

# DIALING IT BACK: WHY COURTS SHOULD RETHINK STUDENTS' PRIVACY AND SPEECH RIGHTS AS CELL PHONE COMMUNICATIONS ERODE THE 'SCHOOLHOUSE GATE'

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## ABSTRACT

*The ubiquity of cell phones in today's society has forced courts to change or dismiss established, but inapplicable analytical frameworks. Two such frameworks in the school setting are regulations of student speech and of student searches. This Article traces the constitutional jurisprudence of both First Amendment off-campus speech protection and Fourth Amendment search standards as applied to the school setting. It then analyzes how the Supreme Court's ruling in Riley v. California complicates both areas. Finally, it proposes a pragmatic solution: by recognizing a categorical First Amendment exception for "substantial threats" against the school community, courts could accommodate students' constitutional rights while upholding school administrators' ability to maintain a safe environment.*

## INTRODUCTION

Cell phone technology has changed almost every aspect of the modern age. Cell phones provide a means to access and store vast amounts of information and to communicate with people around the world. They are also popular across age groups, including among children and teens who use them as a primary mode of communication and entertainment. Because cell phone users keep their phones on their person, this poses several problems in the school setting, where traditionally school administrators can regulate certain student speech and conduct some searches of student belongings. Courts have failed to adopt a consistent standard for school administrators' scope of authority over off-campus speech. Although the Supreme Court has developed a test for assessing the reasonableness of a search in school, it has not clarified how cell phones fit within that test. This Article traces the constitutional contours both of student speech and student searches, identifies the nuanced issues posed by cell phones, and proposes a solution that honors the underlying concerns on all sides: abolish the inconsistent standards of authority for

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off-campus speech and recognize a narrowly defined First Amendment exception for “substantial threats” to the school community.

## I. OFF-CAMPUS STUDENT SPEECH JURISPRUDENCE

### A. *The Supreme Court’s Student Speech Cases*

The Supreme Court first addressed student free speech rights within public schools in the seminal case, *Tinker v. Des Moines Independent Community School District*.<sup>1</sup> In *Tinker*, school officials suspended three students from school when the students refused to remove their black armbands, which they wore in protest of the Vietnam War.<sup>2</sup> Afterwards, the students sued, claiming the school had violated their First Amendment rights to freedom of speech.<sup>3</sup> The case reached the Supreme Court, which found in favor of the students and their right to protest. It held that, although school officials may control conduct in the schools, any regulation must be consistent with fundamental constitutional safeguards and be motivated “by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>4</sup> Indeed, the court proclaimed, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>5</sup>

Despite the favorable ruling, the Court ultimately curtailed students’ speech rights in other contexts. In weighing the competing interests, the Court ruled that a school may interfere with a student’s speech if the school can show that the speech would “materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school”<sup>6</sup> or would “involve substantial disorder . . . of the rights of others.”<sup>7</sup> This “substantial disruption” test established a strong precedent for on campus student speech rights that still applies today.

The Court has since altered the scope of *Tinker*’s “substantial disruption” standard, allowing school administrators to regulate speech

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<sup>1</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>2</sup> *Id.* at 504.

<sup>3</sup> *Id.* at 504-05.

<sup>4</sup> *Id.* at 509.

<sup>5</sup> *Id.* at 506.

<sup>6</sup> *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966))

<sup>7</sup> *Id.*

when (1) the speech is vulgar,<sup>8</sup> (2) the speech is disseminated through school resources,<sup>9</sup> or (3) the speech promotes illegal drug use.<sup>10</sup>

In *Bethel School District No. 403 v. Fraser*, the Court upheld a student's suspension for "lewd and indecent" speech.<sup>11</sup> A school suspended Matthew Fraser, a high school senior, for delivering a speech at an assembly that included an "an elaborate, graphic, and explicit sexual metaphor."<sup>12</sup> The Court distinguished Fraser's vulgar and lewd speech from *Tinker's* political speech because the former "undermined the school's basic educational mission,"<sup>13</sup> which includes instilling in students the "habits and manners of civility" necessary to be productive citizens.<sup>14</sup> Thus, *Fraser* established an exception to *Tinker's* "substantial disruption or material interference" test, granting schools deference to regulate lewd and indecent speech occurring at school.<sup>15</sup>

Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court held that a school may exercise greater editorial control of a school-sponsored newspaper to ensure that it presents students with material suitable for their maturity level.<sup>16</sup> In *Kuhlmeier*, a high school principal removed two student articles from the school newspaper, one discussing teenage pregnancy and the other dealing with divorce.<sup>17</sup> Three students sued, claiming the principal's censorship violated their First Amendment rights.<sup>18</sup> In its analysis, the Court rejected the idea that a school-sponsored newspaper was a public forum.<sup>19</sup> It then distinguished the issue from *Tinker*, framing the question as whether the First Amendment required a school to promote, rather than merely tolerate, particular student speech.<sup>20</sup> The Court answered its inquiry in the negative, focusing on the school's right to editorial control over its official newspaper.<sup>21</sup> In doing so, the Court did not apply either of the *Tinker* prongs in its analysis.<sup>22</sup>

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<sup>8</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>9</sup> *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

<sup>10</sup> *Morse v. Frederick*, 551 U.S. 393, 402 (2007).

<sup>11</sup> *Fraser*, 478 U.S. at 685.

<sup>12</sup> *Id.* at 678.

<sup>13</sup> *Id.* at 685.

<sup>14</sup> *Id.* at 681.

<sup>15</sup> *Id.* at 685.

<sup>16</sup> *Kuhlmeier*, 484 U.S. at 271.

<sup>17</sup> *Id.* at 263.

<sup>18</sup> *Id.* at 264.

<sup>19</sup> *Id.* at 269.

<sup>20</sup> *Id.* at 270–71.

<sup>21</sup> *Id.* at 273.

<sup>22</sup> *Id.* at 272–73.

The Court most recently altered the scope of *Tinker* in *Morse v. Frederick*, expanding school administrators' authority to regulate speech occurring off-campus.<sup>23</sup> In *Morse*, a school suspended a student for displaying a banner on a school field trip that his principal believed was advocating illegal drug use.<sup>24</sup> The Court upheld the suspension, finding that a school's choice to censor drug-related speech did not constitute an abstract desire to avoid controversy.<sup>25</sup> The Court's ruling thus created a second categorical exception to *Tinker's* protection: "promoting illegal drug use."<sup>26</sup> Notably, in its holding, the Court expanded the geographic scope of school administrators' authority beyond the physical schoolhouse gate itself, concluding that the circumstances of the field trip amounted to the student being at school.<sup>27</sup>

These four cases comprise the core of student speech First Amendment doctrine. *Tinker* first established the broad protection to students with the "substantial disruption and material interference" test.<sup>28</sup> The Court has created two content-based exceptions to *Tinker's* protection—vulgar speech and speech advocating drug use—where schools have far greater regulatory authority. Furthermore, the Court has expanded a school's authority regarding school-sponsored expression and to off-campus school-related events.

### *B. The Circuit Courts Apply Tinker in the Modern Age*

In the modern age, the ubiquitous use of social media coupled with the popularity of cell phones has spawned a growing and inconsistent body of law regarding First Amendment protection of off-campus student speech. The Supreme Court has yet to affirm that *Tinker* is applicable to speech originating outside the school setting, and if so, to what extent. Consequently, the lower courts have sought to define the circumstances in which schools may regulate off-campus student speech. Although the specific language differs amongst the circuits, the resulting tests for whether schools may regulate off-campus speech fall in two categories: proximity thresholds and safety thresholds.

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<sup>23</sup> *Morse v. Frederick*, 551 U.S. 393, 400-01 (2007).

<sup>24</sup> *Id.* at 401.

<sup>25</sup> *Id.* at 408–409.

<sup>26</sup> *Id.* at 400.

<sup>27</sup> *Id.* at 400–01. The Court considered the student to be at school because he was at an event that occurred during school hours with teachers in attendance, that included a performance by the school's band and cheerleaders, and where he was visible to fellow classmates. *Id.*

<sup>28</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

### 1. Proximity Thresholds

Proximity thresholds seek to qualify the relationship between the speech in question and the school. When speech occurs at school, *Tinker* governs. The further removed the speech is from the school, the more difficult it is to justify the speech as falling under the school's scope of authority. Several circuit courts have articulated specific analytical frameworks for assessing the scope of schools' authority based on the speech's proximity to the school grounds, school community, or school officials.

In *Wisniewski v. Board of Education of Weedsport Central School District*, the Second Circuit Court of Appeals extended a school's regulatory authority to student speech occurring off-campus and outside the school setting.<sup>29</sup> In *Wisniewski*, an eighth-grade student appealed his suspension for sharing with friends via AOL Instant Messaging from his home computer an animated icon suggesting that his teacher should be shot and killed.<sup>30</sup> A concerned classmate informed the targeted teacher, who shared the image with the school administration, the student's parents, and the local police.<sup>31</sup> The student acknowledged that he had created the image and expressed remorse, but was nevertheless suspended for five days.<sup>32</sup> In response, the student's parents brought forth an unsuccessful suit in the district court.<sup>33</sup> On appeal, the Second Circuit concluded first that the student's actions "pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities."<sup>34</sup> Only then did it apply *Tinker*, concluding that the icon would "materially and substantially disrupt the work and discipline of the school."<sup>35</sup>

The Second Circuit reaffirmed its "reasonable foreseeability" rationale the following year in *Doninger v. Niehoff*.<sup>36</sup> The court upheld disciplinary action against a student who posted on her personal blog a derogatory and false message that encouraged readers to contact school administrators to express dismay over the administrators' negative handling of a student event.<sup>37</sup> Citing *Wisniewski*, the court determined that not only was it reasonably foreseeable that the student's post would reach

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<sup>29</sup> *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35 (2d Cir. 2007).

<sup>30</sup> *Id.* at 35–36.

<sup>31</sup> *Id.* at 36.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 37.

<sup>34</sup> *Id.* at 38.

<sup>35</sup> *Id.* at 39.

<sup>36</sup> *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

<sup>37</sup> *Id.* at 43–44.

school property, but it “was purposely designed . . . to come onto the campus” and “to encourage her fellow students to read and respond.”<sup>38</sup> The court next applied *Tinker*, finding that the post’s harsh language,<sup>39</sup> the misleading nature of the post,<sup>40</sup> and that the student was a student government leader all contributed to the likelihood that the post would “materially and substantially disrupt the work and discipline of the school.”<sup>41</sup>

The Fourth Circuit cited *Doninger* in a 2011 decision in which it upheld Kara Kowalski’s suspension for creating a MySpace page dedicated to bullying and shaming a classmate.<sup>42</sup> Kowalski created the group and invited roughly 100 classmates on her MySpace “friends” list.<sup>43</sup> Upon discovering the group, the targeted student filed a harassment complaint, prompting school administrators to suspend Kowalski for violation of the policy against harassment, bullying, and intimidation.<sup>44</sup> The Fourth Circuit heard Kowalski’s case on appeal to determine whether her activity fell within the boundaries of the high school’s “legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.”<sup>45</sup> While acknowledging the holding in *Doninger*, the court used its own analysis:

There is surely a limit to the scope of a high school’s interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski’s speech to [the school’s] pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body’s well-being.<sup>46</sup>

The court failed to list or set out the factors necessary to show the sufficiency of a “nexus” between speech and a school’s interests.<sup>47</sup> Furthermore, despite discussing the Second Circuit’s “reasonable foreseeability” rationale, the Fourth Circuit did not explain if or how the “nexus” test differed from the “reasonable foreseeability” test, leading

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<sup>38</sup> *Id.* at 50.

<sup>39</sup> *Id.* at 50–51.

<sup>40</sup> *Id.* at 51.

<sup>41</sup> *Id.* at 52.

<sup>42</sup> *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 568–69.

<sup>45</sup> *Id.* at 571.

<sup>46</sup> *Id.* at 573.

<sup>47</sup> *Id.*

some scholars to conclude that the Fourth Circuit adopted the Second Circuit's test using different language.<sup>48</sup>

In *J.S. v. Blue Mountain School District*, the Third Circuit developed a variation on the “reasonable foreseeability” test that allowed it to reach a conclusion without deciding whether *Tinker* applied to off-campus speech.<sup>49</sup> In *J.S.*, the Third Circuit found that a school district had violated a student's First Amendment rights when it suspended the student for creating a fake MySpace profile for the school's principal.<sup>50</sup> The court concluded that “the profile was so outrageous that no one could have taken it seriously . . . . Thus, it was clearly not reasonably foreseeable that [the] speech would create a substantial disruption or material interference in school.”<sup>51</sup> Unlike the Second Circuit's test, which first looks to the reasonable foreseeability of the speech reaching the school before applying *Tinker*'s “substantial disruption” test,<sup>52</sup> the Third Circuit looked instead to the foreseeability of the substantial disruption itself. Because the student's act failed this threshold, the court ended its analysis, “assum[ing], without deciding, that *Tinker* applie[d] to [the] speech in this case.”<sup>53</sup>

In *S.J.W. v. Lee's Summit R-7 School District*, the Eighth Circuit ruled in favor of a school district's 180-day suspension of two brothers for a disruption caused by their personal website.<sup>54</sup> The students had moved for a Preliminary Injunction to lift their suspension,<sup>55</sup> but the Eight Circuit reversed the injunction, finding that the students were unlikely to succeed on the merits.<sup>56</sup> The students' website included a blog that “contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about female classmates, whom they identified by

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<sup>48</sup> Watt Lesley Black, Jr., *Omnipresent Student Speech and the Schoolhouse Gate: Interpreting Tinker in the Digital Age*, 59 ST. LOUIS U. L. J. 531, 551 (2015) (“A fairly stable consensus has emerged in the case law that *Tinker* can appropriately be applied to off-campus student speech . . . . The Second, Fourth, and Eighth Circuits all considered the question of the reasonable foreseeability that a student's off-campus speech would reach the school before extending *Tinker* to off-campus speech.”).

<sup>49</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 930 (emphasis added).

<sup>52</sup> *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

<sup>53</sup> *J.S.*, 650 F.3d at 926.

<sup>54</sup> *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 773 (8th Cir. 2012).

<sup>55</sup> *Id.* at 773.

<sup>56</sup> *Id.* at 776.

name.”<sup>57</sup> The court looked to *Doninger, Kowalski*, and *J.S.* to determine the scope of the school’s authority.<sup>58</sup> Similar to *Kowalski* and *Doninger*, the blog posts here “could reasonably be expected to reach the school or impact the environment.”<sup>59</sup> Unlike *J.S.*, the speech here “caused considerable disturbance and disruption.”<sup>60</sup> Therefore, the court applied *Tinker*.<sup>61</sup>

Except for the Fourth Circuit, the proximity thresholds use “reasonable foreseeability” tests to examine the proximity between the speech in question and the school environment. Although these circuits all use the “reasonable foreseeability” language in their pre-*Tinker* analysis, they ask slightly different questions regarding *what* is reasonably foreseeable. The various circuits ask whether it is reasonably foreseeable that the speech “will come to the attention of school authorities,”<sup>62</sup> “will reach school property,”<sup>63</sup> will create “a substantial disruption,”<sup>64</sup> or will “reach the school or impact the environment.”<sup>65</sup> These differences, although minimal, have produced inconsistent tests across the circuits.

## 2. Safety Thresholds

Other circuits have instituted higher threshold requirements that limit schools’ scope of authority more than the “reasonable foreseeability” test does. These circuits look not only to the foreseeability that the speech will reach the school in some form, but also to the content of the speech itself. As digital speech becomes more common, mere foreseeability that speech will reach school becomes inevitable. These courts look to the threatening nature of the speech and the likelihood that the speech will encroach upon other student’s rights of safety and security at school.

In *Wynar v. Douglas County School District*,<sup>66</sup> the Ninth Circuit held that school administrators had the authority to discipline a student who sent “a string of increasingly violent and threatening instant messages

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<sup>57</sup> *Id.* at 773.

<sup>58</sup> *Id.* at 777–78.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 778.

<sup>61</sup> *Id.*

<sup>62</sup> *Wisniewski v. Bd. of Ed. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007).

<sup>63</sup> *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

<sup>64</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011)

<sup>65</sup> *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012).

<sup>66</sup> *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013).

. . . bragging about his weapons, threatening to shoot specific classmates, [and] intimating that he would ‘take out’ other people at a school shooting on a specific date.”<sup>67</sup> In its analysis, the Ninth Circuit reviewed the decisions of its sister circuits to clarify the various threshold tests.<sup>68</sup> In the Ninth Circuit’s view, *Doninger*, *Kowalski*, and *S.J.W.* had established different thresholds as prerequisites to applying *Tinker*,<sup>69</sup> while the Third Circuit and, in a case not involving digital speech, the Fifth Circuit, had “left open the question whether *Tinker* applies to off-campus speech.”<sup>70</sup>

After its review of the current landscape, the Ninth Circuit declined to adopt any of the other circuits’ reasoning, noting its hesitation to create a “one-size fits all approach.”<sup>71</sup> Instead, the court grounded its reasoning in the threatening content of the student’s speech, holding 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*.”<sup>72</sup> The Ninth Circuit deviated further from other circuits by analyzing the threatening speech under the “invasion of the rights of others” prong of *Tinker*.<sup>73</sup> Although the court declined to elaborate on the exact scope of these rights, it concluded that the threats of a school shooting “represent the quintessential harm to the rights of other students to be secure.”<sup>74</sup>

The Fifth Circuit’s en banc decision in *Bell v. Itawamba County School Board* upheld a school board’s authority to discipline a student for recording a threatening rap song outside of school and posting it on his

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<sup>67</sup> *Id.* at 1065–66.

<sup>68</sup> *Id.* at 1068.

<sup>69</sup> *Id.* at 1068–69 (“The Fourth Circuit requires that the speech have a sufficient ‘nexus’ to the school, while the Eighth Circuit requires that it be ‘reasonably foreseeable that the speech will reach the school community.’ The Second Circuit has not decided ‘whether it must be shown that it was reasonably foreseeable that [the speech] would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability.’ But at least where it is reasonably foreseeable that off-campus speech meeting the *Tinker* test will wind up at school, the Second Circuit has permitted schools to impose discipline based on the speech.”).

<sup>70</sup> *Id.* at 1069. (“The Third Circuit “assumed, without deciding, that *Tinker* applie[d]” to a student’s creation of a parody MySpace profile mocking the school principal, but held that it was not reasonably foreseeable that the speech would create a substantial disruption.”). *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1071–72.

<sup>74</sup> *Id.* at 1072.

Facebook page.<sup>75</sup> The song contained obscene language and accused two high school coaches by name of sexually harassing female students.<sup>76</sup> The lyrics alluded to potential violent acts against those coaches.<sup>77</sup> After a hearing, the school board's disciplinary committee found that the song had constituted "harassment [or] intimidation of []teachers, in violation of school policy," and imposed several punishments.<sup>78</sup> The case eventually reached the Fifth Circuit's en banc panel, which held that the school board had not violated the student's First Amendment rights.<sup>79</sup>

In conducting its analysis, the Fifth Circuit emphasized that five of the six circuits to address the scope of a school's authority had determined that *Tinker* could apply to speech that originated and was disseminated off-campus.<sup>80</sup> It then expressed its hesitation, similar to the Ninth Circuit, to "adopt any rigid standard" regarding a school's scope of authority.<sup>81</sup> Instead, the court established a test sufficient to address the facts in *Bell*.<sup>82</sup> Accordingly, the Fifth Circuit held that *Tinker* applies to a student's off-campus speech when (1) "a student intentionally directs [speech] at the school community,"<sup>83</sup> and (2) the speech is "reasonably understood by school officials to threaten, harass, and intimidate a teacher."<sup>84</sup> The first prong of this test resembles the reasonable foreseeability test. The second prong, however, looks to the content of the

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<sup>75</sup> *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015) (en banc).

<sup>76</sup> *Id.* at 383–84.

<sup>77</sup> *See id.* at 384 ("At the very least, this incredibly profane and vulgar rap recording had at least four instances of threatening, harassing, and intimidating language against the two coaches:

1. 'betta watch your back / I'm a serve this [n\*\*\*\*], like I serve the junkies with some crack';
2. 'Run up on T-Bizzle / I'm going to hit you with my rueger';
3. 'you fucking with the wrong one / going to get a pistol down your mouth / Boww'; and
4. 'middle fingers up if you want to cap that [n\*\*\*\*]/ middle fingers up / he get no mercy [n\*\*\*\*]'").

<sup>78</sup> *Id.* at 386.

<sup>79</sup> *Id.* at 399.

<sup>80</sup> *Id.* at 393–94. The majority concluded that the Second, Fourth, Fifth, Eighth, and Ninth Circuits had applied *Tinker* in these circumstances, while the Third Circuit was unclear on the issue. Notably, despite the Ninth Circuit's express hesitation to adopt another circuit's test or to create its own test, the *Bell* majority interpreted its ruling in *Wynar* to apply *Tinker*. Furthermore, the Fifth Circuit included itself in the tally, despite having not yet ruled on this exact issue.

<sup>81</sup> *Id.* at 396.

<sup>82</sup> *Id.* at 395–96.

<sup>83</sup> *Id.* at 396.

<sup>84</sup> *Id.*

student's speech to determine if *Tinker* applies. Given the "threatening content" threshold, it is hard to imagine a situation in which a student's speech would satisfy both prongs, but then fail under *Tinker*. In *Bell*, having found that the student's song satisfied both prongs of this test, the court then conducted its *Tinker* analysis, finding that, in this case, it was reasonable for school officials to conclude that the song would cause a substantial disruption.<sup>85</sup> Notably, the court did not define "threatening," "harassing," or "intimidating" language, which one dissenting judge criticized, opining that the test was unconstitutionally vague.<sup>86</sup>

While the Ninth and Fifth Circuits deviated from the "reasonable foreseeability" line of cases, their respective tests naturally incorporate the "reasonable foreseeability" analysis, since threatening or harassing language directed at the school community is likely to reach its target. In essence, the Ninth and Fifth Circuits' test imposes another, limiting threshold before conducting a *Tinker* analysis.

## II. FOURTH AMENDMENT SEARCHES IN AND OUT OF THE SCHOOL SETTING

Part I traced the current legal landscape of the scope of schools' authority over off-campus speech. Although the circuit courts' respective cases are modern, with *Bell* decided as recently as 2015, the technological landscape has transformed since then.<sup>87</sup> Most notably, both the prevalence and capabilities of cell phones have increased in recent years, allowing the vast majority of students to remain plugged in to their social networks throughout the school day. As cell phones increase the ease of connectedness, the scope of schools' authority over off-campus digital speech rises, since the "reasonable foreseeability" barriers become easier to breach. This regulatory power, however, butts up against students' Fourth Amendment rights against unreasonable searches. Part II traces the boundaries of students' Fourth Amendment rights and summarizes a recent Supreme Court case that Part III argues should guide where cell phones fall within those boundaries.

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<sup>85</sup> *Id.* at 400.

<sup>86</sup> *Id.* at 413–16 (Dennis, J., dissenting).

<sup>87</sup> See, e.g., *Mobile Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile/> ("The vast majority of Americans – 95% – now own a cellphone of some kind. The share of Americans that own smartphones is now 77%, up from just 35% in Pew Research Center's first survey of smartphone ownership conducted in 2011.").

A. *New Jersey v. T.L.O.: Establishing a Standard for School Searches*

The Supreme Court first addressed the constitutionality of school officials searching students' belongings in *New Jersey v. T.L.O.*<sup>88</sup> In *T.L.O.*, a high school student claimed her Fourth Amendment rights were violated when the school's vice principal searched her purse.<sup>89</sup> A teacher had seen the student smoking a cigarette in a school bathroom and reported the student to the vice principal.<sup>90</sup> The student denied smoking, which prompted the vice principal to search the purse, where he found cigarettes and rolling papers he believed were for smoking marijuana.<sup>91</sup>

The Court held that the search was constitutional,<sup>92</sup> reaffirming that the legality of any search depends "on [its] reasonableness under all the circumstances."<sup>93</sup> Testing the reasonableness, the Court balanced students' expectations of privacy in their personal items against school officials' interest in searching these belongings.<sup>94</sup> The Court held that the Fourth Amendment's warrant requirement was "unsuited to the school environment" because requiring a teacher to get a warrant before searching a student's belongings "would interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."<sup>95</sup> In its place, the Court established a two-step test for testing the reasonableness of a search in the school setting.<sup>96</sup> For a search to be reasonable, it must be (1) "justified at its inception,"<sup>97</sup> and be (2) "reasonably related in scope to the circumstances which justified the interference."<sup>98</sup> Moreover, the measures adopted by the school cannot be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."<sup>99</sup> As applied, the teacher's eyewitness testimony justified the search at its inception and in its scope, since the vice principal reasonably believed the search of her purse would produce evidence of school misconduct, and because students

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<sup>88</sup> 469 U.S. 325 (1985).

<sup>89</sup> *Id.* at 328.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 340.

<sup>93</sup> *Id.* at 341.

<sup>94</sup> *Id.* at 337.

<sup>95</sup> *Id.* at 330–31.

<sup>96</sup> *Id.* at 341.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 342.

do not have a strong expectation of privacy as to bookbags and purses while at school.<sup>100</sup>

*B. Safford United School District v. Redding: Defining the Limits for School Searches*

In *Safford Unified School District No. 1 v. Redding*, the Court held that a strip search of a thirteen-year-old student accused of hiding pills on her person was invasive enough to tip the balance against the reasonableness of the search.<sup>101</sup> Administrators suspected that the student was distributing prescription drugs to other students, so they directed the school nurse to search her bra and expose her underwear.<sup>102</sup> The Court applied *T.L.O.*'s "reasonable suspicion" test to the facts, finding that the search was justified at its inception because the principal had heard the student was distributing pills to students.<sup>103</sup> However, the scope of the search—pulling away a young girl's underwear—was not appropriate given the important societal expectations of personal privacy as to this layer of clothing.<sup>104</sup> The Court ultimately concluded that the "combination of . . . deficiencies [were] fatal to finding the search reasonable."<sup>105</sup>

*C. Riley v. California: Recognizing the Cell Phone's Status in the Privacy Debate*

In 2014, the Supreme Court delivered a unanimous decision in a digital privacy case, *Riley v. California*, holding that police must obtain a warrant to search the contents of cell phones confiscated during an arrest.<sup>106</sup> Police may only search an arrestee's person and immediate surroundings.<sup>107</sup> This search "incident to arrest" exception to the warrant requirement exists both to ensure officer safety while a suspect is being apprehended and to prevent the suspect from destroying any evidence within reach.<sup>108</sup> The Supreme Court has held that the warrant requirement

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<sup>100</sup> *Id.* at 346.

<sup>101</sup> 557 U.S. 364, 374–75 (2009).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 375–76.

<sup>104</sup> *Id.* at 369.

<sup>105</sup> *Id.* at 377.

<sup>106</sup> 134 S.Ct. 2473, 2482 (2014).

<sup>107</sup> See *Chimel v. California*, 395 U.S. 752, 764 (1969) (establishing the it is reasonable for police officers to search the arrestee's person and the area within the arrestee's immediate control); See also *United States v. Robinson*, 414 U.S. 218, 235–236 (1973) (permitting search of closed cigarette package found on arrestee's person); *New York v. Belton*, 453 U.S. 454, 460, (1981) (holding police may search that are within arrestee's reach).

<sup>108</sup> *Chimel*, 395 U.S. at 762–63.

may be dispensed with only when the underlying justifications for the exception apply to the specific situation.<sup>109</sup>

In *Riley v. California*, the Supreme Court considered whether the digital content on an arrestee's cell phone falls within the scope of the search "incident to arrest" exception.<sup>110</sup> David Riley was pulled over by police for driving with expired registration tags.<sup>111</sup> Because Riley had a suspended driver's license, the police impounded the car and performed a standard inventory search.<sup>112</sup> During that search, the police found two illegal firearms and subsequently arrested Riley.<sup>113</sup> Riley had his cell phone on his person at the time of the arrest, and a detective searched through its contents and found videos of Riley making gang signs, along with photos of Riley standing in front of a vehicle involved in a recent shooting.<sup>114</sup> This evidence prompted additional charges including shooting at an occupied vehicle, assault with a semi-automatic firearm, and attempted murder.<sup>115</sup> Riley moved to suppress the photographic evidence taken from his phone, arguing that the warrantless search of his phone violated his Fourth Amendment rights.<sup>116</sup>

The Court acknowledged the lack of "precise guidance from the founding era" as to whether modern cell phones may be searched without a warrant.<sup>117</sup> Thus, the Court instead applied the Fourth Amendment's reasonableness balancing test, weighing the government's interest in the search against the privacy interests of arrestees, to determine if the search was constitutional.<sup>118</sup>

The Court found the governmental interests to be minimal, noting that the underlying justifications for the search incident to arrest exception are not generally applicable to digital content on a phone.<sup>119</sup> The Court first found that the content on the phone could not be used to harm the officers, and thus it did not pose a safety threat.<sup>120</sup> Second, the Court

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<sup>109</sup> *Arizona v. Gant*, 556 U.S. 332, 349 (2009).

<sup>110</sup> 134 S.Ct. at 2482 (2014).

<sup>111</sup> *Id.* at 2480

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 2481.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2484.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 2485.

<sup>120</sup> *Id.* at 2486.

reasoned that, once the officers had possession of the phone, there was no risk that the suspect would destroy its digital contents.<sup>121</sup>

The Court next considered the privacy interests at stake in a cell phone search.<sup>122</sup> Although arrestees have a diminished expectation of privacy, the Court found that the unique privacy-related concerns of cell phones justified a warrant requirement.<sup>123</sup> “Modern cell phones,” the Court noted, “implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”<sup>124</sup> The Court clarified that the term “cell phone” is a misnomer, declaring instead that these “microcomputers” combine the functions of “cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, [and] newspapers.”<sup>125</sup> Thus, the “sum of an individual’s private life can be reconstructed” through the totality of a phone’s detailed contents.<sup>126</sup> The Court further noted the immense storage capacity allows one to find data extending back to the phone’s purchase.<sup>127</sup> In its analysis, the Court addressed the nuances of cloud computing, stating that accessing suspects’ remote storage content through their phones “would be like finding a key in a suspect’s pocket and arguing that it allowed [them] to unlock and search a house.”<sup>128</sup> Considering all the privacy interests at risk, the balance tipped heavily in favor of the suspect’s privacy rights. This extensive exploration of cell phone privacy interests in *Riley* serves to justify its application to the school setting in Part III.

### III. RILEY’S APPLICABILITY TO THE SCHOOL SETTING

The *Riley* Court’s broad pronouncements about the unique privacy concerns raised by cell phones should inform future cases involving cellphone searches in the school setting. Much of the Court’s rationale applies directly or by analogy to the school setting. Both students and arrestees have diminished expectations of privacy, but both parties should still retain a substantial privacy interest in their digital cell phone data.

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<sup>121</sup> *Id.* In its argument, the government posited that information on a cell phone is vulnerable to two types of evidence destruction: remote wiping and data encryption. The Court dismissed these concerns, downplaying their prevalence, and providing examples of reasonable responses to these concerns. *Id.* at 2486–88.

<sup>122</sup> *Id.* at 2487.

<sup>123</sup> *Id.* at 2493.

<sup>124</sup> *Id.* at 2488–89.

<sup>125</sup> *Id.* at 2489.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2491.

Moreover, applying the Fourth Amendment's reasonableness test used in *Riley* would lead to the same result in the school setting.

Although students have a diminished expectation of privacy compared to the general public,<sup>129</sup> *Riley* suggests that the privacy interests at stake can be great enough to tip the balance in favor of those with decreased privacy expectations.<sup>130</sup> The Court has consistently held that school children have a lesser expectation of privacy than that of the general population.<sup>131</sup> When parents send their children to school, they delegate some authority to the school.<sup>132</sup> Furthermore, public schools as state actors exercise a certain degree of control and supervision as part of their custodial duty, curtailing public school students' constitutional rights in the school setting.<sup>133</sup>

However, the privacy rights highlighted in *Riley* were not merely "general population" privacy rights that must be pared down to apply to the school setting. Like students in the school setting, David Riley also experienced a diminished expectation of privacy because of his status as an arrestee. The Court has long recognized a decreased expectation of privacy of an arrestee's person.<sup>134</sup> Guiding this recognition was the concern for officer safety and evidence preservation, or put more broadly, the need for police to exercise reasonable control over the environment,

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<sup>129</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) ("While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect,' we have acknowledged that for many purposes 'school authorities ac[t] in loco parentis,' with the power and indeed the duty to 'inculcate the habits and manners of civility.'") (citations omitted).

<sup>130</sup> 134 S.Ct. at 2497.

<sup>131</sup> *Vernonia Sch. Dist. 47J*, 515 U.S. at 656–57; *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985).

<sup>132</sup> *Vernonia Sch. Dist. 47J*, 515 U.S. at 656 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.")

<sup>133</sup> *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("We have nonetheless recognized that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,' and must be 'applied in light of the special characteristics of the school environment.'") (citations omitted).

<sup>134</sup> *See United States v. Robinson*, 414 U.S. 218, 224 (1973) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."); *id.* at 260 (Powell, J., concurring) ("I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.")

similar to the goal of school administrators.<sup>135</sup> Despite this need, the Court held that the privacy-related concerns were weighty enough to require a warrant to search the contents of a cell phone.<sup>136</sup> Indeed, even though the police could lawfully confiscate Riley's phone, he retained his privacy in the digital contents of the phone separate from the physical object itself.<sup>137</sup> Similarly, while students routinely have their physical phones confiscated due to their diminished sense of privacy in school, that in no way diminishes the expectation that the contents will remain private. Because the privacy concerns that students have in their cell phone data equals that of the general population, *Riley* suggests that students do not lose privacy rights in their cell phone data simply because of their status as students.

In *Riley*, the Court acknowledged both the newness and pervasiveness of modern cell phones.<sup>138</sup> Without a founding era equivalent, the Court could not rely on specific historical guidance, although it highlighted the historical concerns of general warrants in the colonial era.<sup>139</sup> It instead turned to the Fourth Amendment's reasonableness balancing test to assess the constitutionality of a cell phone search, weighing the degree of intrusion against the legitimate governmental interests.<sup>140</sup> The lack of founding era guidance on cell phones remains the same in all settings, suggesting that the reasonableness test should also control cell phone searches in the school setting.<sup>141</sup> Indeed, schools apply the Fourth Amendment's reasonableness balancing test to searches in other contexts,<sup>142</sup> and thus would maintain consistency by applying it to cell phones searches.

School searches must be "reasonably related in scope to the circumstances which justified the interference."<sup>143</sup> However, the *Riley*

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<sup>135</sup> *Riley*, 134 S.Ct. at 2484.

<sup>136</sup> *Id.* at 2495.

<sup>137</sup> *Id.* at 2485.

<sup>138</sup> *See id.* at 2484 ("cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.").

<sup>139</sup> *See id.* at 2494. "Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself."

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>143</sup> *Redding*, 557 U.S. at 375 (quoting *T.L.O.*, 469 U.S., at 341).

Court rejected the government's proposal that warrantless cell phone searches be permitted, but limited to specific areas of the phone,<sup>144</sup> a restriction akin to the requirement that school officials' searches be "reasonable in scope." Its rationale stemmed from its earlier recognition that cell phones store a wide variety of easily accessible personal information, leading to a greater potential for the intermingling of information and, consequently, an invasion of privacy that exceeds the scope of the specific circumstances.<sup>145</sup> In doing so, the Court expressed doubts that officers could discern exactly where information was located without accidentally uncovering other private information.<sup>146</sup> For example, in the school context, a principal might have to search through a digital photo album to find a specific photo or through an entire text message thread to find a specific text. In *T.L.O.*, the Court assumed that school officials could search carefully through the contents of physical belongings to limit the scope of their intrusion,<sup>147</sup> but the complexity of cell phones undercuts this assumption. Indeed, some scholars align a search of cell phone data closer with that of a strip search such as that in *Safford*, given the potential to uncover sensitive information.<sup>148</sup>

*Riley*'s application to the school setting becomes problematic when considering its remedial solution. *Riley*'s holding dictates that cell phone data does not fall within the "incident to arrest" exception to the Fourth Amendment's warrant requirement.<sup>149</sup> While one possible procedure in the school setting is to require school administrators to request warrants, this solution would be impractical. The Court has stated that "the warrant requirement . . . is unsuited to the school environment" because it would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."<sup>150</sup> Thus, although

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<sup>144</sup> 134 S.Ct. at 2492.

<sup>145</sup> *Id.* at 2485.

<sup>146</sup> *See id.* at 2492. ("This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.")

<sup>147</sup> *See* 469 U.S. at 343 ("By focusing attention on the question of reasonableness, the standard will . . . permit [teachers and school administrators] to regulate their conduct according to the dictates of reason and common sense.")

<sup>148</sup> *See* Bernard James, *T.L.O. and Cell Phones: Student Privacy and Smart Devices After Riley v. California*, 101 IOWA L. REV. 343, 354 (2015) ("One must logically conclude that the higher-order privacy interest of students to resist a strip search is equal to (if not greater than) the higher expectation of privacy students now possess in the digital contents of their cell phones.")

<sup>149</sup> *Riley*, 134 S.Ct. at 2495 (2014).

<sup>150</sup> *T.L.O.*, 469 U.S. at 340.

the heightened privacy concerns and the diminished privacy expectations are similar between arrestees and students, the unique discipline mechanisms in the school environment require a different procedure than the warrant standard in *Riley*.<sup>151</sup>

#### IV. HOW CELL PHONES UNDERMINE THE POST-*TINKER* OFF-CAMPUS DOCTRINE

Both cell phones and the developing body of law surrounding their regulation in the school setting have the potential to disrupt the off-campus speech tests discussed in Part I. The argument in favor of recognizing students' higher privacy expectations in their digital cell phone data extends beyond Fourth Amendment concerns. The conversations had, and the photos taken on cell phones constitute protected expression against government interference. Because students' phones contain expressive contents that would fall under the First Amendment's protection in a non-school situation, the *T.L.O.* reasonableness balance should tip to support a higher privacy expectation. This conclusion, however, depends in part on whether such digital contents are afforded First Amendment protection from school officials. That question depends upon the various circuit court tests for off-campus school speech regulation. Although these tests were developed within the past decade, the ubiquity of cell phone use among students is even more recent and threatens to undermine the assumptions on which these tests were based.<sup>152</sup> As Part I discussed, these tests fall into two general categories: (1) "proximity thresholds" and (2) "safety thresholds."

Proximity thresholds have quickly become obsolete in an age where all digital speech can be accessed at any time, including while at school.<sup>153</sup> Continuing to uphold "reasonable foreseeability" tests will ultimately extend a school's scope of authority to regulate speech to all aspects of a student's life. If school officials were looking for a source of

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<sup>151</sup> See *infra* Part V, proposing one such procedure.

<sup>152</sup> See, e.g., Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RES. CTR. (Apr. 9, 2015) <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/> ("Some 88% of teens have or have access to cell phones or smartphones and 90% of those teens with phones exchange texts. A typical teen sends and receives 30 texts per day.").

<sup>153</sup> Donna St. George, *Schools and cellphones: In elementary schools? At lunch?*, WASH. POST (Nov. 13, 2017) [https://www.washingtonpost.com/local/education/schools-and-cellphones-in-elementary-schools-atlunch/2017/11/13/1061064a-ba81-11e7-a908a3470754bbb9\\_story.html?utm\\_term=.3569880f6ae5](https://www.washingtonpost.com/local/education/schools-and-cellphones-in-elementary-schools-atlunch/2017/11/13/1061064a-ba81-11e7-a908a3470754bbb9_story.html?utm_term=.3569880f6ae5) ("Students are supposed to use the district's network while in school, and social media sites in Montgomery are blocked for -middle-schoolers, although some break the rules and go off the network to access them. High school students can use Facebook and Twitter through the network.").

“reasonableness” to search a student’s cell phone, the “reasonable foreseeability” test provides near carte blanche justification for these searches of any student who communicates through a cell phone.

Unless a strict application of *Riley* were to apply to the school setting, proximity tests would allow school officials to intrude upon students’ privacy interests to regulate any form of digital expression accessible by phone, regardless of where or when it was expressed, so long as it had any potential to interfere within the school environment. While minimizing interference is an important policy goal, this overbroad power has the potential to invite even more interference than it would deter. Although cell phones contain multitudes of private information and expression, students do not consciously bring every private communication or expression to the school community when they bring the physical phone on campus. This broad application would inevitably chill protected speech and extend the supervisory role of the state far beyond the limits of the schoolhouse gate, infringing on students’ First Amendment rights.

The safety thresholds used by the Fifth and Ninth circuits create a heightened standard for defining a school’s scope of authority over off-campus student speech. However, the standards in their current form are too vague. The “identifiable threat” test developed in *Wynar* permits a more limited yet vague set of circumstances in which school officials may regulate student speech. Although the Ninth Circuit considered the danger of school shootings and the school’s duty to maintain a safe environment when limiting *Tinker* to on-campus speech,<sup>154</sup> it did not elaborate on the threats or violence covered. The test is thus ambiguous as to the scope of the school’s reach. Serious and immediate threats of physical harm such as those in *Wynar* seem to fall within this scope, but less overt forms of violence such as cyberbullying remain unclear. Arguably, if a victim presented evidence of one-on-one cyberbullying from his or her own phone, there would be no need to search the other’s phone. However, because cyberbullying can take many forms,<sup>155</sup> consensual third-party disclosure may not be possible in all cases.<sup>156</sup> The Fifth Circuit’s test

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<sup>154</sup> *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069–70 (9th Cir. 2013).

<sup>155</sup> See *What is Cyberbullying?*, NATIONAL CRIME PREVENTION COUNCIL, <http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying> (last visited Apr. 12, 2018); *What is cyberbullying exactly?* STOP CYBERBULLYING, [http://www.stopcyberbullying.org/what\\_is\\_cyberbullying\\_exactly.html](http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html) (last visited Mar. 13, 2018).

<sup>156</sup> See Corinne David-Ferdon & Marci Feldman Hertz, *Electronic Media and Youth Violence: A CDC Issue Brief for Researchers*, CENTERS FOR DISEASE CONTROL at 6 (2009), <http://www.cdc.gov/violenceprevention/pdf/electronic>

suffers from the same vagueness concerns, failing to define the “threatening,” “harassing,” or “intimidating” language that is required before applying *Tinker*.<sup>157</sup>

This presents a separate procedural issue that the court acknowledged, but failed to rule on definitively.<sup>158</sup> With safety thresholds, the initial hurdles are arguably more heightened than *Tinker* itself. Indeed, speech that could pose an identifiable threat to the safety of students would also foreseeably reach the school community and would also substantially disrupt or materially interfere with the school environment. Thus, if the initial threshold is met, the *Tinker* threshold is also met. This suggests, as Part V argues, that *Tinker* may not be the most suitable avenue for regulating serious threats made off-campus.

## V. A PRAGMATIC SOLUTION

### *A. Abolish Threshold Tests and Create a Third, Limited Categorical Exception to Protected Student Speech*

The threshold tests developed by the various circuit courts suffer from inconsistency, vagueness, and, for some, irrelevance in the modern age. Schools should expect that nearly all student speech will foreseeably reach the school setting. Thus, schools cannot rely on a geographical nexus without eradicating *Tinker* and extending school regulation to all facets of a student’s social life.

Instead, courts should abandon the outdated threshold tests and establish a third, narrow categorical exception to *Tinker*—granting schools the authority to regulate speech that poses a credible and substantial threat of physical danger, regardless of its origin. This includes when the speech severely impedes the ability of another student to enjoy a benefit or opportunity provided by the school and when the speech jeopardizes the safety of a member of the school community. This category would allow schools to regulate threats of violence directed at the school, but would recognize the limited supervisory role that school officials should play in a child’s life. Thus, this higher standard would allow for certain forms of disfavored off-campus speech—such as mockery, criticism, and certain

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\_aggression\_researcher\_brief-a.pdf (“[B]etween 13% and 46% of young people who were victims of electronic aggression reported not knowing their harasser’s identity. Likewise, 22% of perpetrators of electronic aggression reported not knowing the identity of their victim.”).

<sup>157</sup> See *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 416 (5th Cir. 2015) (en banc) (Dennis, J., dissenting).

<sup>158</sup> See *id.* at 397 (“Arguably, a student’s threatening, harassing, and intimidating a teacher inherently portends a substantial disruption, making feasible a *per se* rule in that regard.”).

unpopular types of creative expression—to fall clearly outside the scope of school authorities. By limiting the school’s scope of authority to serious threats posed to the school, this threshold protects students’ First Amendment rights online and outside of school while still allowing schools to maintain a safe environment.

This proposed categorical exception to protected speech is not a radical departure from the Court’s prior decisions; the Court has twice established categorical content-based exceptions to protected student speech. In *Fraser*, the Court held that schools may regulate lewd and vulgar speech on school grounds without considering the *Tinker* test to prevent “undermin[ing] the school’s basic educational mission.”<sup>159</sup> In *Morse*, the Court held that schools may regulate speech aimed at promoting illegal drug use “to safeguard those entrusted to their care.”<sup>160</sup> These categorical exceptions were limited to the school environment, but the Court in *Morse* did acknowledge that the school’s environment is not bound by a geographical limitation.<sup>161</sup> These exceptions were grounded in the need for school officials to act swiftly in the face of a “special danger” to the unique characteristics of the school environment.<sup>162</sup> Substantial threats against the safety of students or teachers, whether made in the hallway or sent from a student’s phone, present a special danger to the school community.

By creating a limited categorical exception to protected student speech, the Court can do away with over-inclusive threshold tests that allow schools to regulate virtually all digital student speech. The Court would need to define the contours of such an exception and establish some reasonable objectivity requirement when considering if the speech constitutes a substantial threat. The lower court cases have provided examples of speech that could fall within this exception. In *Wynar*, the student continually posted violent messages on social media, threatening to shoot students his school on the anniversary of the Columbine shooting, describing the gun he would use and contemplating who his victims would be.<sup>163</sup> This speech presented a credible and substantial threat to the school community. Regardless of the reasonable foreseeability of it reaching the campus, the school was presented with a special danger it should be able to address.<sup>164</sup>

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<sup>159</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>160</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

<sup>161</sup> *Id.* at 400–01.

<sup>162</sup> *Id.* at 424 (Alito, J., concurring).

<sup>163</sup> *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1065–66 (9th Cir. 2013).

<sup>164</sup> *Id.*

*B. Establish a Two-Prong Procedure for Cell Phone Searches that Arise under the “Substantial Threat” Exception*

When presented with evidence of a credible threat, school administrators should be able to take reasonable measures to uncover the details of the threat and prevent any danger from occurring. This exemplifies the first prong in *T.L.O.*’s reasonableness test—“justification at inception.”<sup>165</sup> In many cases, threats are communicated digitally, whether they are posted in a public forum like Facebook or communicated privately through a one-on-one message.<sup>166</sup> Publicly posted threats do not present the same privacy issues as private communications.<sup>167</sup> Often, the speech at issue can be brought to the attention of administrators willingly by concerned students with access to the threatening speech. Private or semi-private communications present a more difficult situation for administrators. If, for example, a student shows his classmates photos of his plan to carry out a school shooting or a document which describes how to create an explosive device, the direct evidence of a threat never leaves his phone.

Because of the heightened privacy interests at stake, school administrators who reasonably believe there is direct evidence of substantially threatening speech on a student’s cell phone still must afford the student some due process before searching the phone. Even if *Riley*’s warrant requirement does not apply to the school setting, the Court’s acknowledgement of the privacy risks at stake should require the school to develop a standard procedure before searching a student’s phone.<sup>168</sup> Specific elements of that standard procedure are recommended below.

*1. Obtain Parental Consent*

In many cases, the student’s parent is the actual owner of the phone, and thus could give a school administrator permission to search the phone if the administrator suspects that the desired information would

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<sup>165</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

<sup>166</sup> *See St. George*, *supra* note 153.

<sup>167</sup> Social media users have no justifiable expectation that users within their network will keep posted information private. A larger social media network, increases the chances that information will be viewed by someone the user never expected to view it. *See Reid v. Ingerman Smith LLP*, 2012 WL 6720752 (E.D. N.Y. 2012).

<sup>168</sup> *Riley v. California*, 134 S.Ct. 2473, 2494–95 (2014) (“Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’”).

cause a substantial threat to the school environment.<sup>169</sup> The school could also allow the parent to be present during the search or to conduct the search on behalf of the school.

While a parental consent requirement might easily mitigate this issue, there are several potential problems with this approach. First, sometimes phones belong to the students themselves. Minors usually cannot sign up for a cell phone plan, but there is no age restriction on buying a phone. Moreover, some students aren't minors, and thus could both own the phone and contract with the wireless network. Second, not every parent will give consent for a school official to search their child's phone. Although parents and educators ideally work in partnership to support the child, some parents are more hostile toward school officials or simply may not want to assist in a disciplinary action. Third, this procedure assumes that parents are available to come to the school to observe a search or at least receive a call during the day. This is not the case with many working parents. If a school administrator could not reach a parent, presumably the school would retain possession of the phone beyond the end of the school day, thus depriving the child of a necessary instrument. Finally, while the parent may own the phone, that technicality does not diminish the child's privacy interest in the phone's contents. The *Riley* Court framed cell phone privacy in terms of the vast amount of personal data and the potential to invade that sense of privacy.<sup>170</sup> Children rely on a certain degree of privacy regarding their phones, and such a system could betray their reliance on that understanding of privacy.

## 2. Documented Internal Review

Despite its flaws, a procedure requiring parental consent allows for the school to work in tandem with the parents to prevent substantial threats at school while also providing a check on the school administrator. Ideally, such a procedure would still be strictly limited in scope to prevent unnecessary invasions of students' private data. Administrators who could not get parental consent could still afford the student due process by documenting the scope and purpose of the search on a standard form akin to an administrative warrant.<sup>171</sup>

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<sup>169</sup> See Amanda Lenhart et al., *Chapter Four: How Parents and Schools Regulate Teens' Mobile Phones*, PEW RES. CTR. (Apr. 20, 2010), <http://www.pewinternet.org/2010/04/20/chapter-four-how-parents-and-schools-regulate-teens-mobile-phones>.

<sup>170</sup> *Riley*, 134 S.Ct. at 2489.

<sup>171</sup> Administrative warrants require a lower standard than criminal warrants and are "measured against a flexible standard of reasonableness." See *v. City of Seattle*, 387 U.S. 541, 545 (1967).

Under this scheme, the school employee seeking information from a student's phone would fill out a standard form, detailing the facts and circumstances justifying the request. The employee would name the specific apps or folders which he believes might contain the threatening speech and provide the source of his suspicion.

Before the search, an independent administrator, likely the principal, should review the document and use his discretion to decide if the threat is credible and warrants suspicion. After signing off on the document, the independent administrator would conduct the limited search in the presence of the reporting employee, the student, and a student representative. This process assumes that a student would comply, albeit reluctantly. If the student obstructed this process, such as by refusing to provide the password to his phone, then further disciplinary procedures would become necessary.

These solutions present practical policies for raising higher Fourth Amendment safeguards and protecting students' right to privacy in their cell phone data. School boards and state legislatures can incorporate concerns and ideas voiced by their constituents and craft policies that recognize students' rights and school administrators' interests in maintaining a safe environment.

#### CONCLUSION

Without relevant guidance from the courts, school administrators will be left to navigate a patchwork of vague thresholds to avoid depriving students of their constitutional rights while maintaining a safe and secure school community. The unique privacy interests students have in their cell phones present further problems for schools.

As the splits among the courts of appeals increase, so too will the pressure on the Supreme Court to resolve the problem of students' First Amendment speech rights in the age of cell phones. Until then, the nuances of these threshold tests will continue to plague students and administrators alike in the wake of emerging communication technologies. Abolishing these tests and replacing them with a heightened categorical exception to the *Tinker* standard would adhere to the logic of the Supreme Court's prior decisions. It would also provide adequate and reasonable notice of the scope of a school administrator's authority to regulate students' off-campus speech and of students' privacy concerning such speech. Finally, it would provide the justification required to conduct reasonable searches in the school setting.