View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by ScholarWorks@UARK

Arkansas Law Review

Volume 73 | Number 1 Article 11

August 2020

Foreseeably Uncertain: The (In)Ability of School Officials to Reasonably Foresee Substantial Disruption to the School Environment

Maggie Geren
University of Arkansas

Follow this and additional works at: https://scholarworks.uark.edu/alr

 Part of the Civil Rights and Discrimination Commons, First Amendment Commons, Jurisprudence Commons, and the Supreme Court of the United States Commons

Recommended Citation

Maggie Geren, *Foreseeably Uncertain: The (In)Ability of School Officials to Reasonably Foresee Substantial Disruption to the School Environment*, 73 Ark. L. Rev. 155 (2020).
Available at: https://scholarworks.uark.edu/alr/vol73/iss1/11

This Article is brought to you for free and open access by ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact ccmiddle@uark.edu.

FORESEEABLY UNCERTAIN: THE (IN)ABILITY OF SCHOOL OFFICIALS TO REASONABLY FORESEE SUBSTANTIAL DISRUPTION TO THE SCHOOL ENVIRONMENT

Maggie Geren*

I. INTRODUCTION

"Ms. Sarah Phelps is the worst teacher I've ever met."[1]

While the name of this Facebook page is perhaps a bit harsh, most would hardly view it as grounds for school suspension. The very heart of the First Amendment, and indeed the notion for which our Framers drafted it, is the right of citizens to "think, speak, write and worship as they wish, not as the Government commands."[2] Without this fundamental freedom—one that has persevered despite countless efforts to narrow its reach—the American people would live in constant fear of backlash and suppression for merely voicing their opinions.

Nevertheless, the right to freedom of speech is far from absolute—a concept that has, in many cases, given schools the green light to discipline students for social media posts like the one listed above.[3] Although the Supreme Court has recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American

* J.D. Candidate, 2020, University of Arkansas School of Law. The author would like to thank Professor Danielle Weatherby of the University of Arkansas School of Law, without whose guidance, insight, and experience this Comment would not have been possible; the Editorial Board and Staff Editors of the *Arkansas Law Review* for their diligence and attention to detail during the editing process; and her parents for their constant support and encouragement throughout this and every endeavor.

1. Alex Bracetti, *25 School Suspensions Caused by Social Media*, COMPLEX (Apr. 12, 2012), [https://perma.cc/V8FT-QD3U].

2. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 788 (1961) (Black, J., dissenting).

3. *See* Benjamin Herold, *10 Social Media Controversies That Landed Students in Trouble This Year*, EDUC. WEEK (July 6, 2017), [https://perma.cc/B8F5-V6GV].

schools,"[4] the precise extent to which the First Amendment protects student speech remains ambiguous.[5] As students increasingly turn to social media to criticize their classmates, teachers, and other school administrators, courts are struggling with how to maintain the necessary balance between a student's free speech rights and a school's authority to protect the school environment from disruption.[6] In the Second, Seventh, and Eighth Circuits, the latter frequently prevails, as schools are permitted to restrict student speech when it is "reasonably foreseeable" that the speech will reach the school environment and create a material and substantial disruption.[7]

This Article will begin with a discussion of the Supreme Court's existing jurisprudence regarding on-campus student speech, including the Court's landmark holding in *Tinker v. Des Moines Independent School District*,[8] as well as the three so-called "exceptions" to the *Tinker* standard. It will then discuss the various approaches federal appellate courts have developed in their attempts to apply *Tinker* to off-campus student speech, followed by an analysis of the relationship between those approaches and the foreseeability threshold. Finally, it will address the various concerns scholars have raised in response to

4. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

5. *See* Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 132-33 (2007) (noting that while "the Supreme Court has addressed the First Amendment rights of public school students in on-campus speech," it "has yet to define students' First Amendment rights in any form of off-campus speech").

6. Lily M. Strumwasser, *Testing the Social Media Waters: First Amendment Entanglement Beyond the Schoolhouse Gates*, 36 CAMPBELL L. REV. 1, 14-15 (2013) (describing the dilemma that courts face regarding off-campus student speech and First Amendment rights); *see also* Markey, *supra* note 5, at 151-56 (discussing the strength of the school district's interest in preserving order as compared to the student's interest in off-campus Internet speech).

7. Courts have applied the "reasonable foreseeability" threshold to various different types of speech, both on and off campus. *See, e.g.*, Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007) (student's violent instant messaging icon); Doninger v. Niehoff, 527 F.3d 41, 50-51 (2d Cir. 2008) (student's derogatory blog post about a school's cancellation of an upcoming student event); Scoville v. Bd. of Educ. of Joliet Township High Sch. Dist. 204, 425 F.2d 10, 15 (7th Cir. 1970) (articles in an off-campus student newspaper that criticized school policies); D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 766 (8th Cir. 2011) (instant messages describing a plan to shoot several students).

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

the foreseeability threshold, including that it is overly broad, gives school administrators virtually unlimited discretion to punish students for off-campus speech, and provides little protection for online speech.

II. THE SUPREME COURT'S JURISPRUDENCE REGARDING ON-CAMPUS STUDENT SPEECH

This Part will begin by discussing the Supreme Court's famous holding in *Tinker*, the first case to affirmatively address student free speech rights. It will then identify and explain the three major exceptions the Court has crafted to the *Tinker* standard, each of which permits a school to restrict student speech under a particular set of circumstances.

A. *Tinker v. Des Moines Independent Community School District* and the "Substantial Disruption" Standard

In *Tinker*, a group of adults and students in Des Moines, Iowa, planned to protest the United States' involvement in the Vietnam War by wearing black armbands and fasting during the holiday season.[9] Upon discovering the protest, several school principals held a meeting, during which they adopted a policy mandating an automatic suspension for any student who wore a political armband to school and subsequently refused to remove it.[10] A few days later, a group of students wore black armbands to school and were suspended.[11] The students subsequently brought an action against the school challenging the constitutionality of the suspensions.[12]

Although the Supreme Court recognized that states have an interest in maintaining order and discipline in their schools,[13] it ultimately ruled that, under the present circumstances, the

9. *Id.* at 504.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Tinker*, 393 U.S. at 507 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

students' First Amendment rights outweighed that interest.[14] Writing for the majority, Justice Fortas emphasized the Court's "unmistakable holding" that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15] To determine whether a school may permissibly restrict student speech under the First Amendment, the Court adopted a "substantial disruption" standard.[16] Under this standard, a school may impose restrictions on student speech only if the speech "materially disrupts classwork or involves substantial disorder or the invasion of the rights of others."[17] Furthermore, the Court's opinion made clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," nor is "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[18]

B. Exceptions to the *Tinker* Standard

Following its holding in *Tinker*, the Court delivered three more landmark opinions, each of which represents a different exception to the substantial disruption standard.[19] The first, *Bethel School District No. 403 v. Fraser*, involved the punishment of a student who used vulgar and offensive language at a school assembly.[20] The second, *Hazelwood School District v. Kuhlmeier*, involved the deletion of articles in a school newspaper that described students' experiences with pregnancy and

14. *Id.* at 514.

15. *Id.* at 506.

16. *Id.* at 513.

17. *Id. See also* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (holding that schools officials cannot infringe on a student's right to free speech and expression where the speech does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school").

18. *Tinker*, 393 U.S. at 508, 509.

19. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007). The trilogy of cases following *Tinker* has been described as "impos[ing] qualifications and limitations on the scope of *Tinker*." R. George Wright, *Post*-Tinker, 10 STAN. CIV. RTS. & CIV. LIBERTIES 1, 4 (2014).

20. *Fraser*, 478 U.S. at 677-78.

divorce.[21] Finally, *Morse v. Frederick* involved the punishment of a student who refused to take down a banner at a school-sponsored event which read "BONG HiTS 4 JESUS."[22] Collectively, these cases represent the three sets of circumstances in which the Court has recognized that, contrary to *Tinker*, a school's interests outweigh its students' free speech rights. Accordingly, a school is permitted to discipline students when their speech fits into one of these pre-determined categories.

1. Bethel School District No. 403 v. Fraser

In *Fraser*, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating one of his classmates for election to student office.[23] The speech took place at an assembly where approximately 600 students were present.[24] Throughout the course of the speech, the student allegedly used "elaborate, graphic, and explicit sexual metaphor[s]" when describing the candidate.[25] Deciding that the student's conduct violated its rule against the use of obscene language which "materially and substantially interferes with the educational process," the school suspended him for three days and disqualified him as a candidate for commencement speaker.[26] The student then brought an action against the school alleging a violation of his First Amendment right to freedom of speech.[27] Finding in favor of the student, the Western District of Washington held that the suspension violated the student's free speech rights under the First Amendment.[28] The Ninth Circuit affirmed, finding no significant distinction between the student's speech and the political armbands at issue in *Tinker*.[29]

Reasoning that the school's interest in educating its students to be civil and mature citizens outweighed the student's right to

21. *Kuhlmeier*, 484 U.S. at 263-64.
22. *Morse*, 551 U.S. at 397-98.
23. *Fraser*, 478 U.S. at 677.
24. *Id.*
25. *Id.* at 677-78.
26. *Id.* at 678.
27. *Id.* at 679.
28. *Fraser*, 478 U.S. at 679.
29. *Id.*

free speech, the Supreme Court reversed, holding that the suspension did not violate the student's First Amendment rights.[30] In doing so, it carved out an exception to the *Tinker* standard, permitting schools to punish students for "lewd, indecent, or offensive speech and conduct."[31] Despite the Court's holding in *Tinker* that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[32] the Court in *Fraser* emphasized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[33]

2. Hazelwood School District v. Kuhlmeier

Just two years after its holding in *Fraser*, the Court was faced with the unique issue of whether a school could regulate speech contained within a student newspaper *prior* to its publication.[34] In *Kuhlmeier*, members of a journalism class at Hazelwood East High School were responsible for the publication of a student newspaper entitled *Spectrum*.[35] Before publishing an issue, it was customary for the class to submit a proof of the newspaper to the school principal for his approval.[36] In this case, the principal forbade the students from publishing two stories—one which described "three . . . students' experiences with pregnancy," and another which "discussed the impact of divorce on students at the school."[37] The Eastern District of Missouri held that the school's actions did not violate the students' First Amendment rights, noting that school administrators possess the authority to restrict student speech in activities that are "an

30. *Id.* at 685. "[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683.

31. *Id.* ("The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . .").

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

33. *Fraser*, 478 U.S. at 682.

34. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263-64 (1988).

35. *Id.* at 262.

36. *Id.* at 263.

37. *Id.*

integral part of the school's educational function."[38] The Eighth Circuit reversed, emphasizing the newspaper's status as a public forum that precluded school officials from censoring its contents.[39]

Similar to what it had done in *Fraser*, the Court in *Kuhlmeier* abandoned a traditional *Tinker* analysis and elected to follow a reasonableness standard instead.[40] It reasoned that the issue involved in this case was entirely separate from that of *Tinker*.[41] *Tinker* asked the Court to consider whether the First Amendment requires a school to merely *tolerate* student speech, whereas *Kuhlmeier* asked the Court to evaluate whether the First Amendment requires a school to affirmatively *promote* student speech.[42] The latter of these issues concerns the school's authority over "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" and "may fairly be characterized as part of the school curriculum."[43] Accordingly, it held that *Tinker* was not the appropriate standard, and that school officials may regulate "the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[44]

3. Morse v. Frederick

The third major exception to the *Tinker* standard emerged in *Morse*, nearly thirty years after the Court's holding in *Kuhlmeier*.[45] In *Morse*, a high school principal in Juneau, Alaska, permitted students to gather along a street in front of the school as the Olympic Torch Relay passed through the city.[46] During the relay, a group of students unveiled a banner which read "BONG

38. *Id.* at 264 (internal quotations omitted).
39. *Kuhlmeier*, 484 U.S. at 265.
40. *Id.* at 272-73.
41. *Id.* at 270-71.
42. *Id.*
43. *Id.* at 271.
44. *Kuhlmeier*, 484 U.S. at 272-73.
45. Morse v. Frederick, 551 U.S. 393 (2007).
46. *Id.* at 397.

HiTS 4 JESUS."[47] After one of the students refused to take the banner down, the principal suspended him for ten days, claiming that the banner encouraged illegal drug use in violation of school policy.[48] Finding in favor of the school, the District of Alaska held that the principal had the proper authority to prohibit such messages taking place at a school-sanctioned activity.[49] The Ninth Circuit reversed, finding a violation of the student's First Amendment rights.[50]

Although the speech did not technically occur on school property, the Supreme Court rejected the student's argument that this was not a school speech case, explaining that the speech took place during normal school hours at "an approved social event" or "class trip" and was therefore subject to student conduct rules.[51] Nevertheless, the Court refused to apply *Tinker*, reasoning that the concern in this case went far beyond a mere desire to avoid controversy.[52] Given the serious problem with drug abuse among young people, coupled with the government interest in stopping such abuse, the Court held that schools are free to regulate student speech that they "reasonably regard as promoting illegal drug use."[53]

III. VARYING APPLICATIONS OF *TINKER* TO OFF-CAMPUS STUDENT SPEECH

Although the Supreme Court has analyzed the issue of whether—and under what circumstances—a school may permissibly restrict on-campus student speech, it has not yet done so for off-campus student speech.[54] As a result, lower courts have

47. *Id.*
48. *Id.* at 398.
49. *Id.* at 399.
50. *Morse*, 551 U.S. at 399.
51. *Id.* at 400-01.
52. *Id.* at 408-09.
53. *Id.* at 408.
54. *See* Katherine A. Ferry, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717, 730 (2018).

been left without any clear guidance as to how they should analyze student speech that occurs *outside* the schoolhouse gate.[55]

Absent a ruling from the Supreme Court, the majority of federal appellate courts have attempted to apply different variations of *Tinker* and its exceptions to off-campus student speech.[56] For example, the Fourth Circuit has adopted a "sufficient nexus" threshold to *Tinker*,[57] whereas the Eleventh Circuit applies a "true threat" approach in addition to a traditional *Tinker* analysis.[58] The Ninth Circuit declines to extend *Tinker* at all unless faced with an "identifiable threat of school violence,"[59] while the Fifth Circuit modifies its approach to the specific facts of each case.[60] The Second, Third, Seventh, and Eighth Circuits apply a simple foreseeability threshold to *Tinker*,[61] although the Third Circuit places a greater emphasis on the student's intent.[62] The remaining appellate courts, including the First, Sixth, Tenth, and D.C. Circuits, have yet to address *Tinker*'s application to off-campus student speech.[63]

A. The "Sufficient Nexus" Threshold

In *Kowalski v. Berkeley County Schools*, the Fourth Circuit was faced with the issue of whether a school had authority to discipline a student who created a webpage for the purpose of ridiculing a fellow classmate.[64] In making this determination, the court adopted a "sufficient nexus" threshold, under which it considered whether the nexus between the student's speech and

---

55. *Id.*

56. *Id.* ("The majority of federal appellate courts apply some variation of *Tinker* to students' off-campus speech, but differ in their applications and use of the exceptions set forth in *Fraser*, *Kuhlmeier*, and *Morse*."); William Calve, *The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age*, 48 ST. MARY'S L.J. 377, 386 (2016) ("Circuit courts have continuously invoked *Tinker* to regulate off-campus cyberspeech, particularly when the speech is violent or threatening, but the method of application is inconsistent across the country.").

57. *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011).

58. *See* Boim v. Fulton Cty. Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007).

59. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013).

60. *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 395-96 (5th Cir. 2015).

61. *See infra* Section III.E.

62. *See infra* Section III.E.

63. Ferry, *supra* note 54, at 741.

64. Kowalski v. Berkeley Cty. Schs., 652 F.3d 565 (4th Cir. 2011).

the school's pedagogical interests was sufficiently strong to justify disciplinary action.[65] Because the student knew that the content of the webpage would be available to other students and "could reasonably be expected to reach the school or impact the school environment," the court reasoned that there was a sufficient nexus to warrant the suspension.[66] Furthermore, although the student created the webpage at home rather than on school property, it caused substantial disruption in the school and was therefore subject to discipline under a traditional *Tinker* analysis.[67]

B. The True Threat Approach

In *Boim v. Fulton County School District*, the Eleventh Circuit applied a "true threat" approach in addition to a traditional *Tinker* analysis.[68] *Boim* concerned a high school student who wrote an entry in her notebook describing the detailed murder of her math teacher.[69] Upon discovery of the notebook, the school principal suspended the student for ten days and recommended that she be expelled.[70] The court held that the student's speech unequivocally created a material and substantial disruption in the school, and thus satisfied *Tinker*, but delved even further into the threatening nature of the notebook entry.[71] Given the government's interest in preventing school violence, it concluded that "there . . . is no First Amendment right allowing a student to knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day."[72]

65. *Id.* at 573.
66. *Id.*
67. *Id.* at 574.
68. Boim v. Fulton Cty. Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007).
69. *Id.* at 980-81.
70. *Id.* at 981-82.
71. *Id.* at 983.
72. *Id.* at 984.

C. The Ninth Circuit's Approach

The Ninth Circuit's approach is similar to that of the Eleventh Circuit and focuses on whether the student speech creates a threat to the school environment.[73] In *Wynar v. Douglas County School District*, a student sent a series of MySpace messages to his friends describing his plan to bring a gun to school and shoot several of his classmates.[74] His friends reported the messages to a football coach and then notified the school principal.[75] At a school board hearing, the board decided that the student had violated a Nevada statute and expelled him for ninety days.[76]

Noting the obvious differences between a parody social media account and the threat of a school shooting, the court was reluctant to adopt a "one-size fits all approach" to student speech cases.[77] It also declined to adopt any of the threshold tests developed in other circuits, reasoning that each of them would be easily satisfied under the present set of circumstances.[78] Nevertheless, the court held that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."[79] Accordingly, the court concluded that the actions of the school board in this case were constitutional.[80]

D. The Fifth Circuit's Approach

Although the Fifth Circuit historically analyzed off-campus student speech cases using a strict *Tinker* analysis,[81] it changed its approach in 2001 with its decision in *Porter v. Ascension Parish*

73. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013).
74. *Id.* at 1065-66.
75. *Id.* at 1066.
76. *Id.*
77. *Id.* at 1069.
78. *Wynar*, 728 F.3d at 1069.
79. *Id.*
80. *Id.* at 1072.
81. *See* Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 970 (5th Cir. 1972) ("[T]he activity punished here does not even approach the 'material and substantial' disruption that must accompany an exercise of expression . . . . As a factual matter there were no . . . disturbances of any sort, on or off campus, related to the distribution of the [newspaper].").

School Board.[82] In *Porter*, the court departed from *Tinker* and held that school administrators violated the First Amendment when they punished a student for a violent drawing because the student never intended for the drawing to reach the school.[83] Rather than attempting to apply a one-size fits all approach, as it had done in previous decades, the Fifth Circuit tweaked its approach to accommodate the specific facts before it.[84]

In 2015, the Fifth Circuit decided its first case dealing with off-campus cyber speech.[85] *Bell v. Itawamba County School Board* involved a student who was suspended after he recorded a rap song making vulgar and threatening comments toward several school administrators, then posted the song to his Facebook profile.[86] Relying on *Porter*, in which the student's intent played a large role in the court's decision, the court held that "[a] speaker's intention that his speech reach the school community, buttressed by his actions in bringing about that consequence, supports applying *Tinker*'s . . . standard to that speech."[87] Thus, under the Fifth Circuit's approach, *Tinker* applies when a student intentionally directs threatening, harassing, or intimidating speech at the school community, regardless of where the speech originates.[88]

E. The Foreseeability Threshold

The Second, Seventh, and Eighth Circuits incorporate an additional foreseeability threshold to the *Tinker* analysis. The Seventh Circuit was the first to adopt this approach when it addressed its first case dealing with off-campus student speech, *Scoville v. Board of Education of Joliet Township*.[89] In *Scoville*,

82. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608 (5th Cir. 2004).

83. *Id.* at 620 ("Because [the student]'s drawing was composed off-campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him to [school] or publicized in a way certain to result in its appearance at [school], we have found that the drawing is protected by the First Amendment.").

84. *Id.* at 615.

85. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015).

86. *Id.* at 383-85.

87. *Id.* at 395.

88. *Id.* at 396.

89. Scoville v. Bd. of Educ. of Joliet Twp., 425 F.2d 10 (7th Cir. 1970).

the court was faced with the issue of whether a school could discipline students for writing articles in an off-campus newspaper criticizing the school's policies and authorities.[90] Because school administrators could not "reasonably forecast that the publication and distribution of [the] paper . . . would substantially disrupt or materially interfere with school procedures," the court reasoned that a suspension would violate the students' First Amendment rights.[91]

The next court to adopt the foreseeability threshold was the Second Circuit in 2007.[92] In *Wisniewski v. Board of Education of the Weedsport Central School District*, the court addressed whether a school could punish an eighth-grade student for creating an instant messaging icon suggesting that his teacher should be shot and killed, then sending the icon to several of his classmates.[93] Opining that there was "a reasonably foreseeable risk that the icon would come to the attention of school authorities" and "materially and substantially disrupt the work and discipline of the school," the court held that the school's actions were permissible under the First Amendment.[94]

In 2008, the Second Circuit again addressed the issue of whether a school could punish a student for off-campus cyber speech.[95] In *Doninger v. Niehoff*, school officials disqualified a student from running for Senior Class Secretary after she wrote a blog post criticizing the school and encouraging readers to harass its administrators.[96] Using the approach set forth in *Wisniewski*, the court held that it was reasonably foreseeable that the student's blog post would reach school grounds and create a substantial disruption, thus warranting the disqualification.[97]

Finally, the Eighth Circuit applied the foreseeability threshold in 2011 and 2012 when it addressed two cases

---

90. *Id.* at 11.

91. *Id.* at 15.

92. *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007).

93. *Id.* at 35-36.

94. *Id.* at 38-39 (internal quotations omitted).

95. *See* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

96. *Id.* at 45-46.

97. *Id.* at 50-51.

pertaining to off-campus cyber speech.[98] The first, *D.J.M. v. Hannibal Public School District No. 60*, involved a student who was suspended for sending instant messages to one of his friends, in which he described a plan to obtain a gun and shoot several of his classmates.[99] Ultimately, the court held that the suspension was constitutional under both a "true threat" approach and *Tinker*.[100] In making the latter determination, the court opined that "it was reasonably foreseeable that [the student]'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment."[101]

The second case, *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*, involved two students who were suspended after they created a blog and used it to post a variety of offensive, racist, and sexually explicit comments about several of their classmates.[102] In determining whether the suspension was constitutional, the court concluded that because the speech was targeted at the school and "could reasonably be expected to reach the school or impact the environment," *Tinker* applied, regardless of the speech's location.[103]

In addition, the Third Circuit applies a foreseeability threshold similar to that of the Second, Seventh, and Eighth Circuits, but alters its approach to focus specifically on the student's intent.[104] For example, in *J.S. ex rel. Snyder v. Blue Mountain School District*, a student was suspended after he created a parody social media account of his school's principal.[105] Unlike other circuits applying the foreseeability threshold, the court evaluated the student's intent to determine whether it was reasonably foreseeable that the profile would create a substantial

98. D.J.M. v. Hannibal Public Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011); S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012).

99. *D.J.M.*, 647 F.3d at 758-59.

100. *Id.* at 761-66.

101. *Id.* at 766.

102. *S.J.W.*, 696 F.3d at 773-74.

103. *Id.* at 778 (citing Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011)).

104. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011).

105. *Id.* at 920.

disruption in the school.[106] Because the student did not intend for the profile to reach school grounds, the court held that it was not reasonably foreseeable that it would cause a substantial disruption.[107] Accordingly, the court held that the school's actions were unconstitutional.[108]

IV. RELATIONSHIP BETWEEN THE FORESEEABILITY THRESHOLD AND OTHER CIRCUITS' APPROACHES

The foreseeability threshold utilized in the Second, Seventh, and Eighth Circuits asks courts to first consider whether it was reasonably foreseeable that a student's speech would reach the school.[109] Once the court has determined that the speech satisfies this initial threshold requirement, it may then apply the traditional *Tinker* analysis, considering whether it was likely that the speech would create a material and substantial disruption.[110] This Part will address the complex relationship between this approach and threshold requirements in other jurisdictions. In particular, it will discuss the relative scopes of each approach, including the relevance of the nature of the speech and the speaker's intent, as well as the relative importance of a nexus between the speech and the school's interests.

A. Nature of the Speech and the Speaker's Intent

The foreseeability threshold is indubitably more expansive than threshold requirements imposed in other jurisdictions, specifically those in the Eleventh, Ninth, and Fifth Circuits, all of

106. *Id.* at 921-25.

107. *Id.* at 930.

108. *Id.* at 931.

109. Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) ("[A] student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus.") (internal citations omitted).

110. *Id.*

which are defined quite narrowly in their respective scopes.[111] For example, before applying *Tinker*, the Eleventh Circuit first considers whether a student's speech "reasonably could be perceived as a threat of school violence."[112] Similarly, the Ninth Circuit permits schools to restrict student speech only after it has made the initial determination that the speech creates an "identifiable threat of school violence."[113] Although the Fifth Circuit focuses on the student's intent in delivering the speech, rather than the threatening nature of the speech itself, it similarly focuses on just one element in particular—namely, "[the] speaker's intention that his speech reach the school community, buttressed by his actions in bringing about that consequence . . . ."[114]

Due to its expansive scope, the foreseeability threshold seemingly restricts all forms of violent or threatening speech, as well as that which the speaker intentionally directs toward the school. Stated differently, any speech that results in a perceived or actual threat of school violence, as required for discipline under the Eleventh and Ninth Circuits' approaches, respectively, is likely to create a foreseeable risk of disruption to the school environment.[115] Likewise, any speech that is intentionally directed toward the school, as required under the Fifth Circuit's approach, will almost certainly satisfy the foreseeability threshold.[116] This is evidenced by the manner in which courts applying the foreseeability threshold have consistently ruled in favor of the school when deciding cases involving these types of speech.[117]

---

111. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1059-64 (2008).

112. Boim v. Fulton Cty. Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007).

113. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013).

114. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 395 (5th Cir. 2015).

115. Papandrea, *supra* note 111, at 1091.

116. *Id.* at 1091-92 ("Students' speech frequently concerns topics related to their school and classmates. Given this reality, it is hard to imagine when it would not be directed to campus, or when it would not be reasonably foreseeable that students' digital expression would come to the school's attention.").

117. For cases involving violent or threatening speech, see, e.g., Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007); LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001); *Bell*, 799 F.3d 379. For cases involving speech intentionally directed at the school, see, e.g., Doninger v. Niehoff, 527 F.3d 41 (2d Cir.

Nevertheless, while the nature of the speech and the student's intent are often relevant considerations in determining whether it was reasonably foreseeable that a student's speech would reach the school environment, they are by no means prerequisites.[118] The foreseeability threshold is not limited to certain types of speech, but rather applies broadly to any and all types of speech that school administrators may reasonably foresee reaching the school environment.[119] Therefore, it is certainly possible that the foreseeability threshold may permit schools to restrict student speech that is neither violent in nature nor directed at the school.

B. Nexus Between the Speech and the School's Interests

Although the Fourth Circuit's sufficient nexus threshold is undoubtedly less expansive than the foreseeability threshold, both approaches similarly restrict more speech than threshold requirements imposed in other jurisdictions.[120] As stated previously, the sufficient nexus threshold allows a school to discipline students for off-campus speech that has a sufficient nexus to the school's pedagogical interests.[121] The problem with this approach is that it fails to specifically define which interests will warrant discipline, effectively permitting a school to justify suspension or expulsion by choosing any interest that may conceivably promote the education of its students or protect their

---

2008); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010); Boucher v. Sch. Bd. of Greenfield, 134 F.3d 821 (7th Cir. 1998); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002).

118. J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1111-15 (C.D. Cal. 2010) (listing several factors courts may consider in determining whether speech is reasonably likely to cause a substantial disruption, including: (1) whether "students are discussing the speech at issue"; (2) whether "a student's speech is violent or threatening to members of the school"; (3) "whether school administrators are pulled away from their ordinary tasks to respond to or mitigate the effects of a student's speech"; and (4) "whether the school's decision to discipline is based on evidence or facts indicating a foreseeable risk of disruption, rather than undifferentiated fears or mere disapproval of the speech").

119. *Id.* at 1107.

120. *See* Ferry, *supra* note 54, at 755-56 ("The sufficient nexus threshold is overly broad and fails to define what interests will warrant discipline for off-campus, online speech.").

121. Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011).

health and safety.[122] Because there are an endless variety of interests for the school to choose from—including health, safety, diversity, and countless others—it is virtually guaranteed to find one that fits the circumstances of the speech.[123] The sufficient nexus and foreseeability thresholds are similar in this regard because they both grant school administrators broad authority to discipline students for nearly *any* type of speech, unlike the narrow approaches of the Eleventh, Ninth, and Fifth Circuits.

Nevertheless, while the sufficient nexus and foreseeability thresholds may closely resemble one another in their expansiveness, they are not indistinguishable. Similar to the nature of the speech and the speaker's intent, any nexus between the speech and the school's interests is merely a relevant factor in determining whether the speech satisfies the foreseeability threshold, as opposed to a necessary condition.[124] While such a nexus would certainly increase the likelihood that the speech will reach the school environment, the foreseeability threshold may arguably permit school administrators to punish students for speech that bears no connection whatsoever to the pedagogical interests of the school. That is, to justify punishment, the school need only establish that it was reasonably foreseeable that the speech would come to the attention of school administrators—it is not required to demonstrate any nexus between the speech and the school's interests.[125] Thus, while the two approaches are similar in certain respects, the foreseeability threshold is much more expansive than the sufficient nexus threshold.

---

122. The interests the school articulated in *Kowalski v. Berkeley County Schools* were student health and safety against cyberbullying—however, the court's approach ultimately has the effect of allowing schools to choose any interest that fits the circumstances of the speech. *Id.* at 572.

123. For additional examples of interests that courts have held to justify school discipline, see, e.g., *id*. (interest in preventing bullying); Morse v. Frederick, 551 U.S. 393, 407 (2007) (interest in "deterring drug use by schoolchildren"); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 679-80 (1986) (interest in protecting schoolchildren from lewd and indecent language).

124. Ferry, *supra* note 54, at 758-759.

125. *Id.* at 735.

V. CRITICISMS OF THE FORESEEABILITY THRESHOLD

While, from an outside perspective, the foreseeability threshold may appear to be a rather simple and straightforward approach, it has proven to be just the opposite. This Part will identify the various concerns scholars have raised in response to the foreseeability threshold. Chief among them are the ideas that the threshold is overly broad, grants too much discretion to school administrators, and provides little protection for online speech.

A. Overly Broad in Scope

As noted, the foreseeability threshold is much more expansive than threshold requirements imposed in other jurisdictions. This has given rise to perhaps the most obvious and widely expressed shortcoming of the foreseeability threshold—that it is overly broad and fails to define the precise types of speech that fall within its scope.[126] Just as the Supreme Court has yet to articulate a clear standard for the regulation of off-campus student speech, there are similarly no guidelines for lower courts to follow in determining whether it was reasonably foreseeable that a student's speech would reach the school and create a risk of substantial disruption.[127]

Consider, for example, the Second Circuit's holding in *Doninger v. Niehoff*.[128] As mentioned previously, *Doninger* involved a student-written blog post criticizing school

126. *See, e.g.*, Ferry, *supra* note 54, at 751 ("[T]he test articulated in *Doninger* fails to define the content that is within its intended scope."); Daniel Marcus-Toll, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3430 (2014) ("[T]he *Doninger* test, as articulated, fails to define or otherwise qualify the content within its intended scope."); Nathan S. Fronk, Doninger v. Niehoff*: An Example of Public Schools' Paternalism and the Off-Campus Restriction of Students' First Amendment Rights*, 12 U. PA. J. CONST. L. 1417, 1438 (2010) ("[D]ecisions such as *Doninger* . . . allow schools to punish students for any speech that the school deems as creating even a remote risk of disruption.").

127. *Compare* Doninger v. Niehoff, 527 F.3d 41, 48, 50 (2d Cir. 2008) (applying the reasonable foreseeability threshold and upholding the punishment of a student for an off-campus blog post), *with* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216, 219 (3d Cir. 2011) (applying the reasonable foreseeability test with a focus on the student's intent and vacating the punishment for an off-campus blog post).

128. *Doninger*, 527 F.3d at 41.

administrators and encouraging peers to harass them.[129] In determining whether the foreseeability threshold was satisfied, the court placed special emphasis on both the student's intent and the content of the speech.[130] Finding that the post "directly pertained to [school] events," and that the student's "intent in writing it was specifically to encourage her fellow students to read and respond," the court confidently held that "it was reasonably foreseeable that other . . . students would view the blog and that school administrators would become aware of it."[131] However, it failed to specify other types of speech that would fall within the scope of the foreseeability threshold, thus providing little help to future courts attempting to apply this standard.

Due to its overbreadth, some scholars have expressed concern that the foreseeability threshold may lead to a chilling effect on constitutionally protected forms of speech.[132] Judge Smith alluded to this premise in his concurring opinion in *Snyder v. Blue Mountain School District*, in which he presented the following hypothetical:

> Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student's classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption.[133]

129. *Id.* at 45.

130. *Id.* at 50-51.

131. *Id.* at 50.

132. Ferry, *supra* note 54, at 751-52 ("Political speech has consistently been protected, but the breadth of this specific test could become a vehicle to suppress this type of conduct."); Marcus-Toll, *supra* note 126, at 3430 ("[T]he Second Circuit did not unambiguously limit its test only to circumstances involving off-campus digital student speech. Consequently, this approach entails a considerable risk of chilling protected speech.").

133. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 939 (3d Cir. 2011) (Smith, J., concurring). "A bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters." *Id.* at 940.

Political speech is "at the core of what the First Amendment is designed to protect."[134] This is evident through the vast number of statutes and policies the Supreme Court has rejected, either because they sought to regulate political speech directly or created "an unacceptable risk of the suppression of ideas."[135] For example, in *Virginia v. Black*, the Court held that a statute prohibiting cross burning, as the jury instruction had construed it, "chill[ed] constitutionally protected political speech because of the possibility that the Commonwealth [would] prosecute—and potentially convict—somebody engaging only in lawful political speech . . . ."[136]

Similar to the statute at issue in *Black*, the foreseeability threshold creates a risk of chilling constitutionally protected speech by restricting more speech than necessary to protect a school's interests.[137] Because the test lacks any clear scope, there are essentially no limitations on the types of student speech that a school may discipline. Thus, school administrators may theoretically be justified in punishing a student for speech that, under any other circumstances, would be afforded the highest level of constitutional protection, so long as it is reasonably foreseeable that the speech will reach the school and create a substantial disruption. This approach inevitably creates "an unacceptable risk of the suppression of ideas" by causing students to refrain from voicing their opinions due to fear of punishment by school administrators.[138]

B. Affords Unlimited Discretion to School Administrators

A second concern that scholars have expressed regarding the foreseeability threshold is that it affords school administrators too much discretion in determining which types of speech constitute

134. Virginia v. Black, 538 U.S. 343, 365 (2003).

135. *Id.*

136. *Id.*

137. Ferry, *supra* note 54, at 752 ("[T]he reasonable foreseeability threshold does not define the type of speech that one could reasonably foresee causing a substantial disruption. In this regard, the test serves to limit more speech than necessary to protect the interests of the schools.").

138. *Black*, 538 U.S. at 365.

a basis for discipline.[139] Absent any clear definition of "reasonably foreseeable," whether a student's speech satisfies the foreseeability threshold is a purely subjective inquiry.[140] Thus, under this standard, school administrators are frequently permitted to characterize *any* speech as reasonably likely to reach the school environment and create a substantial disruption, even if the only basis for doing so is disapproval of the student's message.[141] This is akin to viewpoint discrimination, which the Supreme Court has held to be "an egregious form of content discrimination" and therefore a "blatant" violation of the First Amendment.[142] Furthermore, the Court expressly rejected such an action in *Tinker* when it held that a "mere desire to avoid the discomfort and unpleasantness that always accompanies an

139. Ferry, *supra* note 54, at 752-54 ("[T]he test affords school administrators . . . broad discretion to characterize any speech they find offensive as reasonably foreseeable to reach school grounds."); Allison E. Hayes, *From Armbands to Douchebags: How* Doninger v. Niehoff *Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 279 (2010) ("Giving administrators this sort of unfettered discretion could potentially chill all juvenile speech."); Papandrea, *supra* note 111, at 1091 ([F]ar more disconcerting are the expansive territorial approaches that permit schools to punish student speech whenever it is directed to campus, or when it is reasonably foreseeable that it will come to the attention of school authorities. These approaches grant schools virtually unbridled discretion to restrict juvenile speech generally."); Darin M. Williams, Tinker *Operationalized: The Judiciary's Practical Answer to Student Cyberspeech*, 62 DEPAUL L. REV. 125, 152 (2012) ("[U]nder the operationalized *Tinker* standard . . . schools clearly have broad authority . . . . This leads to concern that schools have used, and will continue to use, this wide deference to unconstitutionally infringe upon the First Amendment rights of students."); Travis Miller, Doninger v. Niehoff*: Taking* Tinker *Too Far*, 5 LIBERTY U. L. REV. 303, 324 (2011) ("*Tinker*'s substantial disruption test allows school administrators to punish online student speech that caused no substantial disruption in the past and will not cause a substantial disruption in the future . . . .").

140. Ferry, *supra* note 54, at 753 ("Whether it is reasonably foreseeable that speech will reach school property is certainly subjective, and what is foreseeable to one administrator may not be foreseeable to another.").

141. Miller, *supra* note 139, at 332 (arguing that the test announced in *Doninger* has been wrongly "used retroactively to punish a student for online and off-campus speech that could have but did not, and likely will not, cause a substantial disruption").

142. Rosenberger v. Rector, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *see also* Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (arguing that permitting schools to prohibit speech that conflicts with their self-defined educational mission "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed").

unpopular viewpoint" is not enough to overcome a student's First Amendment rights.[143]

A possible response to this criticism is the argument that schools maintain purposeful discretion over students because they are acting *in loco parentis*, or "in the place of a parent."[144] According to the doctrine of *in loco parentis*, when parents place their children into the public education system, they delegate a portion of their parental authority to school administrators, who are then authorized to discipline those students as would the students' parents.[145] Additionally, the Supreme Court has recognized that school officials possess "comprehensive authority" over students,[146] and must frequently perform "important, delicate, and highly discretionary functions."[147] As such, federal courts should generally refrain from interfering with the resolution of conflicts that arise in the context of public school systems.[148]

While school officials are in fact guaranteed a certain level of discretion by virtue of the *in loco parentis* doctrine, their authority to impose discipline is expressly limited to that which is "necessary to answer for the purposes for which [they are] employed."[149] With this limitation in mind, it is doubtful that such discretion was intended to encompass a school's authority to punish students for speech which takes place *away* from school

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

144. *in loco parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

145. 1 WILLIAM BLACKSTONE, COMMENTARIES 441. For a detailed discussion of the *in loco parentis* doctrine, see Justice Thomas's concurring opinion in *Morse*, 551 U.S. at 413-16 (2007) (Thomas, J., concurring). Justice Thomas possesses the rather draconian view that parents, to the extent they do not approve of the discipline imposed by public schools, "can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move." *Id.* at 420.

146. *Tinker*, 393 U.S. at 507; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (describing public school administrators' power as both "custodial and tutelary").

147. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

148. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 864 (1982); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.").

149. BLACKSTONE, *supra* note 145, at 453 ("[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.").

grounds, such as in the privacy of a student's home. The only way that punishment would be justified under these circumstances is if it was "reasonably foreseeable" that the speech would reach the school and create a substantial disruption.[150] However, as discussed earlier, this is a purely subjective inquiry. Thus, school officials are often permitted to punish students for off-campus speech even if it is unlikely that the speech will actually come to the attention of school authorities and create a substantial disruption. In this regard, school officials are exercising discretion well beyond that which is granted to them by the doctrine of *in loco parentis*, thus violating students' free speech rights and, arguably, the parents' rights as well.[151]

Furthermore, although school officials do indeed possess "comprehensive authority" over students due to the "important, delicate, and highly discretionary" nature of public education,[152] such authority is not absolute and must be carefully balanced against the students' First Amendment rights. This premise was determinative in the Third Circuit's holding in *Snyder v. Blue Mountain School District*, in which a student was suspended for creating a MySpace profile that made fun of her school's principal.[153] While recognizing a school's authority over its students, the court emphasized that "[t]he authority of public school officials is not boundless."[154] Because the student merely created the profile as a joke, did not actually identify the principal by name, school, or location, and took specific steps to ensure the profile remained private so that only she and her friends could access it, the court reasoned that "it was clearly not reasonably

150. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38-39 (2d Cir. 2007).

151. Allison Belnap, Tinker *at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech*, 2011 BYU L. REV. 501, 528 (2011) (arguing that the extension of *Tinker* to apply to "speech [that] occur[s] away from school property, without the assistance of any school resources, and . . . not offered at or in conjunction with any school-sanctioned event . . . would allow schools to exercise *in loco parentis* influence well beyond appropriate limitations and would infringe not only on the student's free speech and privacy rights, but on parents' rights as well").

152. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969); *Barnette*, 319 U.S. at 637.

153. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011).

154. *Id.* at 926.

foreseeable that [the student's] speech would create a substantial disruption . . . in school."[155] Rather, the principal likely suspended the student based on the humiliation he experienced as a result of the profile, which was insufficient to justify infringement on the student's right to freedom of expression.[156]

C. Provides Little Protection for Online Speech

Finally, there is an argument among scholars that the foreseeability threshold provides very little, if any, protection for online speech due the expansive reach of the Internet, as well as the ever-increasing popularity of social media.[157] As of December 2019, the world's population was 7.8 billion.[158] Among those 7.8 billion people, 4.54 billion use the Internet, and 3.725 billion are active on social media.[159] The number of social media users worldwide has increased by 1.8 billion since 2010, when it stood at only 0.97 billion people.[160] Furthermore, in the United States alone, the percentage of people who use social media has increased from forty-four percent in 2010 to seventy-nine percent in 2019.[161]

---

155. *Id.* at 929-30.

156. *Id.* at 930 (noting the need for courts to "determine when an 'undifferentiated fear or apprehension of disturbance' transforms into a reasonable forecast that a substantial disruption or material interference will occur") (internal citations omitted).

157. Ferry, *supra* note 54, at 754 ("[The foreseeability threshold] subjects speech that is spoken or written on paper to a higher degree of protection than speech that is written online due to the pervasive nature of the Internet."); Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 235-36 (2009) (expressing "three reasons why it is reasonably foreseeable that nearly any and all controversial provocative speech that is created and posted off campus by a student will come to the attention of school authorities," including the possibilities that: (1) "at least one student in a school will play the role of whistleblower or snitch and reveal the misdeeds of others"; (2) "some teachers and principals will proactively search online, via Google, Yahoo or other search engines, for postings about themselves or their school"; and (3) any "hallway gossip and buzz" about the speech "might be overheard by school officials").

158. Kit Smith, *126 Amazing Social Media Statistics and Facts*, BRANDWATCH (Dec. 30, 2019), [https://perma.cc/H74P-F6TT].

159. *Id.*

160. J. Clement, *Number of Social Media Users Worldwide from 2010 to 2021*, STATISTA (Aug. 14, 2019), [https://perma.cc/3K69-YT4J].

161. J. Clement, *Percentage of U.S. Population Who Currently Use Any Social Media from 2008 to 2019*, STATISTA (Aug. 9, 2019), [https://perma.cc/VQM5-C5PB].

With these statistics in mind, it becomes difficult to imagine how *any* online speech could possibly be shielded from discovery by school administrators. Even if school administrators do not themselves discover the speech, other students are likely to discover it and bring it to their attention.[162] This is often true even where a student takes extensive precautionary measures to protect the privacy of his or her speech. For example, consider again the facts of *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*, in which the Eighth Circuit used the foreseeability threshold to uphold the punishment of two high school students who created a website containing racist and sexually explicit blog posts about their classmates.[163] Despite the students' efforts to maintain the privacy of the posts by using a foreign domain website, which prevented people in the United States from finding the website through a typical online search, the court agreed with the school administrators that it was reasonably foreseeable that the speech would reach the school.[164] In doing so, the court essentially implied that any online speech regarding a student, teacher, or anything related to the school will automatically satisfy the foreseeability threshold, and is therefore given far less protection than speech that is written or spoken.[165]

VI. CONCLUSION

The "schoolhouse gate," of which Justice Fortas spoke with such reverence, has been all but obliterated. As scholars have expressed time and time again, it has become virtually impossible to find the proper balance between students' rights to engage freely in off-campus discussion and a school's interest in protecting the school environment from disruption. Unless the Supreme Court acts quickly, lower courts' attempts to maintain

162. Calvert, *supra* note 157, at 235-36.

163. S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 771, 774 (8th Cir. 2012).

164. *Id.* at 773, 778.

165. Kathryn S. Vander Broek et al., *Schools and Social Media: First Amendment Issues Arising from Student Use of the Internet*, 21 NO. 4 INTELL. PROP. & TECH. L.J. 11, 14 (2009) ("The spoken or printed word is capable of reaching a finite and limited audience. Information posted on the Internet can instantaneously reach a far larger audience potentially anywhere in the world.").

this balance will continue to produce results that are disjointed and unpredictable. More specifically, however, schools will continue to punish students any time it is "reasonably foreseeable" that their speech will reach the school environment—a standard that has numerous implications and ultimately fails to protect a student's First Amendment interests.