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Bell v. Itawamba County School Board: The Need for a Balance of Freedom and Authority

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BELL v. ITAWAMBA COUNTY SCHOOL BOARD: THE NEED FOR A BALANCE OF FREEDOM AND AUTHORITY

I. INTRODUCTION

“Threats to freedom of speech, writing and action, though often trivial in isolation, are cumulative in their effect and, unless checked, lead to a general disrespect for the rights of the citizen.”¹

In 1969, *Tinker v. Des Moines Independent Community School District* provided the standard for evaluating whether the First Amendment protects a student’s speech.² *Tinker* recognized that students do not forfeit all First Amendment rights to free speech and expression,³ but the First Amendment does not provide students absolute rights to these freedoms.⁴ In order to keep school officials safe and still allow officials to teach students the boundaries of socially appropriate behavior, these First Amendment rights must be tempered.⁵

For over forty-eight years, courts across the country have continued to apply *Tinker* to First Amendment student speech cases.⁶ The standard set forth in *Tinker* stated a student “may express his opinions . . . if he does so without ‘materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”⁷ When *Tinker* was written, however, the use of the internet as a medium for student speech was not in the Court’s mind.⁸ Cellphones, smartphones, and digital social media did not exist at that time.⁹ Courts have recognized that the advent of these technologies and their sweeping adoption by students creates new and evolving challenges for school administrators.¹⁰ Despite recognizing *Tinker*’s lack of addressing this technological evolution,

1. 4 GEORGE ORWELL, IN FRONT OF YOUR NOSE 447 (Sonia Orwell & Ian Angus eds., 1968).

2. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 390 (5th Cir. 2015) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

3. *Id.* at 389.

4. *Id.*

5. *Id.* at 389–90 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Morse v. Frederick*, 551 U.S. 393, 408 (2007)).

6. *See generally Bell*, 799 F.3d at 390.

7. *Tinker*, 393 U.S. at 513.

8. *Bell*, 799 F.3d at 401.

9. *Id.* at 392.

10. *Id.*

Tinker was still applied in *Bell v. Itawamba County School Board*, proclaiming a broad reach of power for school boards to punish students for purely off-campus internet speech.¹¹

Part II of this Casenote will provide a brief history of cases which have shaped the standards being applied to First Amendment student speech cases today. Part III will discuss the factual background and various opinions written in the *Bell* case. Part IV analyzes the decision and recommendations set forth by both the majority and dissents in *Bell*, and presents a proposed standard to address the technological evolution concerning student speech and First Amendment protection.

II. HISTORY OF FIRST AMENDMENT STUDENT SPEECH CASES

The First Amendment states “Congress shall make no law . . . abridging the freedom of speech.”¹² It does not follow, however, that the same latitude given to adults’ freedom of speech must be permitted to children in public school.¹³ While restrictions on free speech exist in a public school setting, it can hardly be argued that either students or teachers “completely shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁴ The necessity of balancing these competing interests led to the standard provided in *Tinker* in 1969, helping to evaluate when the First Amendment protects a student’s speech.¹⁵

In *Tinker*, the Court reviewed the suspension of students who wore black arm bands to protest against the Vietnam War.¹⁶ Focusing primarily on the effect the speech had on the school community, the Court held that the students’ speech was protected under the First Amendment.¹⁷ The students’ conduct neither disrupted schoolwork nor interfered with the rights of other students, and “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹⁸ However, when speech materially disrupts classwork or involves substantial disorder or invasion of the rights of others, it is not immunized by the constitutional guarantee of freedom of speech.¹⁹

11. *Id.* at 403 (Dennis, J., dissenting). The majority even recognizes that there are aspects of off-campus speech that the court needs to provide guidance on, in large part to the pervasive use of social media. However, the majority passes on the responsibility to provide clarity on this issue to a different court on a different day.

12. U.S. CONST. amend. I.

13. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

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

15. *Bell*, 799 F.3d at 390.

16. *Id.* (citing *Tinker*, 393 U.S. at 505–14).

17. *Id.* (citing *Tinker*, 393 U.S. at 513).

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

19. *Id.* at 513.

Three years after *Tinker*, the Fifth Circuit in *Shanley v. Northeast Independent School District, Bexar County, Texas* held that the *Tinker* standard may be satisfied by either showing that an actual disruption has occurred, or by showing “demonstrable factors that would give rise to *any reasonable forecast* by the school administration of ‘substantial and material’ disruption.”²⁰ The Court stated this applied to student conduct occurring “in class or out of it,” and supplemented examples of what constituted “out of class” as including the cafeteria, playing field, or on campus during authorized hours.²¹

In the years since *Tinker* was initially decided, the Supreme Court has examined three other notable First Amendment student speech cases, each time fine-tuning and carving out exceptions to the *Tinker* standard.²² In *Bethel School District No. 403 v. Fraser*, the Court reviewed a student’s suspension following his use of lewd and sexual language in a nomination speech at a school assembly.²³ Noting the 600-student audience, some as young as fourteen years old, the Court held that school district acted within its authority in sanctioning the student.²⁴ The Court noted that school officials were not precluded by the First Amendment from restricting this lewd and sexually-charged speech because the dialogue was “inconsistent with the ‘fundamental values’ of the public school education.”²⁵ This provided the first exception which permits deviation from *Tinker*’s general standard, providing a school authority to restrict or punish speech which is lewd or indecent.²⁶

Continuing to provide restrictive authority to schools, the 1988 decision in *Hazelwood School District v. Kuhlmeier* precluded students from publishing controversial topics in a school sponsored newspaper.²⁷ Students who wrote for the newspaper alleged their First Amendment rights were violated when the principal omitted two pages from the original publication which concerned controversial topics, including the students’ experiences with pregnancy and divorce.²⁸ The Court held that educators do not offend the First Amendment by exercising editorial control over student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate

20. *Bell*, 799 F.3d at 390 (quoting *Shanley v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.* 462 F.2d 960, 974 (5th Cir. 1972)).

21. *Tinker*, 393 U.S. at 512–13 (drawing distinction to school-related activities which occur outside the physical four walls of a classroom, not including non-school related activities which are completely separate from school or the classroom).

22. *Bell*, 799 F.3d at 390.

23. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986).

24. *Id.* at 677, 685.

25. *Id.* at 685–86.

26. *Id.* at 676.

27. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

28. *Id.* at 264.

pedagogical concerns.²⁹ Relevant to the Court's analysis was the fact that the newspaper did not constitute a public forum for expression, providing the school with greater authority to regulate the contents in a reasonable manner.³⁰ The *Hazelwood* Court distinguished their holding from *Tinker* as applying only where the public might reasonably perceive the speech to bear the imprimatur of the school.³¹

One of the more recent decisions by the Supreme Court concerning restriction of student speech in the public school context was *Morse v. Frederick* in 2007.³² In *Morse*, the principal demanded a student take down a banner he had raised at a school-sponsored event with the message, "Bong Hits 4 Jesus," which referenced illegal use of marijuana.³³ The student, Frederick, was subsequently suspended for refusing to do so.³⁴ Frederick initially claimed this was not "school speech" because it occurred across the street from the school.³⁵ The Court quickly refuted this argument, as the event occurred during normal school hours, it was sanctioned by Principal Morse as an approved social event or class trip, and school rules expressly stated that students at approved social events and class trips are subject to district rules for student conduct.³⁶ The court noted that there is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but here there is no uncertainty that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."³⁷ Although his self-identified intentions were not to promote drug use, Frederick's asserts no motive for holding the banner that would make the language on the banner permissible, nor does Frederick argue that the banner conveys any sort of political or religious message.³⁸ Absent these assertions, the Court found this was merely a case where speech that is reasonably viewed as promoting illegal drug use may be restricted by a

29. *Id.* at 273.

30. *Id.* at 270. The newspaper was written and edited by the Journalism II class at Hazelwood East and funded by the Board of Education. *Id.* at 262.

31. *Id.* at 270–271.

32. *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

33. *Id.* at 397–398. The Olympic Torch Relay was passing through town near the school. Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. Frederick held up the fourteen-foot banner as the torchbearers and camera crews passed by.

34. *Id.* at 398.

35. *Id.* at 400.

36. *Id.* at 400–01.

37. *Id.* at 401.

38. *Morse*, 551 U.S. at 402–03. The majority disagreed with the dissent's notion that speech of this nature is needed to foster "national debate about a serious issue." Frederick's own admission of no political motive nullified the notion put forth by the dissent. *Id.* at 402.

principal, and remains consistent with the First Amendment.³⁹ This created the final standard which permits deviation from the general *Tinker* standard, where schools have authority over speech advocating drug use that poses a threat to the physical safety of students.⁴⁰ The court did note that this regulation was at the far reaches of what the First Amendment permits, and the opinion does not endorse any further extension.⁴¹

Following this line of cases, the Supreme Court has yet to decide whether a public school may regulate students' online, off-campus speech, and if so, under what circumstances.⁴² With this lack of Supreme Court precedent, courts have continued to apply *Tinker* and its progeny to First Amendment student speech cases without addressing the technological evolution present in today's society.⁴³ However, because *Tinker* allows for the suppression of student speech based on its consequences rather than its content, expansive off-campus application of *Tinker* creates "a precedent with ominous implications."⁴⁴ Continuing to apply *Tinker* and its progeny would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school."⁴⁵ This application does not adequately address the evolving technology present in today's schools, which was not present in 1969 in *Tinker*. This is made clear in the recent miscellany of opinions from the Fifth Circuit in *Bell v. Itawamba County School Board*.⁴⁶

III. FACTUAL BACKGROUND OF THE CASE

On January 5, 2011, Taylor Bell, a student at Itawamba Agricultural High School in Itawamba County, Mississippi, posted a rap recording to his public Facebook profile, and later on his public YouTube page.⁴⁷ The recording partly alleged misconduct by two of the high school's coaches, who Bell referred to by name, as well as additional emotionally-charged and intense language.⁴⁸

39. *Id.* at 403.

40. *Id.* at 425.

41. *Id.*

42. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 427 (5th Cir. 2015) (Dennis, J., dissenting).

43. *Id.* at 424–25.

44. *Id.* at 402 (Elrod, J., concurring).

45. *Id.* at 402 (citing *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (*en banc*) (Smith, J., concurring) (five-judge concurrence opining that *Tinker* does not apply off campus)).

46. *See generally Bell*, 799 F.3d 379.

47. *Bell*, 799 F.3d at 383.

48. *Id.*

The version of the rap recording which was stipulated to be accurate by the party stated in relevant part:⁴⁹

Let me tell you a little story about these Itawamba coaches / dirty ass niggas
like some fucking coacha roaches . . .

I'm a serve this nigga, like I serve the junkies with some crack . . .

Run up on T-Bizzle / I'm going to hit you with my rueger . . .

. . . you fucking with the wrong one / going to get a pistol down your mouth /
Boww

. . . middle fingers up if you want to cap that nigga / middle fingers up / he get
no mercy nigga⁵⁰

After the wife of one of the coaches who was named in the rap recording heard about the rap from a friend, she notified the coach.⁵¹ The coach asked a student at school about the recording, and the student allowed the coach to listen to the recording on the student's cell phone internet capabilities while at the school.⁵² The coach immediately reported the rap recording to the principal, and subsequently the school district's superintendent.⁵³

The next day, Bell was questioned about the rap by school officials, and he was ultimately sent home from school for the day as a consequence of the recording.⁵⁴ Despite having been questioned about the recording, Bell made a finalized version over the next few days while school was not in session.⁵⁵ The finalized version of the recording included extended commentary and various pictures, and was later uploaded to a public YouTube channel.⁵⁶

Upon returning to school several days later, Bell was immediately removed from class and issued a suspension until further notice pending a disciplinary hearing.⁵⁷ The school district's reasoning for the suspension was that Bell had violated school policy which lists harassment, intimidation, or threatening other students and/or teachers as a severe disruption.⁵⁸

At Bell's subsequent disciplinary hearing, Bell stated that he did not report the coaches' improprieties because he thought he would be ignored.⁵⁹

49. These are the lines from the rap song that the court primarily focused on in its analysis.

50. *Id.* at 384. Bell's use of "rueger" [sic] references a firearm manufactured by Sturm, Ruger & Co. *Id.* at 385.

51. *Id.* at 385. A "public" Facebook or YouTube page would permit any internet user to be able to access the page without requiring special permission from the creator of the page.

52. *Id.*

53. *Id.*

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

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

However, Bell thought the rap recording would get more attention because people would listen to it.⁶⁰ Bell stated he knew it would be viewed and heard by students.⁶¹ Notation was made that Bell did not believe the teachers would hear the recording though.⁶² Despite Bell's attempts, the disciplinary hearing did not address these alleged improprieties by the coaches.⁶³ The hearing was narrowly focused on whether Bell had threatened, harassed, and intimidated the teachers, and if his suspension should be upheld.⁶⁴

The next day, Bell was informed that the committee conducting the disciplinary hearing had found his rap recording constituted harassment and intimidation of the two teachers in violation of district policy.⁶⁵ Bell's previously issued suspension was to be upheld, and further, Bell would be transferred to an alternative school for the remainder of the grading period and would not be allowed to attend any school functions.⁶⁶

On appeal of the disciplinary hearing, the committee came to a similar result as the initial hearing.⁶⁷ This time, however, the committee found that not only had Bell harassed and intimidated teachers with his rap recording, but Bell had also threatened them.⁶⁸

On February 24, 2011, Bell filed a legal cause of action, claiming, *inter alia*, that his First Amendment rights to free speech had been violated.⁶⁹ From that point, Bell's case was heard by the Court on four separate occasions, culminating in the most recent en banc hearing by the Fifth Circuit.⁷⁰

Bell initially requested a preliminary injunction, requesting immediate reinstatement to his high school, and restoration of all privileges as though no disciplinary action had ever been imposed.⁷¹ Several individuals testified at this hearing, including Bell, his mother, the school-board attorney, the superintendent, both coaches mentioned in the rap recording, and an expert in rap music.⁷² Both coaches testified that the rap recording had adversely affected their work at the school.⁷³ Coach W. testified that he interpreted the

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

61. *Id.*

62. *Id.* at 386. Bell did note, however, that at least 2,000 people had contacted him about the rap recording after hearing it on Facebook and YouTube. *Id.*

63. *Id.*

64. *Id.*

65. *Bell*, 799 F.3d at 386.

66. *Id.*

67. *Id.* at 386–87.

68. *Id.* at 387.

69. *Id.*

70. *Id.* at 388–89.

71. *Bell*, 799 F.3d at 387.

72. *Id.* The rap expert testified that the statements in Bell's recording were nothing more than "colorful language" reflective of the norm among young rap artists. *Id.* at 387–388.

73. *Id.* at 388.

lyrics of the rap in a literal sense and he was “scared.”⁷⁴ Coach R. testified that it affected the way he conducted himself around students, pursuant to the claims alleged in the rap.⁷⁵ At the end of the hearing, the district court ruled that to grant the injunction would be moot, since Bell’s last day attending the alternative school would be the next day.⁷⁶

The magistrate judge next issued an order stating the parties should resolve the case via motions for summary judgment, as there were no factual issues remaining.⁷⁷ Following a submission of summary judgment motions by both parties, the district court denied the Bells’ motion and granted the school board’s motion on May 15, 2012.⁷⁸ The court concluded that the rap constituted “harassment and intimidation of teacher and possible threats against teachers and threatened, harassed, and intimidated school employees.”⁷⁹ The court continued that the rap recording “in fact caused a material and/or substantial disruption at school and . . . it was reasonably foreseeable to school officials the song would cause such a disruption.”⁸⁰

Bell then challenged the summary judgment ruling against him on appeal. In December 2014, a divided panel held, *inter alia*, the school board violated Bell’s First Amendment right by disciplining him based on the language contained in the rap recording, and reversed the district court’s ruling.⁸¹ En banc review was granted in February 2015.⁸²

IV. THE FIFTH CIRCUIT FAILS TO ADDRESS EVOLVING TECHNOLOGY

A. *Majority Opinion*

On August 20, 2015, Judge Barksdale, writing for the majority opinion, affirmed the decision of the district court.⁸³ The Court notes that it is necessary to balance the Constitutional rights of students with the need to protect those who are entrusted with their care.⁸⁴ Since “the Constitutional rights of students

74. *Id.*

75. *Id.* Coach R stated he would no longer work with female members of the track team pursuant to the allegations. *Bell*, 799 F.3d at 388.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* (quoting *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F.Supp.2d 834, 840 (N.D. Miss. 2012) *aff’d in part, rev’d in part and remanded*, 774 F.3d 280 (5th Cir. 2014) *on reh’g en banc*, 799 F.3d 379 (5th Cir. 2015) *and aff’d*, 799 F.3d 379 (5th Cir. 2015)).

80. *Id.* (quoting *Bell*, 859 F.Supp.2d at 840).

81. *Bell*, 799 F.3d at 388–389 (citing *Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280, 304–05 (5th Cir. 2014) *reh’g en banc granted*, 782 F.3d 712 (5th Cir. 2015) *and on reh’g en banc*, 799 F.3d 379 (5th Cir. 2015)).

82. *Id.* at 389.

83. *Id.* at 400.

84. *Bell*, 799 F.3d at 389–90.

in public schools are not automatically coextensive with the rights of adults in other settings,”⁸⁵ speech that is otherwise protected may not be afforded First Amendment protection in the school setting.⁸⁶

In determining the applicable standard to be applied to Bell’s case, the Court notes that *Tinker* provides “conduct by the student, *in class or out of it*, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized”⁸⁷ Further, the *Tinker* standard may be satisfied by proof of an actual disruption occurring, or by showing “demonstrable factors that would give rise to *any reasonable forecast* by the school administration of ‘substantial and material’ disruption.”⁸⁸

Before settling on the *Tinker* framework, the Court reviews pertinent case law to determine if any of the narrow exceptions to the general *Tinker* standard are controlling.⁸⁹ These exceptions include speech advocating illegal drug use,⁹⁰ school-sponsored speech,⁹¹ and lewd, vulgar, or indecent speech.⁹² In addition to the three exceptions recognized by the Supreme Court, the Fifth Circuit also reviews their decision in *Ponce v. Socorro Independent School District*, which extends the *Morse* exception to include certain threats of school violence.⁹³ In *Ponce*, the court upheld a student’s suspension as being constitutional by extending the *Morse* exception recognizing promotion of illegal drug use to cover speech “bearing the stamp of . . . mass, systematic school-shootings” based on the “[l]ack of forewarning and the frequent setting within schools [which] give mass shootings the unique indicia that the concurring opinion [in *Morse*] found compelling with respect to drug use.”⁹⁴ The concurrence in *Morse* found that the school may discipline a student for speech which poses a “grave and . . . unique threat to the physical safety of students,” which included promoting illegal drug use.⁹⁵ The student in *Ponce* had brought a diary to school with terroristic threats mirroring recent mass school shootings.⁹⁶ Finding that this threat would fall into the “unique threat to

85. *Id.* at 390 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

86. *Id.*

87. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

88. *Id.* (quoting *Shanley v. Ne. Indep. School Dist.*, 462 F.2d 960, 974 (5th Cir. 1972)) (holding school’s suspension of students for their off-campus distribution of “underground” newspaper violated *Tinker*).

89. *Id.*

90. *Bell*, 799 F.3d at 390 (citing *Morse v. Frederick*, 551 U.S. 393, 425 (2007)).

91. *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

92. *Id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

93. *Id.* at 391 (citing *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771–72 (5th Cir. 2007)).

94. *Id.* (quoting *Ponce*, 508 F.3d at 771).

95. *Id.* (quoting *Morse*, 551 U.S. at 425 (Alito, L., concurring)).

96. *Bell*, 799 F.3d at 391 (citing *Ponce*, 508 F.3d at 767).

the physical safety of students” category articulated in *Morse*, the court extended this exception to include instances indicative of mass school shootings.⁹⁷

After reviewing the standards available for analyzing student speech cases, the Court determined that the speech at issue was not disciplined based on lewdness or potential perception of being sponsored by the school.⁹⁸ As such, *Fraser* and *Hazelwood* are not on point and are excluded as viable applicable standards.⁹⁹ The speech did not advocate illegal drug use or foreshadow a Columbine-like mass, systematic school-shooting, thus eliminating the standards set forth in *Morse* or *Ponce*.¹⁰⁰ The Court additionally notes that violence forecast by a student against a teacher does not reach the level of the above-mentioned exceptions compelling divergence from *Tinker*’s general rule.¹⁰¹ Via process of elimination,¹⁰² the Court determines that Bell’s speech should be analyzed under *Tinker*.¹⁰³

The court proceeds to defend its decision to apply *Tinker* to off-campus speech, since Bell contends the standard is strictly reserved for on-campus speech only.¹⁰⁴ The court recognizes the confounding effect that the advent of technologies (such as internet, cellphones, social media, etc.) has had on school administrators and their attempts to delineate boundaries and regulations to keep their schools and students safe.¹⁰⁵ In light of these competing concerns, as well as differing standards applied across circuits, the scope of schools’ authority to restrict or discipline off-campus speech has been drawn into question.¹⁰⁶ Justice Thomas has been critical of the Supreme Court’s failure to offer an explanation of when *Tinker* is applicable or not, stating “I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not.”¹⁰⁷

Bell’s case focuses on the principal need for school officials to be able to react quickly and efficiently to protect students and faculty from threats,

97. *Id.*

98. *Id.* at 391–92.

99. *Id.* at 392.

100. *Id.*

101. *Id.* at 392.

102. *Bell*, 799 F.3d at 391 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001)) (employing a similar approach where “[s]peech falling outside of . . . categories [such as those in *Fraser* and *Hazelwood*] is subject to *Tinker*’s general rule”).

103. *Id.* at 392.

104. *Id.*

105. *Id.* (citing *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013) (recognizing the daunting task school administrators face of evaluating potential threats of violence and keeping students safe without impinging on their constitutional rights)).

106. *Id.*

107. *Id.* at 392–93 (quoting *Morse v. Frederick*, 551 U.S. 393, 418 (2007) (Thomas, J., concurring)).

intimidation, and harassment intentionally directed at the school community.¹⁰⁸ As such, the Court held that *Tinker* can apply to off-campus student speech, but fails to specify the precise times in which it is applicable. The Court supports this determination by looking to a line of five circuits, including their own, which have addressed affirmatively that *Tinker* applies to off-campus speech.¹⁰⁹ The Third Circuit has addressed the issue, but remains unsolved due to an intra circuit split.¹¹⁰ The remainder of the circuits (First, Sixth, Seventh, Tenth, Eleventh, D.C.) do not appear to have addressed the issue.¹¹¹ More significantly noted, the Supreme Court has also failed to address the issue. However, the Fifth Circuit has applied *Tinker* on multiple occasions to analyze the constitutionality of a school board disciplining off-campus student speech.¹¹² Therefore, based on the Fifth Circuit's precedent and guidance by sister circuits, the Court found that *Tinker* can be applicable to off-campus speech in certain situations.

Several other courts have advocated various approaches for when *Tinker* would be applicable to off-campus speech. The Ninth Circuit in *Wynar* held that schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker* when there is an identifiable threat of school violence.¹¹³ The Third Circuit in *Snyder* held that the location of a speaker does not matter since the internet accommodates an "everywhere at once" nature.¹¹⁴ Off-campus student can be restricted so long as it was "intentionally directed towards a school."¹¹⁵ The Fourth Circuit requires a "sufficiently strong nexus" between the student speech and the school's pedagogical interests before a student's speech can be restricted.¹¹⁶ The Eighth Circuit applied *Tinker* where it was reasonably foreseeable that threats to shoot

108. *Bell*, 799 F.3d at 393.

109. *Id.* at 393–94. *See e.g.*, *Wynar*, 728 F.3d at 1069; *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766–67 (8th Cir. 2011); *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573–74 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 48–50 (2d Cir. 2008).

110. *Bell*, 799 F.3d at 393–94.

111. *Id.* at 394.

112. *Id.* *See e.g.*, *Shanley v. Ne. Indep. School Dist.*, 462 F.2d 960, 970 (5th Cir. 1972) ("When the *Burnside/Tinker* standards are applied to this case . . ."); *See also Sullivan v. Hous. Indep. Sch. Dist.*, 475 F.2d 1071, 1072 (5th Cir. 1973) (holding that students who distributed an underground newspaper near campus were protected by the First Amendment because the activity did not approach a material and substantial disruption and there were disturbances of any sort related to the distribution of the newspaper); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38 (2d Cir. 2007) (interpreting *Sullivan* as applying *Tinker* to off-campus speech).

113. *Bell*, 799 F.3d at 395 (citing *Wynar*, 728 F.3d at 1069).

114. *Bell*, 799 F.3d at 395 (citing *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (*en banc*) (Smith, J., concurring)).

115. *Id.* (citing *Snyder*, 650 F.3d at 940 (Smith, J., concurring)).

116. *Id.* (citing *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011)).

specific students in school would create a risk of substantial disruption within the school environment.¹¹⁷ Finally, the Second Circuit held that *Tinker* applies to off-campus speech where there is a foreseeable risk of substantial disruption within the school environment and it was also foreseeable that the off-campus speech might also reach campus.¹¹⁸

Despite the multiple approaches advocated by other circuits, the Court in *Bell* declined to adopt any rigid standard in this instance since such determinations are heavily influenced by the facts in each matter.¹¹⁹ Accordingly, in light of Fifth Circuit precedent, the Court simply held that *Tinker* governs in this instance because a student intentionally directed at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even though the speech originated and was disseminated off-campus absent use of school resources.¹²⁰

While declining to apply a “true threat” analysis to Bell’s speech, the Court hypothesized that the statements in the rap recording constituted “threats, harassment, and intimidation” as a layperson would understand the terms.¹²¹ The statements in the rap threatened violence against the coaches, described the specific injury to be inflicted, described a specific weapon to be used, encouraged other to engage in the action, and intimidated the coaches by telling them to “watch [their] back[s].”¹²² As such, the Court found no genuine dispute of material fact that Bell threatened, harassed, and intimidated the coaches by intentionally directing the rap at the school community, and the speech is subjected to the application *Tinker*.¹²³

Upon applying *Tinker*, the Court found that Bell’s conduct reasonably could have been forecast to cause a substantial disruption, making the discipline appropriate. Factors considered by other courts in determining whether or not an actual disruption occurred or one could reasonably be forecast include: the nature and content of the speech, the objective and subjective seriousness of the speech, and the severity of the possible consequences should the speaker take action;¹²⁴ the relationship of the speech

117. *Id.* at 395 (citing *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011)).

118. *Id.* (citing *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008)). *Doninger* introduced the foreseeability requirement, opening the door to the idea that the speaker’s intent should play some role in the analysis. There, it mattered if the speaker knew or should have known that the speech would actually reach the campus. *Doninger*, 527 F. 3d at 48.

119. *Bell*, 799 F.3d at 396.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 397.

124. *Id.* at 398 (citing *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1070–71 (9th Cir. 2013)).

to the school, the intent of the speaker to disseminate, or keep private, the speech, and the nature, and severity, of the school's response in disciplining the student;¹²⁵ whether the speaker expressly identified an educator or student by name or reference, and past incidents arising out of similar speech;¹²⁶ the manner in which the speech reached the school community;¹²⁷ the intent of the school in disciplining the student;¹²⁸ and the occurrence of other in-school disturbances, including administrative disturbances involving the speaker, such as "[s]chool officials ha[ving] to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place."¹²⁹

Applying this precedent, the Court found that a substantial disruption reasonably could have been forecast as a matter of law.¹³⁰ The court noted that Bell admitted he was trying to increase awareness of the situation and he was foreshadowing something that might happen.¹³¹ Bell also referred to the teachers by name and used what would be understood as threatening language.¹³² Further, the rap recording was intended to be public and reach members of the school community.¹³³ Judge Fisher briefly summed up the impact certain speech can have in a school setting in the *Snyder* opinion: "[W]ith near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment."¹³⁴ Bell's speech violated school policy, which lists harassment, intimidation, or threats to students or teachers as being a severe disruption.¹³⁵ Violation of this school policy may be used as evidence to support the reasonable forecast of a future substantial disruption for purposes of applying *Tinker*.¹³⁶ Further, a recent uptick in school violence

125. *Bell*, 799 F.3d at 398 (citing *Doninger v. Niehoff*, 527 F.3d 41, 50–52 (2d Cir. 2008)).

126. *Id.* (citing *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 574 (4th Cir. 2011)).

127. *Id.* (citing *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 985 (11th Cir. 2007)).

128. *Id.* (citing *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 929 (3d Cir. 2011) (*en banc*)).

129. *Id.* at 398 (citing *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011)).

130. *Id.*

131. *Bell*, 799 F.3d at 398.

132. *Id.* at 398–99.

133. *Id.* at 399.

134. *Id.* at 400 (quoting *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 951–52 (3d Cir. 2011) (*en banc*)).

135. *Id.*

136. *Id.* at 399. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 408–10 (2007) (relying on, *inter alia*, the student's violation of established school policy in holding the school board did not violate the student's First Amendment right); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) (noting that the school disciplinary rule prohibiting obscene language in addition to

which was signaled by speech, writings, or actions prior to being carried out, creates a need to identify these warning signs to prevent tragedy.¹³⁷ As such, the Court in *Bell* determined the school board reasonably could have forecast a substantial disruption at school based on the language in Bell's rap recording, and affirmed the judgment of the district court.¹³⁸

B. *Concurrences and Dissents*

In addition to the majority opinion, there were three additional concurrences and four dissents. The length of the full opinion, as well as the necessity for each Judge to render their own opinion, further exemplifies the complexity and unsettled nature of the law surrounding off-campus student speech.

In Judge Jolly's concurrence, he points out that the facts in *Bell* do not align with *Tinker*, and *Tinker* did not address the intersection between on-campus speech and off-campus speech.¹³⁹ He goes on to note that *Bell* is also a different case from *Morse*, *Ponce*, and *Porter*.¹⁴⁰ A main difference between *Bell* and the preceding cases is that the internet as a medium for student speech was not within the Court's mind.¹⁴¹ Due to the evolving common law,¹⁴² Jolly believes a simple decision, consonant with prior case law, would unequivocally address these concerns:

Student speech is unprotected by the First Amendment and is subject to school discipline when that speech contains an actual threat to kill or physically harm personnel and/or students of the school; which actual threat is connected to the school environment; and which actual threat is communicated to the school, or its students, or its personnel.¹⁴³

Jolly does, however, agree with the ultimate result of the majority opinion.

Judge Elrod, joined by Judge Jones, addresses the issue that the majority opinion subjects a broad swath of off-campus student expression to *Tinker*.¹⁴⁴ Elrod acknowledges that it has been cautioned that a broad off-campus application of *Tinker* would create a precedent with ominous implications since it allows the suppression of student speech based on its consequences

reprimand by the teacher gave the student adequate warning that his speech could subject him to sanctions).

137. *Bell*, 799 F.3d at 399.

138. *Id.*

139. *Id.* at 400 (Jolly, J., concurring).

140. *Id.*

141. *Id.* at 401.

142. *Id.*

143. *Bell*, 799 F.3d at 401 (Jolly, J., concurring). "True threats" are not protected under the First Amendment, however, a true threat analysis was not done by the court in reference to Bell's speech. *Id.* at 400.

144. *Id.* at 402 (Elrod, J., concurring).

rather than its content.¹⁴⁵ Elrod defends the implications of the majority opinion and notes the opinion is actually narrow and precise in its reach.¹⁴⁶ He states that the case is sensibly decided, applying *Tinker* to Bell's rap lyrics, which were intentionally directed toward the school and contained threats of physical violence.¹⁴⁷ By limiting the application of the school's authority where speech is intentionally directed toward the school and indicative of threats of physical violence, the suppression of student speech is narrowly contained.¹⁴⁸

Judge Costa's concurrence, joined by Judge Owen and Judge Higginson, addresses the issue that Bell's speech was a matter of public concern attempting to expose harassment of female students.¹⁴⁹ Costa notes that the speech in *Tinker* was solely of public concern, being in protest of the Vietnam War, but was still balanced against its impact on the learning environment.¹⁵⁰ Costa states that it is not enough to identify some portions of Bell's rap to elevate the speech beyond the application of the *Tinker* framework.¹⁵¹ Costa states that Bell's off-campus speech is susceptible to *Tinker* since it is threatening, harassing, and intimidating.¹⁵² Costa does note, however, that broader questions raised by off-campus speech will have to be addressed by the higher court soon, to provide clear guidance for students, teachers and school administrators.¹⁵³

Finally, Judge Dennis, joined by Judge Graves, and in part by Judge Prado, delivers a 50-page dissent, strongly disagreeing with the majority.¹⁵⁴ The main issue brought up by Judge Dennis is the content of the speech being on a matter of public concern.¹⁵⁵ As such, the rap song "occupies the highest rung of the hierarchy of First Amendment values."¹⁵⁶ Dennis found fault in the majority's approach of picking out specific lines of the rap recording, rather than looking to the overall thrust and dominant theme of the song.¹⁵⁷ Additionally, by applying a school policy which focuses on a layperson's view of what is "threatening, harassing, or intimidating," the framework of the

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Bell*, 799 F.3d at 402 (Costa, J., concurring).

150. *Id.* at 402–03.

151. *Id.* at 403.

152. *Id.*

153. *Id.*

154. *Id.* at 403–33 (Dennis, J., dissenting).

155. *Bell*, 799 F.3d at 403 (Dennis, J., dissenting).

156. *Id.* at 404.

157. *Id.* (“[T]he majority opinion wholly glosses over the urgent social issue that Bell’s song lays bare and thus flouts Supreme Court precedent requiring us to evaluate whether ‘the overall thrust and dominant theme of [Bell’s song] spoke to broader public issues’—which it did.”).

majority opinion fails to provide constitutionally adequate notice of when student speech crosses the line between permissible and punishable off-campus expression.¹⁵⁸ Dennis further points out that *Tinker* was not meant to apply to off-campus speech, and the majority opinion allows schools an unprecedented and unnecessary intrusion on students' rights by permitting students' internet expression to be policed anytime and anywhere.¹⁵⁹ Dennis warns that if the majority opinion is left uncorrected, school officials will be encouraged to silence student speakers "solely because they disagree with the content and form of their speech, particularly when such off-campus speech criticized school personnel."¹⁶⁰

V. ANALYSIS AND CRITICISMS OF THE *BELL* OPINION

The Court in *Bell*, like many other recent district courts, failed to address the evolution of technology on student speech cases.¹⁶¹ The Court found that the facts in *Bell* did not fit one of the cases which permit a divergence from *Tinker*, thus applying *Tinker* by default.¹⁶² The need for the Supreme Court to review *Bell* and provide a clear standard for off-campus student speech is greater now than ever. Students are unaware of what they can and cannot say, while school administrators are unaware of what they can and cannot censor or punish.¹⁶³ The only certainty is that technology, computer use, and social media are showing no signs of slowing down.¹⁶⁴

While a few cases have come through the Supreme Court that concerned student speech, none of them were clearly off-campus and none of them had a standard which aimed to fully protect student rights while balancing the necessity of school safety.¹⁶⁵ Most cases solely take notice of the duty of school officials to protect students,¹⁶⁶ teach students appropriate material and behaviors,¹⁶⁷ and a general necessity of keeping control over the school and students.¹⁶⁸ However, these approaches have lost sight of the student and the original intent of the First Amendment to protect individual rights.

158. *Id.* at 405.

159. *Id.*

160. *Id.* at 405–06.

161. *Bell*, 799 F.3d at 417 (Dennis, J., dissenting).

162. *Id.* at 392 (majority) (“[W]hen the type of violence threatened does not implicate ‘the special features of the school environment’, *Tinker*’s ‘substantial disruption’ standard is the appropriate vehicle for analyzing such claims.”).

163. *See supra* note 107.

164. Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RESEARCH CENTER (Oct. 8, 2015), available at <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>.

165. *See supra* Part II: History of First Amendment Free Speech Cases.

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

167. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986).

168. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

In a society filled with cell phones, tablets, laptops, and a new social media craze every few months, it is clear that student speech has capabilities not available even ten years ago.¹⁶⁹ The majority in *Bell* argue that student on-line speech is still subject to *Tinker*, as this off-campus speech can still make its way to campus and cause a disruption.¹⁷⁰ However, *Tinker* and subsequent case law make a distinction that not all speech is immunized by a Constitutional guarantee of free speech while *at school*.¹⁷¹ To expand this reduced level of freedom to online activity outside the school essentially eliminates First Amendment rights indefinitely for students until high school commencement. This blasé trampling of First Amendment rights of students is not what was intended by the framers or by the established case law.¹⁷²

As made clear through the varying views of the opinion and dissents in *Bell*, as well as the multiple conflicting decisions each time the case was heard,¹⁷³ there is a great need for clarity in the analysis of First Amendment protection for off-campus student speech, especially in light of evolving technology.¹⁷⁴ It is also necessary to restore some rights to students, particularly in an off-campus setting when they are no longer students, but are merely average citizens.¹⁷⁵

The first step in resolving this confusion is to draw a bright-line as to when the original *Tinker* framework is applied. As seen in the language of *Tinker*, school authority is limited to geographically on-campus speech or at school-sponsored events.¹⁷⁶ This follows the intent of the Supreme Court in the

169. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (stating that over 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations).

170. *Bell*, 799 F.3d at 400 (citing *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 951-52 (3d Cir. 2011) (*en banc*) (Fisher, J., dissenting) (stating that “with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment.”)).

171. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

172. Olivia A. Weil, *Preserving the Schoolhouse Gates: An Analytical Framework for Curtailing Cyberbullying Without Eroding Students’ Constitutional Rights*, 11 AVE MARIA L. REV. 541, 548 (2013).

173. *See supra* pp. 9–10. Trial Court found in favor of the school, the Appellate Court found for Bell, and the Appellate Court en banc reversed again finding for the school.

174. *See generally Bell*, 799 F.3d at 379.

175. Scott L. Sternberg, *Outside the Schoolhouse Gate: The Limits of Tinker v. Des Moines Independent Community School District*, COMM. LAW., Fall 2014, at 20.

176. *Tinker*, 393 U.S. at 512–13 (referencing examples of what constituted “out of class” speech which would still be actionable by the school as including the cafeteria, playing field, or on campus during authorized hours which is only when the speech occurs on school grounds or at a school-sponsored event).

original decision, as no mention is made of a school's authority to restrict speech extending beyond the schoolhouse gates.¹⁷⁷ Further, school regulations are deemed reasonable when they are essential in maintaining order and discipline on school property.¹⁷⁸ Notably absent from this statement is the relation of school policies as applied to off-campus speech. As such, Courts should continue to apply the original *Tinker* framework only to cases which meet a bright-line showing of "on-campus" speech, where school policies are intended to impose order and discipline.¹⁷⁹ However, if the speech is outside of the geographic location of the school or not during a school-sponsored activity, a modified standard should be applied—a standard which provides more opportunity for a student to freely express themselves without being susceptible to school authority twenty-four hours a day.

Prior to circumventing freedoms provided to minors by the First Amendment, a heightened standard should be met to permit a student's off-campus speech to be restricted. Since students only shed some Constitutional rights behind the schoolhouse gates, inherently their rights outside of those gates are greater.¹⁸⁰ To restore those rights and freedoms to students while off-campus, the Supreme Court should adopt a modification of the *Tinker* standard that heightens the level of disruption necessary prior to punishing or censoring student speech, as well as analyzes the subjective intent of the speaker.

VI. PROPOSED *TINKER-BELL* STANDARD FOR OFF-CAMPUS SPEECH

If speech is deemed off-campus, the threshold question as to when a school may have the authority to restrict or punish the speech is whether or not actual disruption occurred at the school as a result of the speech. This modifies the *Tinker* standard by removing the language that speech can be restricted if it is reasonably foreseeable that substantial material disruption could occur.¹⁸¹ The disruption must also be of a substantial or material nature, not merely a small distraction or insignificant disruption.¹⁸² Absent an actual substantial disruption, the analysis stops and the school is not permitted to restrict or punish the speech. If actual substantial disruption did occur, then the subjective intent and purpose of the speaker shall be analyzed. If the subjective intent and purpose of the speech served legitimate purpose,¹⁸³ the school cannot limit the First Amendment protection provided to a student's off-campus speech.

177. See *Tinker*, 393 U.S. at 503.

178. *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966).

179. *Id.*

180. See generally *Tinker*, 393 U.S. at 506 (noting that students do not shed all of their free speech rights at the schoolhouse gate).

181. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 390 (5th Cir. 2015).

182. *Boucher v. School Board*, 134 F.3d 821, 828 (7th Cir. 1998).

183. See *infra* Part b: Subjective Intent of the Speaker.

A. *Heightened Substantial Material Disruption*

The first portion of the *Tinker-Bell* analysis is a heightened requirement for disruption. Before a school can interject its authority over a student's off-campus speech, there must be an actual disruption or a near certainty of risk to school safety. Absent an actual harm or near-certain safety risk incurred by the school, there is not a strong enough connection between the speech and the school to justify expansion of school authority beyond the schoolhouse gate, and into the private homes of students.

Further, cases have long used the terms "substantial" and "material" disruption, and permit censorship and reprimand for speech which rises to this level. However, courts have stretched these boundaries without providing a clear understanding of what delineates a substantial or material disruption from an insignificant disruption. For this proposed standard, a true disruption of substantial or material proportion must occur.

There are many cases that rely on offended feelings of a listener or mere schoolhouse chatter to meet the standard of substantial or material disruption.¹⁸⁴ These cases, however, have applied a lax standard of general disruption, rather than adhering to the importance inherent in the definitions of substantial or material. Substantial means "considerable in importance, value, degree, amount or extent."¹⁸⁵ This definition indicates that only conduct of an increased significance would meet this standard, not trivial or inconsequential conduct. There must be "more than some mild distraction or curiosity created by the speech."¹⁸⁶

Conduct that can be said to create a substantial or material disruption carries a visible or tangible consequence that is directly correlated to the speech at hand. In *Boucher v. School Board*, the court found that a student's blog post instructing how to hack the school's computer system was a "call to action" which could be predicted to substantially disrupt the school.¹⁸⁷ The substantial disruption the court noted was the risk of numerous people hacking the school system.¹⁸⁸ The consequence of the system being hacked exceeds a trivial disruption and as such the risk alone is properly classified as being a substantial disturbance. Further, in *J.S. ex rel. H.S. v. Bethlehem Area School*

184. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 209 (3d Cir. 2011) (discussing a principal being concerned for his reputation after students made a mock profile online with the principal's picture); see also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 922 (3d Cir. 2011) (noting that there were general "rumblings" in the school regarding the profile).

185. *Substantial*, THE AMERICAN HERITAGE DICTIONARY 1213 (2d ed. 1982).

186. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (2002) (citing *Burnside*, 363 F.2d at 748).

187. *Boucher*, 134 F.3d at 828.

188. *Id.* (describing the article to be a blueprint for the invasion of the school's computer system along with encouragement to do just that).

District, derogatory comments about a teacher left the teacher unable to complete the school year or return for the next year due to stress and anxiety.¹⁸⁹ Upon her absence, students lost the cohesive learning plan of the semester by being subjected to substitute teachers for the remainder of the school year.¹⁹⁰ The difference between a teacher or administrator who is simply offended by student speech pales in comparison to the extent of physical and emotional harm endured by this teacher. As such, the visible disruption caused by the speech rises to a level of substantiality.

A risk to security of a school also rises to a material or substantial disruption.¹⁹¹ In *Wynar v. Douglas County School District*, a student engaged in a string of violent and threatening instant messages sent from home to his friends bragging about his weapons, threatening to shoot specific classmates, intimating that he would “take out” other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre.¹⁹² His friends were alarmed by these messages and notified school authorities of the risk and potential threat.¹⁹³ Based on the student’s descriptive language and self-proclaimed accessibility to weapons, a *legitimate* risk was created to the safety of the school.¹⁹⁴ As such, the court properly found this risk was a substantial and material disruption to the school. Additional deference should be given to schools when dealing with speech characteristically associated with tragic mass school shootings. By comparing the severity of disruption caused by student speech in these preceding cases, a common-sense analysis reveals when disruptions are more than trivial and properly deemed substantial or material.

B. *Subjective Intent of the Speaker*

The second portion of the *Tinker-Bell* framework, once a substantial or material disruption has been identified, is to analyze the subjective intent of the speaker. Further, the intent of the speaker is vital, as it cannot be sanctioned that the view of the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.¹⁹⁵ While subjective intent is hard to

189. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 416–17 (Pa. Commw. Ct. 2000) *aff’d*, 807 A.2d 847 (2002) (describing a website made containing derogatory comments about a teacher, including calling her fat, referring to her as a bitch, and displaying a diagram of the teacher with her head cut off and blood dripping from her neck).

190. *Id.* at 417.

191. *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1065 (9th Cir. 2013)

192. *Id.* at 1064–65.

193. *Id.* at 1065.

194. *Id.* at 1064.

195. *Cohen v. California*, 403 U.S. 15, 26 (1971).

define, there are many indicating factors which assist in identifying the actual purpose behind students' speech. Two major factors to consider include the speaker's purpose in creating or disseminating the speech and the form of the speech.

Speech created or disseminated with the purpose of political speech, religious matters, or matters of public concern are provided First Amendment protection. In a case where arguably political speech is directed against the very individuals who seek to suppress that speech, school officials do not have limitless discretion.¹⁹⁶ While "much political and religious speech might be perceived as offensive to some," such speech "is at the core of what the First Amendment is designed to protect."¹⁹⁷ Further, speech on matters of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."¹⁹⁸ Speech of this nature on the internet is still provided this high level of protection, as there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."¹⁹⁹

Although on-campus speech cases do not look to the speaker's intent,²⁰⁰ it is of great necessity to do so when possibly censoring students' off-campus speech. The court in *Thomas v. Board of Education, Granville Central School District*, focused on the location of the speech, finding "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena."²⁰¹ Although the court did not identify specific scenarios, it was noted that there could be a situation in which students incite "substantial disruption within the school from some remote locale."²⁰² A heightened intent element mirrors the public arena's analysis of threatening language, as seen in *Elonis v. United States*. Although *Elonis* deals in the criminal realm, it is noted that wrongdoing must be conscious.²⁰³ If a speaker is intending to blow the whistle on a matter of public concern or spread a religious message, there is an absence of any conscious wrongdoing.

196. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992).

197. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 402 (5th Cir. 2015) (Elrod, J., concurring) (quoting *Morse v. Frederick*, 551 U.S. 393, 403, 409 (2007) (Alito, J., concurring)).

198. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

199. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

200. *Morse*, 551 U.S. at 402 (denying the dissenting opinion's contention that the court should take into consideration the motive for the student to display the banner with language involving illegal drug use).

201. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979).

202. *Id.* at 1052 n.17.

203. *Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015).

The form of the speech can also be indicative of the intent of the speaker. Many forms of speech are utilized as expressive or artistic vehicles for a speaker's message. All art forms — including plays, music, dance, film, literature, poetry and the visual arts — enjoy considerable First Amendment protection.²⁰⁴ Violent art has been a staple of human cultures since ancient times.²⁰⁵ Many human behavioralists believe that violent art has a “useful and constructive societal role, serving as a vicarious outlet for individual aggression.”²⁰⁶ To ensure that artistic or therapeutic expression is not being constrained, latitude should be given to speech which is in an artistic form. This is not a one-size-fits-all approach, and should be applied in a common sense fashion. A student who uses artistic expression as a free pass to engage in inappropriate speech should not be afforded that opportunity. But a student who is known to engage in certain artistic outlets should be recognized as having a different intent or purpose when creating this art.

C. *Application of Tinker-Bell Framework to Bell's Case*

Applying this new standard to *Bell*, the school board would fail on both analyses. First, the alleged disturbance incurred by the school does not rise to a substantial level, nor is there a reasonable certainty of risk to the safety of the school. One of the teachers whose name was included in the song stated that he viewed the rap as “just music,” and he did not take it seriously.²⁰⁷ The second teacher stated that song caused him to be more cautious around students and to avoid the appearance that he was behaving inappropriately toward them.²⁰⁸ His discomfort stemmed more from the allegations in the rap presenting him in a negative light.²⁰⁹ As such, the reactions and alleged disturbance felt by the teachers did not rise to the higher standard of being substantial or material. Unlike *Bethlehem*, where the teacher's response to the speech caused her serious physical and mental harm,²¹⁰ here one teacher felt discomfort stemming from whistleblowing allegations while the other felt no harm. Facially, there is no tangible disruption that rises beyond mild disruption or curiosity of the speech. Further, there is no material disruption to the school

204. Ken Paulson, *Arts & First Amendment Overview*, FIRST AMENDMENT CENTER (Jan. 3, 2004), available at <http://www.firstamendmentcenter.org/arts-first-amendment>.

205. *Freedom of Expression in the Arts and Entertainment*, AMERICAN CIVIL LIBERTIES UNION, available at <https://www.aclu.org/freedom-expression-arts-and-entertainment> (last visited Feb. 14, 2016)[hereinafter *Freedom of Expression*].

206. *Freedom of Expression*, *supra* note 205.

207. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 289 (5th Cir. 2014) *reh'g en banc granted*, 782 F.3d 712 (5th Cir. 2015), *reh'g en banc*, 799 F.3d 379 (5th Cir. 2015).

208. *Id.*

209. *Id.*

210. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 417 (Pa. Commw. Ct. 2000) *aff'd*, 807 A.2d 847 (2002).

community as a whole, as the impact is mainly noted to be confined to the single teacher's uneasiness.

Further, there is no reasonably certain risk to the safety of the school. When looking at Bell's past, he has no history of violence or mental health issues that would be indicative of a risk to violent behavior and had created his recording in a professional studio.²¹¹ There is no indication that Bell actually had weapons or had access to weapons.²¹² To the contrary, Bell had never even been in serious trouble at school besides one instance of tardiness.²¹³ Unlike *LaVine v. Blaine School District*, where the student had previous suicidal intentions, had recently broken up with his girlfriend (whom he was reportedly stalking), had several prior disciplinary problems, and had been absent from school for three days prior to handing in a poem "filled with imagery of violent death and suicide,"²¹⁴ here, Bell had no typical red-flags for being a potential threat to the school.

The period of time that passed between Bell's creation of the rap and any action on behalf of the school also indicates no reasonably certain risk. Bell was confronted about the rap song at school and the adverse action taken against him was not until several days later.²¹⁵ If the school board felt there was an actual risk to the school's safety, the lapse of time prior to taking action would not have been permitted. If the school perceived a reasonably certain risk, immediate corrective action would have been essential. Beyond briefly inquiring with Bell as to the recording, no *immediate* action indicating legitimate concern on behalf of the school board was taken.²¹⁶ In combination, these facts indicate there was no reasonably certain risk to the safety of the school.

Assuming, arguendo, the Court would find there was either a substantial disruption or reasonable risk, Bell's intent and purpose in creating the rap song outweigh any alleged disruption or risk. First, Bell's speech exposing wrongdoing by a teacher, especially where students are being victimized, warrants a matter of public concern that should be given greater First Amendment protection.²¹⁷ Bell's own testimony indicates his goals in creating and disseminating the song was to bring to light this misconduct, and thought this form of exposure was the best means to uncover the issue.²¹⁸ The majority of the rap song addressed this issue of public concern as well.²¹⁹

211. *Bell*, 799 F.3d at 428 (Dennis, J., dissenting).

212. *Id.*

213. *Id.*

214. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989–990 (9th Cir. 2001).

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

216. *Id.*

217. *Bell*, 799 F.3d at 404 (Dennis, J., dissenting).

218. *Id.* at 385 (majority).

219. *Id.* at 384.

In addition to the intent and purpose of the speech, Bell was expressing himself in an artistic form. The rap song was far from an amateur compilation of threats disguised as art. Bell recorded the rap song in a professional studio and performed two edits on the video, which he later posted to a popular artistic media forum.²²⁰ The history and culture of rap music shows the commonality of vulgar and violent imagery.²²¹ This language and expression is often misinterpreted by those unfamiliar with rap culture and lacking appreciation for the artistic element intended by rap artists.²²² Here, Bell was engaging in his artistic outlet of choice, one which he had repeatedly engaged in.²²³ While the rap did contain some violent language which is characteristic of the rap culture, it does not discredit his expression of being worthy of artistic designation.

The combination of exposing a matter of public concern paired with legitimate artistic expression outweighs any alleged disruption or perceived risk of safety at the school. To censor Bell's speech would set an ominous precedent of restricting student expression twenty-four hours a day.²²⁴ To discourage students from blowing the whistle on wrongdoing in a school setting would prevent nearly all wrongdoing from being addressed, as students are the best suited parties to bring these issues to light.²²⁵ To curb students' artistic expressions would limit not only therapeutic outlets, but could also put a halt to possible future endeavors or careers which are artistically related.²²⁶ On a broader level, for schools to constantly monitor and censor student speech on social media, students would be robbed of their most vital form of communication and expression.²²⁷ Here, Bell's speech on a matter of public concern outweighs any perceived disturbance or risk to safety caused by literary vulgar language. As such, upon application of the proposed *Tinker-Bell* standard, the Supreme Court should reverse the en banc decision of the Appellate Court in favor of Bell.

220. *Id.* at 428, 431.

221. *See id.* at 387–88.

222. AARON J. LIGHTSTONE, *The Importance of Hip-Hop for Music Therapists*, THERAPEUTIC USES OF RAP AND HIP-HOP 39, 43 (Susan Hadley & George Yancy eds., 2012).

223. *Bell*, 799 F.3d at 428 (Dennis, J., dissenting).

224. *Id.* at 402 (Elrod, J., concurring).

225. *Id.* at 412 (Dennis, J., dissenting).

226. Famous rapper, Eminem, has created rap songs explicitly stating that he will “punch Lana Del Rey right in the face twice, like Ray Rice,” before threatening to rape Iggy Azalea, on a leaked track Vegas. Despite the vulgar and violent language, Eminem has had a successful music career since the late 1990's. Patrick Ryan, *It's 2014, So Why are Eminem's Violent Lyrics Still OK?*, USA TODAY (Nov. 25, 2014, 8:01 PM), <http://www.usatoday.com/story/life/music/2014/11/25/eminem-shady-xv-misogyny-violence/19444645/>.

227. Eight in ten online teens use some kind of social media. Mary Madden, et al., *Part 1: Teens and Social Media Use*, PEW RESEARCH CENTER (May 21, 2013), available at <http://www.pewinternet.org/2013/05/21/part-1-teens-and-social-media-use/>.

D. Possible Objections to Proposal

Although the proposal adheres to a modified *Tinker* standard, there are still divergences from the long-upheld *Tinker* framework that may cause concern. First, *Tinker* has held that a school is not required to wait for a disruption to occur before taking action in response to student speech.²²⁸ The *Tinker-Bell* proposal does tip the scales slightly back in favor of student freedoms, but does so since there is less of a temporal urgency when the speech is off-campus. Morse addressed the difficult job of school administrators when faced with a possibly disruptive issue: “to decide to act—or not act—on the spot.”²²⁹ When the speech is moved off-campus, this split-second decision is not required. With the availability of more time to assess off-campus situations, a higher standard requiring an actual disruption should be necessary to provide the school with the jurisdiction to exert authority. Additionally, this standard does not propose that a school must wait for violence to actually occur prior to stepping in. If there is a reasonably certain risk to the safety of the school, the threshold question of the *Tinker-Bell* standard will also be met. The importance of preventing and discouraging threats, especially those indicative of systematic mass-school shootings, is addressed by not requiring a higher standard of actual disruption in this context.

Second, schools can typically be held responsible for allowing harassment to a student to continue after the school has become aware of the issue.²³⁰ However, the school does not have to tolerate harassment that spills into the school. As long as the school properly addresses any actual on-campus harassment while students are under their care, this issue does not arise.²³¹ Further, this proposed standard does not prevent a school from simply contacting a student’s parents if there is pertinent information to communicate or behavior to address. If school authorities choose to further notify parents of alarming behavior, this would further insulate the school from allegations of inaction.

Finally, there may be concern that students will be able to guise their unprotected speech as artistic or on a matter of public concern to shield themselves from censorship or discipline. While there is always a chance that students may attempt to disguise their speech, this is remedied by the proposal

228. *Bell*, 799 F.3d at 390 (quoting *Shanley v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.* 462 F.2d 960, 974 (5th Cir. 1972)).

229. *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007).

230. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (holding that actions may be brought against schools that acts with deliberate indifference to known acts of harassment in its programs or activities).

231. *See Tyrell v. Seaford Union Free Sch. Dist.*, 792 F.Supp.2d 601, 629 (E.D.N.Y. 2011) (holding the school district did not have control in the context in which the harassment occurred off of school grounds).

not adhering to a rigid standard. The analysis of the intent and purpose of the speech looks to a common-sense totality of the circumstances analysis to allow the school some deference in determining if the public concern or artistic nature is authentic. There is no indication that the artistic nature of Bell's speech or the topic of public concern were not genuine.²³² Bell stated he was told by multiple students about the inappropriate acts engaged in by the teachers referenced in his rap song.²³³ Further, the artistic expression in rap form is characteristic of Bell's known identification as a rap artist.²³⁴ He had previously been active in the rap culture and even recorded his song in a legitimate recording studio.²³⁵ When taking a common-sense approach to the circumstances as a whole, it is clear the public speech nature and the artistic elements to Bell's speech were authentic. If school administrators are concerned about future students attempting to use the intent and purpose prong as a loophole, the standard permits a flexible analysis to take into account the circumstances surrounding these claims.

VII. CONCLUSION

The decision in *Bell* failed to take into account the evolving technology present in our society, which is within reach of nearly every student in America. *Tinker* is outdated in light of the internet and social media, and confusion and lack of uniformity continues to plague lower courts. By continuing to apply the forty-eight year old standard of *Tinker* and allowing schools to punish off-campus speech any time it does or potentially could cause a substantial disruption, schools have obtained an unprecedented and unrestricted authority over students nearly twenty-four hours a day.

The Supreme Court bypassed the opportunity to weigh in on this topic and provide guidance to lower courts when certiorari was denied to Bell in February 2016.²³⁶ As similar cases continue to come through the courts, the opportunities for the Supreme Court to hear a case concerning internet-based off-campus speech will continue to present themselves. Absent direct commentary on the topic of off-campus speech in light of modern technology, the Supreme Court is allowing schools to reach beyond the schoolhouse gates and infringe on parents' roles in raising and disciplining their children, as well as infringing upon the free-speech rights of today's youth. A clear standard is needed now more than ever, to balance the necessity of keeping schools safe

232. See *Bell*, 799 F.3d at 428 (Dennis, J. dissenting); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 990 (9th Cir. 2001).

233. *Bell*, 774 F.3d at 283 (5th Cir. 2014) *reh'g en banc granted*, 782 F.3d 712 (5th Cir. 2015) *reh'g en banc*, 799 F.3d 379 (5th Cir. 2015).

234. *Bell*, 799 F.3d at 428 (Dennis, J. dissenting).

235. *Id.*

236. *Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016).

and the rights of students to freely express themselves once they exit the schoolhouse gates.

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