize the basic principle that parental rights can be subservient to the best interests of the child.[81]

Accordingly, the SJC in *Shak* ignored other constitutional concerns that conflicted with Ronnie's freedom of speech.[82] The SJC overlooked the argument that the non-disparagement order protected Masha's constitutional right to raise her child free from the mental anguish that

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mother's liberty interest of raising children without emotional harm caused by the father is superior to the father's freedom of speech interests); Dickson v. Dickson, 529 P.2d 476, 479-80 (Wash. Ct. App. 1974) (finding that the father's defamatory remarks about the mother caused her emotional harm, thus affecting her constitutional right to raise her children as she saw fit).

[75] *See, e.g.*, *Borra*, 756 A.2d at 650 (finding that New Jersey case law illustrated that the importance of safeguarding a child's best interest can supersede other fundamental rights); *Dickson*, 529 P.2d at 479-80.

[76] *See, e.g.*, *Dickson*, 529 P.2d at 479–80.

[77] *Borra*, 756 A.2d at 650-51; *Dickson*, 529 P.2d at 479–80.

[78] *Dickson*, 529 P.2d at 479–80.

[79] *Borra*, 756 A.2d at 650–51.

[80] In re Guardianship of K.H.O., 736 A.2d 1246, 1251 (N.J. 1998).

[81] *See* Op. of the Justices to the Senate, 691 N.E.2d 911, 913 (Mass. 1998) (advising legislature that parental constitutional rights are not absolute when they conflict with the best interests of the child); *see also* Youmans v. Ramos, 711 N.E.2d 165, 172 (Mass. 1999) (holding that in custody proceedings, a parent's constitutional right to a relationship with their child can be outweighed by the best interests of the child standard).

[82] *See* 144 N.E.3d 274, 276–77 (Mass. 2020).

Ronnie's disparagement could cause to her, and consequently, to the child.[83] Similarly, the state's interest in protecting the child from the harm caused by Ronnie's disparaging remarks could serve as a limitation on Ronnie's constitutional rights.[84] Thus, the SJC's holding and analysis is vulnerable because it did not conduct a complete constitutional analysis; the Court failed to discuss how the non-disparagement order protected both Masha and her child's constitutional right to liberty.[85]

IV. The Court Inappropriately Applied the Traditional Notion of "Specific Harm" Given the Facts and the Permanence of Social Media

In an interview after the SJC's decision, Masha's attorney stated that the decision ultimately was legally correct.[86] The SJC followed both federal and state precedent in emphasizing that prior restraints are heavily disfavored, and, absent a specific showing of harm, prior restraints are unconstitutional.[87] However, Attorney Novitch further explained that practicality and common sense creates lingering doubts about the propriety of following precedent in his client's case.[88]

A. *The SJC's Reliance on Other Jurisdictions' Distinguishable Cases Undermines the Strength of Its Argument*

Courts refusing to grant prior restraints simply out of a desire to prevent speculative harm is a well-established tenet of constitutional law.[89] Massachusetts case law also follows this precedent and requires a detailed showing of harm to trigger the compelling interest of protecting children's welfare.[90] In a footnote to its decision in *Shak*, the SJC asserted that other jurisdictions also require a very high bar to order prior restraints in the

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[83] *Id.*; *see Dickson*, 529 P.2d at 479.

[84] *Shak*, 144 N.E.3d at 276; *see Dickson*, 529 P.2d at 479.

[85] *Shak*, 144 N.E.3d at 276.

[86] Kris Olson, *Non-Disparagement Orders Improperly Restrained Speech*, MASS. LAW. WKLY. (May 13, 2020), https://perma.cc/C5HY-4AT2.

[87] *See, e.g.*, Southeastern Promotions Ltd. v. Conrad 420 U.S. 546, 559 (1975); Care & Protection of Edith, 659 N.E.2d 1174, 1176 (Mass. 1996).

[88] *Richard Novitch Quoted in NYT Article on Landmark MA Ruling Concerning Nondisparagement Orders in Divorce Cases*, TODD & WELD LLP (May 2020), https://perma.cc/9ZBT-JZX9.

[89] *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (requiring the gravity of harm to demonstrate a clear and present danger to justify imposition of a prior restraint).

[90] Fenton v. Fenton, 418 N.E.2d 606, 607 (Mass. 1981).

family law setting.[91] However, the SJC did not cite decisions involving non-disparagement clauses and instead included other family law proceedings.[92] Thus, the cited cases did not directly speak to the issue in *Shak*, consequently undermining the SJC's reliance on those cases.[93]

Some courts agree that a prior restraint meant to protect children's welfare will only be constitutional if the restraint will prevent specific harm to the children and if the prior restraint is not overbroad or vague.[94] For example, Colorado will only find that a child's welfare can serve as a compelling state interest if a parent's free speech rights threaten the child with physical or emotional harm or actually cause said harm.[95] *In re Marriage of Newell* further defined that such harm must be substantial and cannot be assumed.[96] Illinois courts will only allow prior restraints on extrajudicial comments on an upcoming trial, even a trial involving children, if there is a clear and present danger to the fairness of the trial.[97] Nevada similarly requires a specific showing of a serious and imminent threat to the integrity of a trial to issue a gag order on extrajudicial comments.[98] New York and Texas both require prior restraints and gag orders to be narrowly tailored to prevent the order from being overbroad.[99]

Most of these cases that the SJC relied on involved prior restraints in the form of gag orders to prevent parents and other trial participants from communicating with the press.[100] Cases in other jurisdictions that involve both prior restraints and child welfare that require a showing of specific harm to qualify as a compelling state interest also overwhelmingly involve gag orders restricting speech with the press.[101] Additionally, the three

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[91] 144 N.E.3d 274, 279 n.7 (Mass. 2020).

[92] *Id.*

[93] *Id.*

[94] *See* Johanson v. Eighth Judicial Dist. Ct. of Nev. ex rel. Clark County, 182 P.3d 94, 98 (Nev. 2008); Grigsby v. Coker, 904 S.W.2d 619, 620 (Tex. 1995); In re Marriage of Newell, 192 P.3d 529, 536 (Colo. Ct. App. 2008); Adams v. Tersillo, 245 A.D.2d 446, 447 (N.Y. App. Div. 1997); In re Summerville, 547 N.E.2d 513, 517 (Ill. App. Ct. 1989).

[95] *Newell*, 192 P.3d at 536.

[96] *Id.*

[97] *Summerville*, 547 N.E.2d at 517.

[98] *Johanson*, 182 P.3d at 98.

[99] *See Grigsby*, 904 S.W.2d at 620; *Adams*, 245 A.D.2d at 447.

[100] *See Johanson*, 182 P.3d at 98; *Grigsby*, 904 S.W.2d at 620; *Summerville*, 547 N.E.2d at 517.

[101] *See, e.g.*, In re T.R., 556 N.E.2d 439, 455 (Ohio 1990) (holding gag orders against speaking with the media allowable to protect best interest of children only with a showing of demonstrated harm); Marriage of Geske v. Marcolina, 642 N.W.2d 62, 70 (Minn. Ct. App. 2002)

Massachusetts cases that found prior restraints to be unconstitutional all involved prior restraints preventing access to the press and media.[102] *Shak* does not involve a gag order against the press; rather, it prevents Masha and Ronnie from disparaging one another in the presence of the child or on social media.[103] For this reason, the SJC should not have relied on these other cases.[104] This reliance weakens the SJC's holding because not all prior restraints are equally offensive to free speech rights, and there exists substantially less support for the prevention of private communications compared to communications with the press.[105]

B. *The Child's Very Young Age Makes the Child More Vulnerable to Disparaging Comments*

In explaining why the non-disparagement order did not serve a compelling interest in *Shak*, the SJC explained that there were no medical or psychological records to indicate the child was especially vulnerable to the disparaging language.[106] The SJC also reasoned that Masha failed to provide any evidence that Ronnie's disparaging language caused the child any specific kind of harm.[107] However, the SJC failed to consider that the child's very young age makes it more difficult to show specific instances of harm caused by the disparaging speech.[108] For example, courts sometimes look at how restricted speech might cause harm to a child in school.[109] Since Masha and Ronnie's child is too young to attend school, one common indicator for determining harm to the child is not applicable here.[110] Thus, this limitation demonstrates one way that the child's very young age makes it impractical to use the traditional harm standard because its application works to exclude

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(holding a prior restraint preventing father from showing pictures of his children to the media constitutional because his children suffered specific harm).

[102] *See* Commonwealth v. Barnes, 963 N.E.2d 1156, 1167 (Mass. 2012); George W. Prescott Publ'g v. Stoughton Div. of the Dist. Court Dep't of the Trial Court, 701 N.E.2d 307, 309 (Mass. 1998); Care & Protection of Edith, 659 N.E.2d 1174, 1177 (Mass. 1996).

[103] *See* 144 N.E.3d 274, 279 (Mass. 2020).

[104] *See id.*

[105] *See* Meyerson, *supra* note 58, at 1107.

[106] 144 N.E.3d at 280.

[107] *Id.*

[108] *See id.*

[109] *See* Marriage of Geske v. Marcolina, 642 N.W.2d 62, 67 (Minn. Ct. App. 2002) (finding that a child's unwillingness to go to school constitutes a harm to the child sufficient to justify a prior restraint).

[110] *Shak*, 144 N.E.3d at 279.

harm to very young children.[111]

The SJC also failed to acknowledge that the child's young age makes him psychologically more susceptible to harm caused by disparaging language.[112] Scientific research and studies demonstrate that parents disparaging and fighting with one another can negatively affect infant brain development and growth.[113] Because of the high degree of plasticity of infants' brains, they are highly susceptible to the stress caused by parental arguments, which can affect their ability to adjust and function later in life.[114] The kind of speech that non-disparagement agreements prohibit parents from saying to one another is considered destructive conflict that can eventually lead to both development and physical problems.[115] Consequently, scientific research shows an infant's exposure to disparaging fights and arguments themselves can cause substantial harm to the child.[116] Therefore, the SJC erred by not considering the long-term harm that disparaging words can cause to a child as young as Masha and Ronnie's child.[117]

Disparaging comments can also negatively affect a child's relationship with the child's parents in addition to negatively affecting the child's cognitive development.[118] A parent who routinely badmouths the other parent often alienates the child from the non-disparaging parent.[119] Unwarranted alienation from a parent also harms children because having a healthy relationship with both parents is in the best interest of a child.[120] Alienation of a child caused by a parent's disparaging remarks could also

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[111] *See id.*; *Geske*, 642 N.W.2d at 70.

[112] *See* Gwen Dewar, *Can Babies Sense Stress in Others? Yes They Can!*, PARENTING SCI., https://perma.cc/9HZV-TLK7 (last updated July 2018) (explaining that babies can notice and subsequently feel a parent's stress).

[113] Ashik Siddique, *Parents' Arguing in Front of Baby Alters Infant Brain Development*, MED. DAILY (Mar. 25, 2013, 6:38 PM), https://perma.cc/BD93-7BY8.

[114] *Id.*

[115] Diana Divecha, *What Happens to Kids When Parents Fight*, GREATER GOOD MAG. (Jan. 26, 2016), https://perma.cc/72CD-P4SU (defining destructive conflict as verbal aggression such as name calling or insults).

[116] *See* Siddique, *supra* note 113.

[117] *See* Shak v. Shak, 144 N.E.3d 274, 277 (Mass. 2020).

[118] *See* Edward Kruk, *Parental Alienation as a Form of Emotional Child Abuse: Current State of Knowledge and Future Directions for Research*, 22 FAM. SCI. REV. 141, 144 (2018).

[119] *Id.* at 149.

[120] *See id.* at 142. *See generally* Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV., no. 3, 2001, at 249 (explaining what differentiates an alienated child from children with healthy parental relationships).

impact a parent's constitutional right to raise and control the upbringing of that child.[121] Scientific studies and psychology demonstrate that the risk of harming a child transcends mere speculative harm because the younger a child is, the more vulnerable he or she is to suffering harm by his or her parents disparaging one another.[122]

C. *The Very Nature of Social Media Requires a Reexamination of Speculative Harm*

The SJC emphasized that Masha failed to demonstrate that the child suffered harm because of Ronnie's disparagement, in part because the child cannot read social media posts due to his age.[123] After the hearing, Masha's attorney critiqued that portion of the decision by pointing out that the social media posts will not disappear anytime soon.[124] Social media and the internet age requires reformulating the prior restraint doctrine.[125] The nature of social media magnifies the amount of damage that speech can cause since online postings can be accessed by almost anyone, including children with smartphones.[126] For example, in the United Kingdom, nearly one third of children use the internet by the age of three.[127] This fact demonstrates another flaw in the SJC's decision because Ronnie and Masha's child was closer to using the internet and accessing disparaging content than the SJC suggested.[128] Thus, the easily accessible nature of social media makes the risk of harm less speculative than the SJC's opinion asserted, especially for an infant.[129]

The permanence of social media posts also contributes to harm infants suffer.[130] Parents' social media use can directly harm children because the

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[121] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[122] *See Shak*, 144 N.E.3d at 277.

[123] *Id.* at 280.

[124] Olson, *supra* note 86.

[125] *See* Ariel L. Bendor & Michal Tamir, *Prior Restraint in the Digital Age*, 27 WM. & MARY BILL RTS. J. 1155, 1158 (2019) (arguing that in part because of the lasting damage a permanent social media post can cause, courts should be allowed to remove expressions from online).

[126] *Id.* at 1172; *see* Natalie Frank, *Young Children and the Internet: What Puts Them at Risk?*, WE HAVE KIDS (Jun. 23, 2019), https://perma.cc/8U29-F9FV.

[127] Frank, *supra* note 126.

[128] *See Shak*, 144 N.E.3d at 280; Frank, *supra* note 126.

[129] *See* Bendor & Tamir, *supra* note 125, at 1170–71; Frank, *supra* note 126.

[130] *See, e.g.*, Elizabeth Fernandez, *What We Post on Social Media May Harm Our Children's Development*, FORBES (Jul. 8, 2019, 2:01 PM EDT), https://perma.cc/WKS2-6L9J; Adrienne

photos and other posts parents make about their children create an online presence for children while they are too young to have any input on what is posted.[131] This phenomenon is known as "sharenting."[132] Sharenting mirrors the tension inherent in non-disparagement agreements as a parent's right to freedom of expression collides with a child's right to privacy.[133] Thus, non-disparagement orders can serve to protect children from negative posts that could reflect poorly back on the child.[134]

Ultimately, even though the SJC's decision was squarely in line with Massachusetts and federal precedent, the child's age and the digital landscape inherent in social media communications demonstrate that the SJC erred in holding the harm to Ronnie and Masha's child was too speculative to warrant a prior restraint on Ronnie's ability to disparage Masha.[135]

V. The SJC Erred in Determining That Reasonable Alternatives to the Non-Disparagement Order Existed

A. *The SJC's Suggested Legal Alternatives Are Not Practicable*

Though the SJC ended its analysis after it erroneously found that a compelling state interest did not exist, it nonetheless suggested alternatives to non-disparagement orders.[136] The SJC suggested three categories of alternatives: (1) civil lawsuits against the disparaging parent; (2) government assistance in the form of a harassment prevention order; and (3) voluntary cooperation between parents.[137]

The legal actions that the SJC suggested accurately reflects legal actions available to Masha, but they do not reflect reasonable alternatives.[138] First, the Court's suggestion that Masha could institute a defamation lawsuit against Ronnie in lieu of the non-disparagement order is not reasonable because of the extreme difficulty in proving a prima facie defamation case and the exorbitant cost associated with it.[139] Second, the SJC's dicta

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LaFrance, *The Perils of 'Sharenting'*, THE ATLANTIC (Oct. 6, 2016), https://perma.cc/3XV5-KC7M.

131 LaFrance, *supra* note 130.

132 Fernandez, *supra* note 130.

133 *See* LaFrance, *supra* note 130.

134 *See* LaFrance, *supra* note 130.

135 Shak v. Shak, 144 N.E.3d 274, 280 (Mass. 2020).

136 *Id.*

137 *Id.*

138 *See id.*

139 *See* Jennifer M. Paine, *Non-Disparagement Clauses: The Tooth Fairy Story and Other Times to*

explaining that Masha could file an intentional infliction of emotional distress (IIED) claim as an alternative to the non-disparagement order is likewise not reasonable because of the high burden of proof Massachusetts requires to grant IIED claims.[140] Finally, the SJC's recommendation that Masha apply for a harassment prevention order under Massachusetts General Laws chapter 258E is not reasonable because Masha would only be able to apply for an order after three instances of Ronnie's disparaging comments, thus unnecessarily exposing the child to further harm.[141]

The SJC concluded by reminding future parties, "the best solution would be for parties in divorce and child custody matters to rise above any acrimonious feeling that they may have and, with the well-being of their children paramount in their minds, simply refrain from making disparaging remarks about one another."[142] This sentiment completely overstates how contentious divorce proceedings could be and how honest communication and cooperation might not be possible.[143] The SJC emphasized that its holding would not affect voluntary non-disparagement orders and subsequently suggested such orders as a vehicle to deal with heated divorce proceedings.[144] However, signing a voluntary non-disparagement agreement only goes so far because non-disparagement clauses represent one of the most common forms of custody agreement violations.[145] The SJC's proffered alternatives arguably put a greater burden on Masha than the non-disparagement order's burden on Ronnie's free speech, highlighting the weakness of the SJC's holding.[146]

Bite Your Tongue, DADS DIVORCE, *https://perma.cc/E32B-8Y6G* (last visited Feb. 9, 2022) (explaining non-disparagement clauses are preferable to defamation suits because of the time and money involved).

[140] *See* Agis v. Howard Johnson Co., 355 N.E.2d 315, 318–19 (Mass. 1976) (establishing that even though non-physical injuries can satisfy the four requirements, severe distress must be demonstrated); Justin McCarthy, *Intentional Infliction of Emotional Distress*, LAW OFFICE OF JUSTIN R. MCCARTHY (Nov. 9, 2017), https://perma.cc/6B2F-Y7HR.

[141] MASS. GEN. LAWS ch. 258E, § 1 (2022); *Find out What Qualifies as Harassment*, MASS.GOV, https://perma.cc/LCJ8-3AZL (last visited Feb. 9, 2022).

[142] *Shak*, 144 N.E.3d at 280.

[143] *See Managing Your Divorce When Your Spouse Will Not Cooperate*, ANDREW CORES FAM. L. GROUP (Oct. 31, 2018), https://perma.cc/P9M5-GGTN (explaining that in some cases a party in a divorce case will be uncooperative especially if the divorce came as a surprise or there is still emotional attachment).

[144] *Shak*, 144 N.E.3d at 280.

[145] *See Common Violations of Custody Agreements*, LAW OFFICE OF KENT L. GREENBERG, https://perma.cc/D2KK-ULHR (last visited Feb. 9, 2022).

[146] *See Shak*, 144 N.E.3d at 280.

B. *The Non-Disparagement Order Itself Was Already Narrowly Tailored*

The SJC's erroneous decision in failing to find enough specific harm to trigger the state's compelling interest caused the Court to gloss over the fact that the non-disparagement order, compared to non-disparagement orders from other jurisdictions, was actually already narrowly tailored, thus negating the need for alternatives in the first place.[147] The New York appellate court, for example, ruled that a non-disparagement order that prohibited either party from making derogatory comments to one another was constitutionally over broad.[148] However, the court found that modifying the order to bar disparaging remarks made only in the presence of the children was constitutionally permissible.[149] The order approved in *Adams v. Tersillo* is very similar in substance to the order the probate judge issued in *Shak*, as both orders prohibited disparaging comments made in the presence of children.[150] In fact, the *Shak* order was even more narrowly tailored than the *Adams* order because the *Shak* order defined "in the presence of children."[151] *Adams* provides an example of a court approving a similarly worded non-disparagement agreement without an extensive discussion of harm suffered.[152] Thus, the SJC mistakenly relied on *Adams* as an example of a case requiring a high burden for proving a child suffered harm because *Adams* actually undermines the SJC's argument rather than supporting it.[153]

The SJC acknowledged that the probate and family court judge put "careful thought" into the order, but that this did not matter because the situation did not justify an imposition of a prior restraint.[154] Here, the SJC implicitly acknowledged that the non-disparagement order actually was

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147 *See* Adams v. Tersillo, 245 A.D.2d 446, 447 (N.Y. App. Div. 1997); *see also* Karantinidis v. Karantinidis, 186 A.D.3d 1502, 1504 (N.Y. App. Div. 2020) (modifying a non-disparagement order only to prevent an ex-spouse from disparaging her ex in front of her patients); Nash v. Nash, 307 P.3d 40, 49 (Ariz. Ct. App. 2013) (finding that a non-disparagement order that prohibits ex-wife from disparaging ex-husband on social media to be narrowly tailored because ex-husband is a famous athlete).

148 *Adams*, 245 A.D.2d at 447.

149 *Id.*

150 *Id.*; 144 N.E.3d at 277.

151 144 N.E.3d at 277 (defining in the presence of a child as meaning one hundred feet); 245 A.D.2d at 447.

152 245 A.D.2d at 447.

153 *See id.*; *Shak*, 144 N.E.3d at 278–79.

154 *Shak*, 144 N.E.3d at 280.

narrowly tailored.[155] Once again, the SJC failed to thoroughly consider the second part of the prior restraint analysis on whether there was a less restrictive alternative.[156] Other jurisdictions' jurisprudence that have found that compelling interests existed to protect children from disparaging language weakens the SJC's argument because the weight of persuasive authority is against its holding that a compelling interest did not exist in the present case.[157]

VI. The SJC's Decision Has the Potential to Disrupt a Settled Portion of Family Law

Beyond the legal flaws in the SJC's decision, the SJC failed to consider the decision's potential to disrupt other jurisdictions' precedents.[158] Though *Shak* does not represent binding precedent outside Massachusetts, other jurisdictions may follow *Shak's* holding and cite *Shak* as persuasive authority.[159] The SJC's decision marks the first time a court has struck down a judicially ordered non-disparagement order based solely on First Amendment concerns, as the Massachusetts precedent the SJC relied on did not concern non-disparagement orders, but rather gag orders related to trial proceedings or parents communicating with the press.[160] The SJC's decision has already caused confusion in other states, demonstrated by law offices informing clients that courts may be persuaded by the SJC's decision to strike down non-disparagement orders.[161] For example, a Pennsylvania

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[155] *Id.*

[156] *Id.*

[157] *Id.*; *see, e.g.*, Schutz v. Schutz, 581 So.2d 1290, 1293 (Fla. 1991) (finding a substantial state interest in enjoining mother from making disparaging comments about father in order to ensure the child had a healthy relationship with both parents); Stephanie L. v. Benjamin L., 602 N.Y.S. 2d 80, 82 (N.Y. Sup. Ct. 1993) (stating that a court's ability to infringe on parents' First Amendment rights in order to protect the best interests of the child is so common it's often not even reported by courts).

[158] *See Shak*, 144 N.E.3d at 280.

[159] *See* Jennifer A. Brandt & Megan K. Feehan, *The Constitutionality of Nondisparagement Provisions in Custody Orders*, LEGAL INTELLIGENCER, https://perma.cc/W5HV-HCF3 (last visited Feb. 9, 2022).

[160] *See* Commonwealth v. Barnes, 963 N.E.2d 1156, 1167 (Mass. 2012); George W. Prescott Publ'g v. Stoughton Div. of the Dist. Court Dep't of the Trial Court, 701 N.E.2d 307, 309 (Mass. 1998); Care & Prot. of Edith, 659 N.E.2d 1174, 1177 (Mass. 1996).

[161] *See* John J. Beski, *Badmouthing in Divorce: Parental Alienation or Free Speech?*, GRAHAM L. (June 4, 2020), https://perma.cc/NE42-HGME (informing potential clients that *Shak* could serve as persuasive authority in Colorado courts); K.O. Herston, *Is Tennessee's Automatic Injunction Unconstitutional?*, HERSTON L. GROUP (May 13, 2020), https://perma.cc/ESS4-FQN4 (expressing

lawyer's analysis of *Shak* expressed a concern that Pennsylvania and other states may follow Massachusetts's example.[162] Thus, the SJC's decision in *Shak* casts doubt on a well-established power of judges in custody and divorce proceedings, and the SJC erred by not considering the effect its decision could have in upending a practice designed to protect children.[163]

CONCLUSION

In *Shak v. Shak* the SJC held that a parent's constitutional right to free speech superseded the best interests of the child. The SJC followed prior restraint precedent blindly insofar that it did not adequately consider the kind of harm a toddler could suffer by hearing his parents disparage one another. In a way, the SJC penalized Masha and Ronnie's child for being very young as his age precluded him from showing some of the common signs of harm or distress that courts usually look to in determining harm. Scientific studies demonstrate that the harm that an infant suffers because of disparaging comments is not as speculative as the SJC assumed that it was. The SJC adopted the heavy presumption against prior restraints without adequately analyzing the case's circumstances, which in this case did in fact justify a prior restraint against Ronnie.

The SJC's decision also demonstrates a lack of understanding of the true nature of divorce and custody proceedings. When emotions are running high, rational thought may not be as easy as the SJC assumed. The SJC failed to appreciate that the alternative actions it suggested to Masha place a greater burden on her proportionate to Ronnie's inability to post negative things about her on social media. At its essence, *Shak v. Shak* is about the tension inherent in preserving the best interests of the child while balancing a parent's constitutional right both to free speech and the freedom to control a child's upbringing. With this decision, the SJC made a definitive declaration that freedom of speech trumps both a child's well-being and a parent's right to control the raising of a child by shielding the child from harmful words and speech. The true losers of this decision are the countless children who may not be adequately protected from disparaging speech in the future because of the SJC's holding in *Shak v. Shak*.

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concern that *Shak's* precedent could undermine a Tennessee law that imposes an automatic injunction in every divorce settlement to prevent parents from disparaging one another).

[162] Brandt & Feehan, *supra* note 159.

[163] *See* 144 N.E.3d at 280; Beski, *supra* note 161.