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The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age

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COMMENT

THE AMPLIFIED NEED FOR SUPREME COURT GUIDANCE ON STUDENT SPEECH RIGHTS IN THE DIGITAL AGE

WILLIAM CALVE*

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I. INTRODUCTION

On August 20, 2015, the Fifth Circuit determined school officials from Itawamba County, Mississippi, had the authority to suspend Taylor Bell for a rap song[1] he posted online over the winter break.[2] Bell's rap, laden with profane and even ominous rhetoric, alleged two coaches were sexually harassing and assaulting female students at his high school. The Fifth Circuit invoked the Supreme Court's nearly fifty year-old standard for student speech from *Tinker v. Des Moines Independent Community School District*,[3] that student speech may be abridged where school officials can reasonably forecast a substantial disruption to the school environment.[4] The judgment against Bell is indicative of national uncertainty around the breadth of student speech rights in a twenty-first century where the education system has been transformed by the rise of teenagers on social media and the looming fear of school violence. *Bell v. Itawamba County School District*[5] is the crescendo of an amplified need for solutions from the Court on the question of how much power can be granted to school administrators in regulating what students may say on the Internet once the school day is complete. By granting certiorari to Bell's case, the Court could have provided guidance to both students and school administrators as to the current state of student speech doctrine. Instead, the Court left answers for another day and student speech litigation will continue until that day arrives.

This Comment examines Taylor Bell's case and the uncertainty in the law for off-campus, online student speech. Part II provides an overview of the student speech test devised by the Supreme Court in *Tinker*, how subsequent

1. "Rap music derives from oral and literary traditions of the Black community . . . ." Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 22 (2007). According to the Supreme Court, rap music is "defined as a 'style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 n.1 (1994) (citation omitted). The genre has grown into "a sophisticated form of poetry that has served as an important vehicle for social commentary and political protest." Brief for Erik Nielsen, et al as Amici Curiae Supporting Petitioner at 5, Bell v. Itawamba Cty. Sch. Bd., 136 S. Ct. 1166 (2016) (No. 15-666). *See* Richard Primus, *Will Lin Manuel-Miranda Transform the Supreme Court?*, ATLANTIC (June 4, 2016), http://www.theatlantic.com/politics/archive/2016/06/lin-manuel-miranda-and-the-future-of-originalism/485651/ (discussing the social and political impact of the Broadway rap opera *Hamilton*).

2. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016); Jack Elliot, Jr., *Mississippi Student Loses Legal Appeal over Rap Suspension*, CLARION-LEDGER (Aug. 21, 2015, 7:31 AM), http://www.clarionledger.com/story/news/2015/08/21/mississippi-student-loses-legal-appeal-over-rap-suspension/32104551/.

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

4. *Id.* at 514.

5. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016

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exceptions from the Court have expanded the authority afforded to school administrators since 1969, and the conflicting standards lower courts have adopted to assess student online speech cases. Part III relays the background of Taylor Bell's case and the Fifth Circuit's 2014 and 2015 opinions, one in favor of protecting Bell's speech and one upholding his suspension by school authorities. Part IV offers a critique of the Fifth Circuit's recent *Bell* decision. Part V discusses the importance of Supreme Court guidance on the issue and proposes a test to solve the constitutional question. This Comment concludes with a final call for changes to the student speech standard to adapt to the altered realities of public education.

II. A BRIEF HISTORY OF STUDENT SPEECH RIGHTS

A. *The Supreme Court on Student Speech*

The Constitution safeguards the freedom of speech without reference to students.[6] At the height of the Vietnam War, the Supreme Court sealed the right of student speech[7] with the landmark *Tinker*[8] case's dynamic conclusion that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] In *Tinker*, a group of schoolchildren wore black armbands to school as a symbol of opposition to American military involvement in Vietnam, and administrators consequently ordered their suspensions.[10] Though the Court sided with the students' rights to express themselves, it also recognized the need for

6. U.S. CONST. amend. I.

7. *See* Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U. L. REV. 1129, 1130 (2009) (noting "it was not a foregone conclusion that students had any affirmative free speech rights in public schools" prior to the Court's decision in *Tinker*). The beginnings of student speech doctrine can be traced back to 1943, when the Court protected the First Amendment rights of a group of schoolchildren expelled for refusing to salute the American flag. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (rejecting the notion that a school could compel speech by students). Before *Tinker*, however, schools could freely prohibit student expression without ramifications in the courts. *See, e.g.*, Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966) (upholding school prohibition on students wearing freedom buttons).

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

9. *Tinker*, 393 U.S. at 506. In effect, however, *Tinker* did not lead to immediate student speech victories in the lower courts. *See* Hill v. Lewis, 323 F. Supp. 55, 59 (E.D.N.C. 1971) (declining to issue an injunction against school officials for disciplining students wearing Vietnam armbands); *see also* Hernandez v. Sch. Dist. No. One, 315 F. Supp. 289, 292 (D. Colo. 1970) (upholding school discipline of students for wearing black berets in celebration of Mexican Independence Day); Guzick v. Drebus, 305 F. Supp. 472, 484 (N.D. Ohio 1969) (holding school's suspension of a student for wearing an anti-war button was permissible under the *Tinker* standard).

10. *Tinker*, 393 U.S. at 504.

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schools to exercise a degree of control over student conduct.[11] Accordingly, the Court devised the substantial disruption test, holding student speech could not be prohibited without "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . ."[12] Justice Hugo Black's scorching dissent called for greater deference to the authority of schools, railing: "This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students."[13] The struggle to balance the right of students to express viewpoints and the right of schools to discipline has bedeviled courts since the inception of student speech jurisprudence.[14]

In the decades following *Tinker*, a changing Court[15] decided a trio of student speech cases affording a broader degree of authority to school

11. *Id.* at 507 (recognizing "the need for affirming the comprehensive authority of the States and of school officials" in schools).

12. *Id.* at 514. In perhaps the earliest iteration of the substantial disruption standard, over a century before *Tinker*, the Vermont Supreme Court determined that "where [a student's] offence has a direct and immediate tendency to injure the school and bring the master's authority into contempt," a schoolmaster could whip a student for misbehavior occurring even away from the schoolhouse. Lander v. Seaver, 32 Vt. 114, 120 (Ver. 1859). Even in 1859, however, the court acknowledged the potential difficulties in determining what could constitute such an injury to the school environment. *See id.* ("Cases may readily be supposed which lie very near the line, and it will often be difficult to distinguish between the acts which have such an immediate and those which have such a remote tendency.").

13. *Tinker*, 393 U.S. at 522, 525 (Black, J., dissenting). Justice Black's dissent is often remembered as "an angry polemic against according students First Amendment rights." Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 546 (2000) [hereinafter Chemerinsky, *What's Left of* Tinker*?*]. Prior to the 1960s, however, Justice Black wielded a reputation as a zealous defender of the First Amendment on the Court. *See* Tinsley E. Yarbrough, *Justice Black and His Critics on Speech-Plus and Symbolic Speech*, 52 TEX. L. REV. 257, 257 (1974) (discussing Justice Black's legacy on speech cases). In 1941, retired Justice Louis Brandeis reportedly remarked, "Black and company have gone mad on free speech!" *Id.*

14. *See* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 625 (2002) (highlighting the competing interests of freedom for student expression and the need for schools to advance education through order and discipline); Julieta Chiquillo, *Four Cases That Test Reach of Student Free-Speech Rights in Age of Cyberbullying*, DALL. MORNING NEWS (Apr. 27, 2015, 1:00 PM), http://www.dallasnews.com/news/community-news/mckinney/headlines/20150427-four-cases-that-test-reach-of-student-free-speech-rights-in-age-of-cyberbullying.ece (providing an overview of the ongoing conflict between schools' efforts to keep students safe and students' rights to First Amendment expression under *Tinker*).

15. *See* Chemerinsky, *What's Left of* Tinker*?*, *supra* note 13, at 527 (explaining by the time of the *Tinker* decision Chief Justice Earl Warren was soon to be replaced by Warren Burger, a "much more conservative" justice); Martha McCarthy, *Student Expression Rights: Is a New Standard on the Horizon?*, 216 ED. L. REP. 15, 33 (2007) (noting "the Court is more conservative than it was when *Tinker* was rendered" in the context of student speech issues).

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administrators under particular circumstances.[16] In *Bethel School District No. 403 v. Fraser*,[17] the Court upheld a student's suspension for delivering a sexually-charged speech at a school assembly.[18] The incident occurred at school, but the Court refrained from applying the *Tinker* substantial disruption test, instead holding that, since the student's speech was lewd and indecent in nature, it fell outside the realm of ordinary protection.[19] The Court emphasized judicial deference to the decision-making of school administrators, officials tasked with imparting "the shared values of a civilized social order."[20] By deciding *Fraser* without revising *Tinker*, the Court opened the first window for school districts to regulate certain student speech without needing to prove a substantial disruption.[21]

Shortly after *Fraser*, the Court carved out another specific exception for student speech regulation, this time pertaining to school newspapers, in *Hazelwood School District v. Kuhlmeier*.[22] A high school removed student

16. *See* Bernard James, Tinker *in the Age of Judicial Deference*, 81 UMKC L. REV. 601, 613 (2013) (describing "narrow exceptions" to the *Tinker* standard). Some legal scholars view the Court's post-*Tinker* decisions as gradual abandonment of student speech rights, rather than mere narrow exceptions. *See* Chemerinsky, *What's Left of* Tinker*?*, *supra* note 13, at 541 ("In light of the subsequent cases, it is hardly surprising that lower courts have questioned whether *Tinker* remains good law."); Christina Snyder, *Reversing the Tide: Restoring First Amendment Ideals in America's Schools Through Legislative Protections for Journalism Students and Advisors*, 2014 BYU EDUC. & L.J. 71, 75 (2014) (describing the Court's post-*Tinker* decisions as "exceptions that have almost completely undermined" student speech rights); S. Elizabeth Wilborn, *Teaching the Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 122 (1995) ("[U]nder the current standard applicable to student speech, a commercial for Hostess Twinkies receives greater protection under the First Amendment than does a student's political speech.").

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

18. *Id.* at 677–78.

19. *Id.* at 685. The Court distinguished *Fraser* from *Tinker* by invoking political speech, noting, "Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint." *Id.* Looking to the indecent content of the speech, the Court relied on the principle that a school environment "is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.*

20. *Id.* at 683.

21. *See* Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion* Fraser, 90 DENV. U. L. REV. 131, 146 (2012) (describing one interpretation of *Fraser* as "limited to sexual offensiveness" and concluding different interpretations view *Fraser* as applying either very narrowly or very broadly); *see, e.g.*, Posthumus v. Bd. of Educ., 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005) (broadly interpreting *Fraser* as teaching "judgments regarding what speech is appropriate in school matters should be left to the schools rather than the courts"). In general, courts "have inconsistently applied *Fraser*." Jerry C. Chiang, Comment, *Plainly Offensive Babel: An Analytical Framework for Regulating Plainly Offensive Speech in Public Schools*, 82 WASH. L. REV. 403, 415 (2007).

22. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). *See* Jeffrey D. Smith, Comment, *High School Newspapers and the Public Forum Doctrine:* Hazelwood School District v. Kuhlmeier, 74 VA. L. REV. 843, 846 (1988) (narrowly characterizing *Hazelwood* as a case about "the extent to which public high school officials may exercise editorial control over a high school newspaper"). *But see* Alexander

articles about pregnancy and divorce from a school-sponsored newspaper out of concern for the articles' inappropriate character, and the Court held no First Amendment violation had occurred.[23] The Court again indicated a particular scenario where student expression could be unprotected, explaining, "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in student-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[24] Again the Court was careful to leave the general *Tinker* rule undisturbed and framed the issue as one of a school's imprimatur, concluding the substantial disruption standard is not appropriate if "determining when a school may refuse to lend its name and resources to the dissemination of student expression."[25] Stated differently, the Constitution does not require "a school affirmatively to *promote* particular student speech."[26]

In the most recent of the student speech cases, *Morse v. Frederick*,[27] the Court extended the reach of school administrators to prohibit drug advocacy at a school-sanctioned event just outside the schoolhouse gate.[28] An Alaska high school permitted students to leave school premises and cross the street to cheer on runners in the Olympic Torch Relay, but when a student displayed a "BONG HiTS 4 JESUS" banner at the rally, the student was suspended and sued the school on a First Amendment claim.[29] The Court sided with the school, and the effect of the *Morse* ruling was "a new loophole in the *Tinker* standard: schools could now restrict speech that could reasonably be interpreted as advocating illegal drugs."[30] Justice Samuel Alito's concurrence[31] maintained the holding was to go "no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use," and not to allow

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Wohl, *The* Hazelwood *Hazard: Litigating and Legislating in the State Domain when Federal Avenues are Closed*, 5 ST. THOMAS L. REV. 1, 9 (1992) (asserting "school administrators and teachers inflicted an iron fist policy on student expression" after the *Hazelwood* decision).

23. *Hazelwood*, 484 U.S. at 260.

24. *Id.*

25. *Id.* at 273.

26. *Id.* (emphasis added).

27. Morse v. Frederick, 551 U.S. 393 (2007).

28. *Id.* at 409–10.

29. *Id.* at 397–98.

30. Ronald Schildge & Michael A. Stahler, *Student Speech After* Morse v. Frederick*: An "Unwise and Unnecessary" Convolution*, VT. B.J., Fall 2009, at 55, 57 (2009).

31. *Morse*, at 422 (Alito, J., concurring). The Fifth Circuit previously characterized Justice Alito's concurrence as "controlling." *See* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007). *But see* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008) (disagreeing with the Fifth Circuit's portrayal of Justice Alito's *Morse* concurrence as controlling).

for restrictions affecting speech "on any political or social issue."[32]

The post-*Tinker* trio of *Fraser*, *Hazelwood*, and *Morse* are powerful concessions to the authority of school principals in monitoring student speech and conduct.[33] Nevertheless, none of the modern student speech cases have overruled *Tinker* or permitted broad authority for school officials to reach outside the proverbial schoolhouse gates and regulate purely off-campus student speech.[34] To constitutionally abridge student speech under current jurisprudence, schools must satisfy the substantial disruption standard, or invoke one of the three post-*Tinker* exceptions for lewd on-campus speech, speech making use of school resources, or speech promoting illegal drug use.[35]

B. *Circuit Courts on Off-Campus Student Speech and Cyberspeech*

Circuit courts run the gamut in determining how to apply the Court's jurisprudence in student speech cases, particularly when it comes to the

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32. *Morse*, 551 U.S. at 422. *But see* Joyce Dindo, Note, *The Various Interpretations of* Morse v. Frederick, *Just a Drug Exception or a Retraction of Student Speech Rights?*, 37 CAP. U. L. REV. 201, 221 (2008) ("Lower courts can interpret *Morse*'s majority opinion in several ways."); Jeremy Jorgensen, *Student Rights Up in Smoke: The Supreme Court's Clouded Judgment in* Morse v. Frederick, 25 TOURO L. REV. 739, 765 (2009) (critiquing the Court's decision in *Morse* as a misguided limitation on student speech rights).

33. *See* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 127 (2004) (portraying the post-*Tinker* student speech cases as decisions to "effectively deconstitutionalize the First Amendment in the context of schools" by allowing for expanded power to school administrators); Nadine Strossen, *Students' Rights and How They Are Wronged*, 32 U. RICH. L. REV. 457, 458 (1988) (critiquing the "sad back-sliding in Supreme Court decisions" following *Tinker*); C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 344 (1989) (characterizing the post-*Tinker* decisions as "dramatic steps" weakening student speech rights).

34. Scott A. Moss, *The Overhyped Path from* Tinker *to* Morse*: How the Student Speech Cases Show the Limits of Supreme Court Decisions for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1435 (2011) (illustrating how *Fraser*, *Hazelwood*, and *Morse* "did not truly eviscerate" *Tinker*); Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1190 (2009) [hereinafter Calvert, Tinker*'s Midlife Crisis*] (characterizing *Tinker* as "alive and kicking" despite subsequent Court decisions); Adam K. Nalley, Note, *Did Student Speech Get Thrown Out with the Banner? Reading 'BONG HITS 4 JESUS" Narrowly to Uphold Important Constitutional Protections for Students*, 46 HOUS. L. REV. 615, 647 (2009) (advocating for courts to "read the Supreme Court decisions narrowly" when considering student speech cases); Sean R. Nuttall, Note, *Rethinking the Judicial Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1308 (2008) (reasoning the state of student speech rights "is much the same as before" the post-*Tinker* decisions).

35. *See* Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1136 (2011) (stating "a student speaker should never face punishment" unless the school has a proper justification under *Tinker*, *Fraser*, *Hazelwood*, or *Morse*); Michael Kent Curtis, *Be Careful what You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 472 (2009) (noting a student's message would need to fall under the substantial disruption test or one of the post-*Tinker* exceptions to be abridged by school officials).

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undefined arena of off-campus student cyberspeech.[36] Prior to the rise of the Internet, courts often favored protection for students' speech made while away from the school environment, but the emergence of online speech has blurred the boundaries of the schoolhouse gate[37] and conjured a host of unsettled legal questions.[38]

To the extent circuit courts have weighed in on off-campus student expression before the Internet, students often emerged the victors.[39] Only five years after *Tinker*, the Fifth Circuit applied the new substantial disruption standard to hold an off-campus newsletter constituted student speech and was shielded from a San Antonio school's disciplinary actions.[40] Similarly, the Second Circuit also overturned a high school's suspension of students for off-campus publication and dissemination of an underground newspaper. The court determined the expression was not within the purview of the substantial disruption test at all since it occurred away from school premises.[41] The Second Circuit weighed the interest of deference to schools in overseeing student conduct, but concluded "willingness to grant school officials substantial autonomy within their academic domain rests in

36. *See* Jacob Tabor, Note, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 580 (2009) ("The lower courts' jurisprudence regarding student speech makes it apparent that there is no clear, uniform method of analysis for cyberspeech currently in use."); Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727, 729 (2012) (describing the "disarray" of lower courts in assessing student cyberspeech).

37. *See* John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying* Tinker *in the Internet Age*, 39 PEPP. L. REV. 939, 940 (2012) (noting the "once-well established separations" have been blurred by the rise of the Internet).

38. *See* Samantha M. Levin, Note, *School Districts as Weathermen: The Schools' Ability to Reasonably Forecast Substantial Disruption to the School Environment from Students' Online Speech*, 38 FORDHAM URB. L.J. 859, 870–71 (2011) ("Due to the advent of the Internet, lower court opinions have shifted away from a bright line standard according to which off campus speech is afforded full First Amendment protection, to a broader approach not limited by the physical characteristics of the speech."); Michael J. O'Connor, Comment, *School Speech in the Internet Age: Do Students Shed Their Rights When They Pick Up a Mouse?*, 11 U. PA. J. CONST. L. 459, 483 (2009) (explaining "the courts seem to be split" on off-campus electronic speech).

39. Daniel Marcus-Toll, Note, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3417 (2014) (describing judicial protection for student "speech that originates beyond school premises and control"); Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 149 (2003) (stating a significant number of courts—as of 2003—chose to extend constitutional protections to students' off-campus speech).

40. Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 970 (5th Cir. 1972).

41. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1051 (2d Cir. 1979) ("We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property."). Even nearly a century before *Tinker*, one court sought to protect students' rights to disseminate an off-campus pamphlet ridiculing school administrators. Murphy v. Bd. of Dirs., 30 Iowa 429, 432 (Iowa 1870).

part on the confinement of that power within the metes and bounds of the school itself."[42] While deciding one on-campus speech case, the Eighth Circuit mentioned the obstacles to a school district's hypothetical efforts to "govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds" could possibly be "insurmountable."[43]

Social media and the Internet equipped students with an unprecedented platform for speech, and presented schools with new First Amendment challenges.[44] The boom of online communication led to faster dissemination of speech among high school students across the country, even when the speech was made off campus, and schools encountered the new question of how to regulate this brand of speech.[45] As early as 1998, a federal court applied *Tinker* to determine whether school officials violated a student's First Amendment rights by suspending the student for creating a vulgar website about school faculty members.[46] In the wake of the

42. *Thomas*, 607 F.2d at 1053. Notably, the *Thomas* students even used school typewriters to draft some of the content and copies of the newsletter were stored in a faculty member's closet, but these on-campus connections were considered minimal by the Second Circuit. *Id.* at 1050.

43. Bystrom *ex rel.* Bystrom v. Fridley High Sch., Ind. Sch. Dist. No. 14, 822 F.2d 747, 750 (8th Cir. 1987). *But see* Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 829 (7th Cir. 1998) (upholding student's suspension for on-campus dissemination of an off-campus newsletter under *Tinker*).

44. *See* Cory M. Daige, Note, *Freedom of Speech in the Technological Age: Are Schools Regulating Social Media?*, 11 CONN. PUB. INT. L.J. 363, 363–64 (2012) (illustrating the lack of clarity in the law despite the consistent growth of student Internet usage); David L. Hudson Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621, 625 (2012) (listing the unanswered questions surrounding off-campus student cyberspeech); Carolyn Joyce Mattus, *Is it Really My Space? Public Schools and Student Speech on the Internet after* Layshock v. Hermitage School District *and* Snyder v. Blue Mountain School District, 16 B.U. J. SCI. & TECH. L. 318, 321 (2010) (noting "lower courts are struggling to apply pre-Internet legal standards to student speech on the Internet" due to uncertainty about the applicability of the substantial disruption standard); Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1604 (2012) (describing the rise of social media and impact on First Amendment questions from a teacher-student communication perspective); Steve Varel, Comment, *Limits on School Disciplinary Authority over Online Student Speech*, 33 N. ILL. U. L. REV. 423, 483 (2013) (predicting a continuing need for answers on the issue of how to assess off-campus student speech).

45. *See* Kaitlin M. Gurney, Comment, *Myspace, Your Reputation: A Call to Change Libel Laws for Juveniles Using Social Networking Sites*, 82 TEMP. L. REV. 241, 246 (2009) (describing the "explosive growth" of social media among teenagers); Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of* Tinker *in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 918 (2012) (examining circuit court case law on *Tinker* applied to student social media usage).

46. *See* Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) ("Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."). The use of *Tinker* to uphold student speech rights on the Internet away from campus continues in some courts. *See* Evans v. Bayer, 684 F. Supp. 2d 1365, 1367 (S.D. Fla. 2010) (protecting a student's off-campus Facebook comments about a teacher

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Columbine school shootings, courts began showing greater deference to school officials acting to discipline student speech.[47] *Tinker*'s substantial disruption test often served as the standard for determining what brand of cyberspeech could be disciplined.[48]

Circuit courts have continuously invoked *Tinker* to regulate off-campus cyberspeech, particularly when the speech is violent or threatening, but the method of application is inconsistent across the country.[49] For example, the Fourth Circuit added a "sufficient nexus" threshold prong to the *Tinker* test, inquiring whether the nexus of the speech in question to the school's "pedagogical interests was sufficiently strong to justify the action taken by school officials" in disciplining the student for cyberbullying.[50] The

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from discipline).

47. *See* Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1091 (2003) (arguing after the Columbine shootings high school administrators had new opportunities "to trounce the First Amendment rights of public school students" as part of preventative measures against violence). *E.g.*, LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001) (invoking "Columbine, Thurston, Santee and other school shootings" in deciding a student cyberspeech case). *See generally* Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground,* 7 B.U. J. SCI. & TECH. L. 243 (2001) (offering a critique of increased school authority over early student cyberspeech). One exception to the post-Columbine trend of school authority over cyberspeech occurred in Washington, where a district court blocked the suspension of a high school student for the off-campus creation of a website featuring mock obituaries of several classmates. Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000). The court determined there was "no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever[,]" and since the speech occurred off-campus, it fell "entirely outside of the school's supervision or control." *Id.* at 1090.

48. *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. 2002) (holding a student's website about hiring a hitman to target his teacher did not constitute a true threat but rose to the level of a substantial disruption under *Tinker*); Mahaffrey *ex rel.* Mahaffrey v. Aldrich, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (requiring school officials to satisfy the *Tinker* standard to punish a student for the content of his website).

49. *See* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1056 (2008) [hereinafter Papandrea, *Student Speech Rights*] (detailing the varying approaches to student speech taken by circuit courts). *See generally* Marcus-Toll, *supra* note 39 (comparing, contrasting and grading appellate courts' various standards for assessing school regulation of student cyberspeech).

50. Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011). Notably, in devising its nexus test the Fourth Circuit highlighted the content and context of the message at issue, cyberbullying. *See* Lily M. Strumwasser, *Testing the Social Media Waters: First Amendment Entanglement Beyond the Schoolhouse Gates*, 36 CAMPBELL L. REV. 1, 27 (2013) (discussing the Fourth Circuit's intent for schools to prevent students from being bullied by other students). The policy goal of protecting students from online bullies often justifies extending the reach of schools to regulate students' off-campus speech. *See* Shannon L. Doering, Tinker*ing with School Discipline in the Name of the First Amendment: Expelling a Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 NEB. L. REV. 630, 671 (2009) (asserting schools should not be prevented from disciplining cyberbullies' off-campus speech merely because the speech occurred away from school); Karly Zande, *When the School Bully Attacks in the Living Room: Using* Tinker *to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 126

Eighth Circuit, in deciding a student's online threats were not protected speech, described the standard with a "reasonable foreseeability" aspect, holding "it was reasonably foreseeable that [the student]'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment."[51] Reasonable foreseeability was further developed by the Second Circuit, which created a two-step process of inquiring whether it was reasonably foreseeable the affected student speech would reach campus, and whether it was reasonably foreseeable the student speech would create a substantial disruption.[52] Focusing on student safety in the aftermath of continuing gun violence in schools, the Ninth Circuit held schools may take action to discipline substantially disruptive off-campus speech "when faced with an identifiable threat of school violence."[53] Commentators describe the Seventh Circuit's approach as a "place of reception standard," assessing where the speech in question ultimately was disseminated, rather than its origins."[54]

The Third Circuit serves as a microcosm for the broader confusion on students' off-campus Internet speech.[55] In 2011, the Third Circuit decided

(2009) (advocating for *Tinker* to apply to off-campus cyberbullying). *But see* Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV. 153, 204 (2009) ("What kind of public are we creating when our schools choose reactionary harsh discipline in the face of objectionable student off-campus speech, rather than thoughtful instruction on the rights and responsibilities of free speech?").

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

52. Wisniewski v. Bd. of Educ., 494 F.3d 34, 38–39 (2d Cir. 2007) (upholding school discipline for a student's violent AOL Instant Messenger icon). *See* Caitlin May, Comment, *"Internet-Savvy Students" And Bewildered Educators: Student Internet Speech Is Creating New Legal Issues for the Educational Community*, 58 CATH. U. L. REV. 1105, 1118 n.103 (2009) (outlining the Second Circuit's two-part reasonable foreseeability *Tinker* test).

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

54. *See* James M. Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855, 866 (2010) (explaining the Seventh Circuit's approach to student speech); Erin Reeves, Note, *The "Scope of a Student": How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1148 (2008) (defining the "place of reception" standard).

55. *See* 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) (providing a chart of Third Circuit judges' stances on off-campus student cyberspeech); Lindsay J. Gower, Blue Mountain School District v. J.S. ex rel. Snyder*: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?* 64. ALA. L. REV. 709, 727 (2013) (discussing the Third Circuit conflict on off-campus Internet speech and asserting the Supreme Court should adopt a position to clarify school officials' regulatory abilities on the issue); Mattus, *supra* note 44, at 319 (pointing to inconsistencies in case law as sufficient to "compel the Supreme Court to define the contours of First Amendment protection for student speech on the Internet—specifically where that speech, though occurring off-campus and during non-school hours, reaches the school environment").

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twin student speech cases with factually similar circumstances, but took two different approaches.[56] Justin Layshock, a high school senior, was suspended for creating a fake MySpace profile for his school principal while at home, and subsequently filed suit against Hermitage School District on First Amendment grounds.[57] The Third Circuit rejected the school district's ability to discipline Layshock, holding:

> It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated his First Amendment guarantee of free expression.[58]

In rendering the decision, the Third Circuit noted the school's failure to establish a "sufficient nexus" existed between Layshock's speech and a substantial disruption to the school environment, but ultimately concluded that the purely off-campus speech was out of the school's purview regardless. By contrast, when deciding *J.S.* ex rel. *Snyder v. Blue Mountain School District*[59] on the same day, the Third Circuit assumed, without deciding, that the *Tinker* test applied to the suspension of a student who created a MySpace parody profile mocking the principal.[60] Both cases resulted in a favorable outcome for the student involved, but the court avoided the issue of which standard to adopt for off-campus Internet speech.[61]

III. AN OVERVIEW OF TAYLOR BELL'S CASE

Shortly before Christmas 2010, eighteen year-old Taylor Bell was told by female classmates that they had been sexually assaulted and harassed by two Itawamba Agricultural High School coaches, Coach Wildmon and Coach

56. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc).

57. *Id.* at 208–11.

58. *Id.* at 216.

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

60. *Id.* at 926–29.

61. *See* Lee C. Baxter, *The Unrealistic Geographic Limitations of the Supreme Court's School-Speech Precedents:* Tinker *in the Internet Age*, 75 MONT. L. REV. 103, 133 (2014) (noting the Third Circuit has left ambiguous which student speech standard it approves).

Rainey.[62] In Bell's view, the "school officials generally ignored complaints by students about the conduct of teachers."[63] Bell opted to spend his winter break working to raise awareness about the students' allegations through the use of mediums that commonly connect teenagers: rap music and social media.[64] In a professional studio outside of school, using his own private computer and under the rap artist name "T-Bizzle," Bell recorded a rap song about the allegations and uploaded the recording to Facebook and YouTube.[65] Bell's rap song blasted the coaches for the alleged sexual harassment of teenaged students.[66] The lyrics contained vulgar language and aggressive rhetoric warning about the possibility of retaliation against the coaches for their sexual misconduct. Among the lines at issue to school officials were: (1) "looking down girls[']shirts/drool running down your mouth / *[Y]ou [messing] with the wrong one / [G]oing to get a pistol down your mouth*[;]" and (2) "[M]iddle fingers up if you can't stand that nigga / *[M]iddle fingers up if you want to cap that nigga.*"[67] The remainder of the song elaborated on specific instances of the purported sexual harassment by the coaches.[68] Administrators learned of the rap song, and subsequently suspended Bell from school.[69]

Itawamba school officials held a disciplinary hearing about "whether Bell threatened, harassed and intimidated the teachers," as well as "to decide whether his suspension should [have been] upheld."[70] Bell characterized himself as a whistleblower rapping on an issue of importance to the student body; he maintained that he never threatened the coaches, and his recording was meant to raise awareness about sexual misconduct, since "he knew

62. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 408 (5th Cir. 2015) (en banc) (Dennis, J., dissenting), *cert. denied*, 136 S. Ct. 1166 (2016).

63. *Id.* at 411 n.6.

64. Social media usage is almost universal among teenagers, and a significant number of teenagers report listening to rap music. *See Pew Teen and Young Adult Internet Use*, PEW RES. CTR., http://www.pewresearch.org/millennials/teen-internet-use-graphic/ (last visited Feb. 22, 2017), (stating ninety-three percent of teenagers between the ages of 12 to 17 use social media websites every day and forty-one percent of teenagers often listen to rap).

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

66. *Id.*

67. *Id.* at 384. Other lyrics of concern to the Fifth Circuit included: "[B]etta watch your back / I'm a serve this nigga, like I serve the junkies with some crack" and "Run up on T-Bizzle / I'm going to hit you with my [R]ueger." *Id.*

68. The specific instances mentioned in the song are: "Rubbing on the black girls[']ears in the gym . . . Heard you textin[']number 25 / [Y]ou want to get it on[,]" and "OMG / Took some girls in the locker room in PE[.]" *Id.*

69. *Id.* at 385.

70. *Id.* at 386.

students would listen to it."[71] The board upheld Bell's suspension.[72]

Subsequently, Bell filed suit in the United States District Court for the Northern District of Mississippi, alleging school administrators had violated his First Amendment right to free speech.[73] On March 15, 2012, the district court granted summary judgment against Bell, holding that the rap recording amounted to "'harassment and intimidation of teachers and possible threats against teachers' and 'threatened, harassed, and intimidated school employees.'"[74] Applying *Tinker*, the district court determined the rap "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."[75]

On appeal, a panel of three Fifth Circuit judges reversed the decision of the lower court and held the school board violated Bell's right to free speech.[76] The panel rejected the lower court's notion that the *Tinker*'s substantial disruption standard could be applied to off-campus expression and characterized the Supreme Court's more modern modifications to *Tinker*'s scope as narrow exceptions inapplicable to Bell's circumstances.[77] Even if the *Tinker* test were proper, the panel reasoned, no substantial disruption to the campus could be forecasted since the board's only evidence was a blanket policy of classifying all perceived threats as severe disruptions.[78] In its conclusion, the panel qualified that its holding was not that "the *Tinker* 'substantial disruption' test can be applied to a student's rap song that he composed, recorded and posted on the Internet while he was off campus during non-school hours[,]"[79] but rather that even if *Tinker* were applicable in Bell's case, the school board would be unable to prevail using a substantial disruption standard due to a lack of evidence.[80]

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71. *Id.*

72. *Id.*

73. Bell v. Itawamba Cty. Sch. Bd., 859 F. Supp. 2d 834, 836 (N.D. Miss 2012), *aff'd & rev'd*, 799 F.3d 379 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016).

74. *Id.* at 840.

75. *Id.*

76. Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 304 (5th Cir. 2014), *reh'g en banc granted*, 782 F.3d 712 (5th Cir. 2015), *aff'd on reh'g*, 799 F.3d 379 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016); ASSOCIATED PRESS, *Miss. Student Wins Challenge to Rap Song Suspension*, CLARION-LEDGER (Dec. 12, 2014, 4:38 PM), http://www.clarionledger.com/story/news/2014/12/12/miss-student-wins-challenge-to-rap-song-suspension/20317175/.

77. *Bell*, 774 F.3d at 293, 296–97.

78. *Id.* at 297.

79. *Id.* at 304.

80. *See id.* (concluding *Tinker* was not a viable defense for the school board's violation of Bell's First Amendment Rights since there was no evidence of a substantial disruption or a reasonably forecasted substantial disruption); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503,

In the summer of 2015 the Fifth Circuit, sitting en banc, affirmed the district court's summary judgment against Bell.[81] The court dismissed the idea of school authority ending at the schoolhouse gate in an age of "the Internet, cellphones, smartphones, and digital social media" and opted to join a number of other courts of appeals in analyzing Bell's case under the *Tinker* framework.[82] As a public policy basis for applying *Tinker*, the court pointed to escalations in school violence, advising schools to stay "vigilant and take seriously any statements by students resembling threats of violence."[83] With *Tinker* in mind, the court concluded school officials could reasonably forecast a substantial disruption from Bell's "incredibly profane and vulgar rap recording."[84] The court emphasized the inappropriate nature of Bell's speech and declared: "If there is to be education, such conduct cannot be permitted."[85]

IV. THE FIFTH CIRCUIT AMPLIFIES THE NEED FOR SUPREME COURT GUIDANCE

Bell expanded school authority to censor student expression, even at the expense of First Amendment rights. Through its ruling against Taylor Bell, the Fifth Circuit "broadly proclaims that a public school board is constitutionally empowered to punish a student whistleblower for his purely off-campus Internet speech publicizing a matter of public concern."[86] The court widened the scope of the *Tinker* test to apply *Tinker* in a way contrary to the spirit of the 1969 victory for student speech rights.[87] Moreover, even analyzing *Bell* under *Tinker*, the majority is misguided in assuming school officials could have reasonably forecasted any substantial disruption to the school environment by Bell's speech. Rather than offering clarity in an already-muddled area of constitutional law, the Fifth Circuit's decision

511 (1969).

81. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015) (en banc), *aff'g* 774 F.3d 280 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 1166 (2016).

82. *Id.* at 391, 394.

83. *Id.* at 393 (citing Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771 (5th Cir. 2007)). The Fifth Circuit's concern is not without merit. *See Despite Increased Security, School Shootings Continue*, PBS NEWSHOUR (Feb. 2, 2014 11:52 AM), http://www.pbs.org/newshour/rundown/despite-increased-security-school-shootings-continue/ (reporting continued gun violence in schools despite an overall increase in security efforts).

84. *Bell*, 799 F.3d at 384, 398.

85. *Id.* at 399.

86. *Id.* at 403 (Dennis, J., dissenting).

87. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution.").

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exacerbates a conflict across the circuits and amplifies the need for a twenty-first century solution from the Supreme Court.

A. *The Fifth Circuit Expansion of* Tinker *and* Morse

At present, the Supreme Court has yet to extend *Tinker* to student speech occurring outside the school environment.[88] In devising the *Tinker* substantial disruption standard, the Court only acknowledged the ability of "school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct *in the schools*."[89] Indeed, a "student is free to speak his mind when the school day ends."[90] When students are away from school, the right to monitor student speech and conduct generally lies with parents and guardians, rather than school principals.[91] Even a student's insult of a teacher after the school day is over, for instance, could be immune from school discipline.[92]

While the Court's three more modern student speech cases altered the scope of *Tinker* to allow for greater school oversight under particular circumstances, none permit regulation of purely off-campus expression.[93] Justice Alito's concurrence in the most recent student speech case from the Court, *Morse*, even explains *Tinker* permits "*in-school speech* [to] be regulated by state actors in a way that would *not* be constitutional in other settings."[94] Regardless, in *Bell* the Fifth Circuit stretches the narrow *Morse* decision, a

88. *See* Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 152 (2009) (explaining "the Supreme Court has never indicated, either in *Tinker* or its subsequent cases, that a school district may apply the *Tinker* standard" to speech purely away from school premises); *see also* Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 10 (2014) ("Importantly, the Supreme Court has never said schools have authority over off-campus speech equivalent to that of on-campus speech.").

89. *Tinker*, 393 U.S. at 507 (emphasis added). When writing for the *Tinker* majority, Justice Abe Fortas explained the substantial disruption standard determines student speech rights "in light of the special characteristics of the *school environment*." *Id.* at 506 (emphasis added).

90. Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 (2d Cir. 1979).

91. *See* Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 110 (2010) ("Such extension of jurisdiction not only violates students' speech rights, it also violates parents' rights to raise their children as they believe proper." (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968))); *see also Ginsberg*, 390 U.S. at 639 ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

92. *See* Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986) (preventing school officials from disciplining a student for making a vulgar gesture toward a teacher while off school premises).

93. *See generally* Calvert, Tinker*'s Midlife Crisis*, *supra* note 34, at 1177, 1190 (2009) (asserting students still retain speech rights under *Tinker* despite continuous exceptions from the Supreme Court and lower courts' misuse of the substantial disruption standard).

94. Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (emphasis added).

case about a pro-marijuana banner at a school day event, to broadly encompass school power over all "grave and unique threats to the physical safety of students."[95] When deciding *Morse*, the Court "was not giving schools carte blanche to regulate student speech."[96]

Bell's rap is factually distinguishable from any student speech case ever considered by the Court. First, the rap occurred off-campus.[97] Additionally, the rap was not lewd speech at a school assembly, a controversial article in a school-sponsored newspaper, or a pro-drug message at a school-sanctioned rally.[98] The Fifth Circuit "greatly and unnecessarily expands *Tinker* to the detriment of Bell's First Amendment rights."[99]

B. *An Unreasonable Forecast of Substantial Disruption*

Even if *Tinker* were applicable to off-campus student speech, Bell's suspension should not have been upheld due to the unreasonableness of the school board's forecast of substantial disruption.[100] Without a reasonable forecast of substantial disruption, "even provocative speech" must be

95. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 423 n.15 (5th Cir. 2015) (en banc) (Dennis, J., dissenting), *cert. denied*, 136 S. Ct. 1166 (2016). In 2007, the Fifth Circuit used *Morse* to permit regulation of violent student speech, but the student in question planned a mass school shooting, distinguishable from Bell's rap. Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 766 (5th Cir. 2007) (citing Morse v. Frederick, 551 U.S. 393 (2007)). The Fifth Circuit was criticized for its broad application of *Morse*. *See* Clay Calvert, *Misuse and Abuse of* Morse v. Frederick *by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1, 5 (2008) (disagreeing with the Fifth Circuit after it "ripped the narrow concurring opinion of Justices Alito and Kennedy from its factual moorings and took it for a judicial joyride down a slippery slope of censorship" in *Ponce*).

96. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008).

97. *Bell*, 799 F.3d at 383 (majority opinion).

98. *See Bell*, 799 F.3d at 434 (Prado, J., dissenting) (explaining Bell's conduct did not fall under any of the categories of speech previously considered by the Court).

99. *Id.* at 435 (Haynes, J., dissenting). Many commentators maintain the *Tinker* test should not be applied to purely off-campus forms of student expression. *See* Markey, *supra* note 88, at 150 (asserting students who create Internet speech independently from school activities or resources and without an impending threat should be protected by a rebuttable presumption that the speech cannot be disciplined); *see also* Susan B. Bendlin, *Far from the Classroom, the Cafeteria, and the Playing Field: Why Should the School's Disciplinary Arm Reach Speech Made in a Student's Bedroom?*, 48 WILLAMETTE L. REV. 195, 222 (2011) (rationalizing schools and courts should not apply *Tinker* to extend to off-campus messages on social media); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 430 (2011) ("When student speech occurs outside of school supervision, the speech should receive the same First Amendment protection as a non-student's speech.").

100. If courts are divided on the issue of when to apply *Tinker*, there is an even deeper lack of clarity in identifying what speech constitutes a substantial disruption. *See* Black, *supra* note 55, at 551 (noting the uncertainty around defining substantial disruptions). "It is apparent, however, that the standard of material and substantial disruption, when applied to off-campus speech, can be a difficult one for school administrators to meet." *Id.* at 531.

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tolerated by school officials.[101] Evidence[102] from Bell's disciplinary hearing showed "there was no commotion, boisterous conduct, interruption of classes, or any lack of order, discipline and decorum at the school, as a result of Bell's posting his song on the Internet."[103] Coach Wildmon indicated students appeared to "act normal" after Bell posted the rap.[104] As with the students who wore armbands in *Tinker*, the school showed "no indication that the work of the schools or any class was disrupted."[105] On the contrary, if any disruption occurred, it arrived as a result of the school board's actions since "most of the talk amongst students had not been about Bell's song but rather about his suspension and transfer to an alternative school."[106]

When assessing substantial disruption, the Fifth Circuit compared Bell's rap to another student's pseudo-Nazi notebook outlining plans for a mass school shooting.[107] A sardonic suggestion about the possibility of violence in a song, however, fails to come close to the same level of forecasted danger as diary entries planning a specific terroristic threat.[108] Bell had no history

101. John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 348 (1979).

102. On reviewing the school board's motion for summary judgment, the Fifth Circuit was required to view all evidence in the light most favorable to Bell. *See* Cooley v. Hous. Auth. of Slidell, 747 F.3d 295, 298 (5th Cir. 2014) (explaining standard of review on motion for summary judgment).

103. *Bell*, 799 F.3d at 429–30 (Dennis, J., dissenting). The Supreme Court, while not requiring proof of actual disruption, considered whether there was evidence of an actual disruption to the school environment when deciding *Tinker*. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (holding school officials lacked "actual or nascent" evidence of a disruption). Similarly, circuit courts have also evaluated evidence of actual disruptions. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 929 (3d Cir. 2011) (en banc) (concluding no substantial disruption could have been reasonably forecasted by school officials where no actual disruption aside from some "general rumblings" did occur). Five years after Tinker, the Fifth Circuit stated: "Disruption in fact is an important element for evaluating the reasonableness of a regulation screening or punishing student expression." Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 970 (5th Cir. 1972). Another relevant consideration for schools is whether the type of speech implicated has led to past disruptive incidents on the school premises. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 253 (3d Cir. 2002) (holding past school incidents arising from similar forms of speech to be a relevant factor in determining what speech can be disciplined).

104. *Bell*, 799 F.3d at 430.

105. *Tinker*, 393 U.S. at 508. In *Tinker*, the Court also stated a school's mere fear of students causing a disturbance was not enough to merit reasonableness and permit school abridgement of student speech. *See id.* (stating "undifferentiated fear or apprehension of disturbance is not enough" to limit student speech).

106. *Bell*, 799 F.3d at 430.

107. *Id.* at 391; *see also* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769 (5th Cir. 2007). The student in *Ponce* kept a notebook diary outlining the "author's" plans to lead a pseudo-Nazi group in committing a "[C]olumbine shooting" at his high school. *Id.* at 766.

108. *See J.S.* ex rel. *Snyder*, 650 F.3d at 930 (determining student's off-campus speech to be protected where no one at the school would have reasonably "taken it seriously" after considering the context); Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) (underscoring evaluation

of disciplinary concerns,[109] another factor in assessing danger.[110] In stark contrast to other cases where school officials feared a student's violent speech would cause a substantial disruption, school officials allowed Bell to return to classes pending his disciplinary hearing and never contacted law enforcement authorities.[111] Even Coach Rainey, one of the subjects of Bell's lyrics, felt the song was "just a rap."[112]

The Fifth Circuit determined Bell's rap was disruptive because it was threatening; but, if that were the case, the court could have followed its own precedent and the precedent of other circuits to examine the off-campus speech under the "true threat" standard instead of only applying *Tinker*.[113] True threats—"statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"—are not protected by the First Amendment.[114] In 2004, the Fifth Circuit determined a student's violent sketch drawn at home and later brought to school could not be evaluated under *Tinker* because it was off-campus speech, and the correct inquiry was

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of the student speaker's intent in communicating threatening language).

109. *See Bell*, 799 F.3d at 429 (Dennis, J., dissenting) ("Except for a single tardiness, Bell had an unblemished school conduct record.").

110. *See* Cuff *ex rel.* B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 114 (2d Cir. 2012) (upholding judgment for school officials who suspended a student for writing a violent essay after considering the student's disciplinary history and past indications of violent thoughts).

111. *See* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 991 (9th Cir. 2001) (referencing school officials' efforts to contact law enforcement about a student's violent off-campus speech); *see also Ponce*, 508 F.3d at 767 n.1 (mentioning the arrest of a student suspected of making a terroristic threat).

112. *Bell*, 799 F.3d at 430.

113. *See Porter*, 393 F.3d at 620 (holding student's off-campus speech did not rise to the level of a true threat); *see also* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 765 (8th Cir. 2011) (analyzing a student's threatening instant message under both a true threat standard and the *Tinker* test); Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat*, 33 VT. L. REV. 283, 306 (2008) (elaborating on courts' review of cyberspeech under true threat analysis); Allison Belnap, Comment, Tinker *at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech*, 2011 BYU L. REV. 501, 532 (2011) (asserting courts should assess threatening off-campus student speech under a true threat analysis).

114. Virginia v. Black, 538 U.S. 343, 359 (2003). Immediacy is a key element of a true threat. *See* Anna Boksenbaum, Comment, *Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era*, 8 N.Y.C. L. REV. 123, 156 (2008) ("True threat doctrine removes speech from the protection of the First Amendment when a statement is so frightening and immediate that it rises to the level of an actual physical threat."). The definition and scope of a true threat, however, are continuously up for debate. *See* Mary Margaret Roark, Elonis v. United States, *The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment Rights in the New Era of Communication*, 15 U. PITT. J. TECH. L. & POL'Y 197, 210 (2015) (underscoring the need for a subjective element in assessing true threats); Adrienne Scheffey, Note, *Devising Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After* Virginia v. Black, 69 U. MIAMI L. REV. 861, 875 (2015) (discussing the lack of clarity in the true threats standard as applied to social media).

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whether the sketch posed a true threat.[115] Conversely in *Bell*, the Fifth Circuit found it unnecessary to determine whether Bell's rap, which apparently never reached the school except when one of the coaches asked a student to play it,[116] was a true threat since any layperson could understand Bell's words to be threatening. As dissenting Judge Prado stated, however, "no reasonable juror could conclude that Bell's rap lyrics constituted a 'true threat.'"[117] Without evidence that Bell intended to carry out any kind of threat, the rap lyrics were no more disruptive than the black armbands protected by the Supreme Court in *Tinker*.[118] Nevertheless, the Fifth Circuit created a new category of unprotected speech by ruling "threat-like" language is subject to discipline.[119]

C. *Rapping on an Issue of Public Concern*

The Fifth Circuit also avoided Bell's role as a whistleblower speaking out on an issue affecting the public.[120] Bell's rap focused on the gravity of the sexual harassment and assault allegations against two faculty members, constituting a matter of great public concern to Itawamba Agricultural High School.[121] Speech on "any matter of political, social, or other concern to

115. *Porter*, 393 F.3d at 619. Notably, in *Porter* the Fifth Circuit emphasized *Tinker* applies to substantial disruptions in the form of "student speech *on the school premises*." *Id.* at 615 (emphasis added).

116. *Bell*, 799 F.3d at 430.

117. *Bell*, 799 F.3d at 435 (Prado, J., dissenting). The Court has specifically discussed the subjective intent component of true threats in the context of rap lyrics. In the summer of 2015, the Court reversed and remanded the criminal conviction of a man on trial for posting threatening rap lyrics to his Facebook account, holding the prosecution needed to demonstrate a subjective intent. Elonis v. United States, 135 S. Ct. 2001, 2012 (2015). Bell was never shown to have subjectively intended to threaten the Itawamba coaches.

118. *See* R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 715 (2009) (asserting students' "doubtful threats" are similar to the speech at issue in *Tinker* and should be protected). *But see* Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 603 (2011) [hereinafter Waldman, *Badmouthing Authority*] (noting courts' tendencies to support school restrictions of "doubtful threats" made by students).

119. *See Bell*, 799 F.3d at 421 (Dennis, J., dissenting) (mentioning the Fifth Circuit majority's creation of a new variation of unprotected student speech).

120. *See id.* at 404 (criticizing the majority for failing to acknowledge Bell spoke on an issue of public concern).

121. *See id.* at 410 (providing Bell's remarks on why he chose to create the rap song). Student speech on issues affecting the community should be accorded "public concern" deference. *See* R. George Wright, Tinker *and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105, 116 (2008) (noting student speech may raise a matter of public concern); Sam Winston, Comment, *From Bullying to Purely Political Speech: Updating the Supreme Court's Student Speech Jurisprudence with a Substantial Harm Rule*, 58 LOY. L. REV. 415, 443 (2012) (proposing student speech on matters of public concern should not be within the purview of school authority). Uninhibited speech of students commonly helps hold schools accountable and provides a check on what could otherwise be limitless school

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the community" is "entitled to special protection."[122] As vulgar as the school board members may have personally found Bell's language, the rap nevertheless served as an "impassioned protest of two teachers' sexual misconduct."[123] The Fifth Circuit noted, even before *Tinker*, "school officials cannot ignore expressions or feelings with which they do not wish to contend."[124] Despite the fact that four female students came forward with affidavits supporting the allegations,[125] and another Itawamba coach[126] had been arrested for sexual offenses just a year before Bell's rap, school officials "never attempted to argue that Bell's song stated any facts falsely."[127] As dissenting Judge Dennis wrote, the majority opinion "faults Bell for his efforts to publicize the teachers' sexual misconduct, thus creating precedent that contravenes the very values that the First Amendment seeks to protect."[128]

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authority. *See* Tyll van Geere, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 245 (1983) ("[T]he student's free speech rights serve to restrain what might otherwise be the overweening official voice of the school."); David R. Wheeler, *Do Students Still Have Free Speech in Schools?*, ATLANTIC (Apr. 7, 2014), http://www.theatlantic.com/education/archive/2014/04/do-students-still-have-free-speech-in-school/360266/ (describing incidents where student whistleblowers brought problems in schools to public light). *But see* Tracy L. Adamovich, Note, *Return to Sender: Off-Campus Student Speech Brought On-Campus by Another Student*, 82 ST. JOHN'S L. REV. 1087, 1106 (2008) (qualifying student speech restricted only to "private grievances" should not be considered speech on issues of public concern).

122. Carey v. Brown, 447 U.S. 455, 467 (1980); *see* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 766 (1978) (holding speech on matters of public concern to be "at the heart" of the First Amendment); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 667 (describing constitutional protections for speech on matters of public concern); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 1 (1990) (outlining the importance of speech on matters of public concern). *See, e.g.*, Settlegood v. Portland Pub. Schs., 371 F.3d 503, 516 (9th Cir. 2004) (protecting First Amendment rights of teacher who acted as whistleblower in speaking about issues of public concern at school).

123. *Bell*, 799 F.3d at 409.

124. Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). The pre-*Tinker* Fifth Circuit also maintained schools must not be permitted to interfere with "students' right to free and unrestricted expression as guarantee[d] to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and school rooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* Commentators believe this 1966 standard from the Fifth Circuit served as the inspiration for the *Tinker* test. *See generally Bowman*, *supra* note 7 (connecting *Tinker* with the standard promulgated by the Fifth Circuit in *Burnside*).

125. *Bell*, 799 F.3d at 411.

126. In his rap, Bell called Coaches Rainey and Wildmon "Bobby Hill the second," a reference to a coach arrested for sending sexually explicit messages to a student in 2009. *Id.* at 409.

127. *Id.* at 411.

128. The affidavits included a statement from one student about how a coach "rubbed her ears without her permission[,]" another relayed how a coach told her she was "one of the cutest black females at Itawamba[,]" and still another stated a coach suggested how he would set her "back straight from being gay." *Bell*, 799 F.3d at 409 n.3. School students, like Bell, can often be in an ideal position

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Constitutional protection of Bell's off-campus expression is not diluted because the selected medium for the message was a provocative rap song.[129] A number of prominent rap artists have asserted in "taking Bell's song lyrics literally rather than as forms of artistic expression, both the school and the Fifth Circuit essentially delegitimized rap as an art form that is entitled to full protection under the Constitution."[130] Rather than conveying actual threats to the coaches, Bell's lyrics follow a conventional device of implying metaphorical, not literal, violence in an exaggerated style common to the rap music genre.[131] Similarly in other music genres, no one suspected the Dixie Chicks of plotting to murder a man named Earl because of a well-known country music song,[132] took Bob Marley lyrics as the literal

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to serve as dissenters against such misconduct or abuses of authority by officials in public schools, and should be protected from retaliation. *See* Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U. L. REV. 253, 282 (2012) (asserting students can and should serve as "citizen-critics" afforded constitutional protection). Free and open student expression is an integral part of the American education system, as "a central theme of democratic education is to cultivate tolerance for dissent and differing views within the realm of nondisruptive or nonharmful ideas." Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269, 1329 (1991). Furthermore, dissent in the form of "speaking truth to power" is a critical aim of the First Amendment. *See* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1747 (2005) (illustrating the nature of dissent by speaking against official authority).

129. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (emphasizing provocative speech must nonetheless be protected). The black armbands at issue in *Tinker* were similarly considered a provocative medium for speech by Des Moines school officials at the time of the Vietnam protests. *See* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 132 n.43 (1982) (referencing contemporary schools' view that the armbands at issue in *Tinker* were provocative). A school's level of tolerance for provocative speech can be an indicator of educational commitment. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1051 (2d Cir. 1979) (asserting "whether a school condemns or tolerates indecent language within its sphere of authority" can impact the educational success of the school and the student body); Roe, *supra* note 128, at 1329 (discussing the benefits of controversial speech in education).

130. Brief for Erik Nielsen, *supra* note 1, at 5; *see* Cristian Farias, *The Supreme Court Is Cray if It Doesn't Listen to Killer Mike*, HUFFINGTON POST (Dec. 23, 2015, 5:23 PM), http://www.huffingtonpost.com/entry/supreme-court-rap-killer-mike_567a9ecde4b014efe0d78d88 (agreeing with rap artists' concern that "music may wrongly be associated with a person's character" in the context of the *Bell* case).

131. *See* Dennis, *supra* note 1, at 14 (explaining how rap "lyrics may employ metaphor, exaggeration, and other artistic devices"); Gilad Edelman, *Killer Mike's Supreme Court Brief*, NEW YORKER (Dec. 28, 2015), http://www.newyorker.com/news/news-desk/killer-mikes-supreme-court-brief (characterizing rap music as "crime fiction" and musing rap artist Jay-Z likely did not fear for his life following a threatening reference in a rival rapper's "diss track"); Scott L. Sternberg, *Outside the Schoolhouse Gate: The Limits of* Tinker v. Des Moines Independent Community School District, COMM. LAW., Fall 2014, at 20, 20 (2014) (noting rap artist Eminem used "a rhetorical hyperbole" with violent lyrics about a prominent politician and was not prosecuted). Similarly, one of the rap artists supporting Bell goes by the stage name "Killer Mike," but "has never actually killed anyone." Brief for Erik Nielsen, *supra* note 1, at 2.

132. *See* THE DIXIE CHICKS, *Goodbye Earl*, *on* FLY (Monument Records 2000) (relaying the

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admission to the shooting of a local sheriff,[133] or investigated Johnny Cash's musical confession that he "shot a man in Reno just to watch him die."[134] Here, however, Bell's expression came in the form of a rap song and the school district followed a history of official suspicion surrounding the genre.[135] The Fifth Circuit may have found Bell's rap distasteful, but as Justice John Marshall Harlan II once wrote, "[O]ne man's vulgarity is another man's lyric."[136] By declining to consider whether Bell's lyrics could be anything but literal, the Fifth Circuit discounted the artistic expression inherent in rap music to the detriment of the First Amendment.[137]

Bell constitutes an expansion of school authority at the expense of student

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fictional story of how two women killed an abusive husband).

133. *See* THE WAILERS, *I Shot the Sheriff, on* BURNIN' (Island Records 1973) (narrating a young outlaw's account of shooting a law enforcement official); Brief for Erik Nielsen, *supra* note 1, at 2 (connecting the song with violent lyrics in rap music).

134. JOHNNY CASH, *Folsom Prison Blues, on* WITH HIS HOT AND BLUE GUITAR, (Sun Records 1955). The counterargument, of course, is that these artists sang about hypothetical targets, as opposed to Bell's explicit reference to the Itawamba coaches. Eugene Volokh, *What If a Young Johnny Cash Sang 'I Shot a Man in Reno' Right After a Bitter Argument with a High School Coach Who Was Going to Reno?*, WASH. POST. (Jan. 8, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/08/what-if-a-young-johnny-cash-sang-i-shot-a-man-in-reno-right-after-a-bitter-argument-with-a-high-school-coach-who-was-going-to-reno/.

135. *See* Michael Render & Erik Nielsen, *Rap Lyrics Are Fiction – But Prosecutors Are Treating Them like Admissions of Guilt*, VOX (Mar. 26, 2015), http://www.vox.com/2015/3/26/8291871/rap-lyrics-mac-phipps (noting "when it comes to rap, many people fail to recognize the fundamental distinction between artist and art, author and narrator, making it all too easy to assume that gangsta rappers are the criminals they portray in their rhymes"); Leola Johnson, *Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 TEMP. POL. & CIV. RTS. L. REV. 25, 25 (1994) (describing early censorship and distrust of rap music). *But see* Clay Calvert, Emma Morehart and Sarah Papadelias, *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 COLUMB. J.L. & ARTS 1, 24 (2014) ("This is not, of course, to say that simply because a message takes the form of a rap that it never constitutes a true threat or that writers of a rap are immunized from criminal threats prosecution."). Rather, "[c]ontextual information", such as "aspects of a defendant's background" should be weighed when determining whether a threat is viable. United States v. Parr, 545 F.3d 491, 502 (7th Cir. 2008); *see, e.g.*, Jones v. State, 347 Ark. 409, 415 (Ark. 2002) (holding rap lyrics constituted a true threat where a rapper had criminal history).

136. Cohen v. California, 403 U.S. 15, 25 (1971); *see* Torris v. Hebert, 111 F. Supp. 2d 806, 810 (W.D. La. 2000) (deeming the rap music at issue "disgusting and offensive" but nonetheless extending First Amendment protection). The Supreme Court's vulgarity exception to student speech was a limited one, primarily applicable during a school-sponsored event where other students had to listen to the speaker. *See* Morse v. Frederick, 551 U.S. 393, 405 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."); Valerie Schmidt, Note, *Dirty T-Shirt Trends, Pure Speech and the Law*, 23 ST. JOHN'S J. LEGAL COMMENT. 355, 371 (2008) (addressing the limitations of the *Fraser* Court's holding on vulgar student speech).

137. *See* Brief for Erik Nielsen, *supra* note 1, at 5 (challenging the Fifth Circuit's misinterpretation of Bell's rap); *see also* Jason Powell, Note, *R.A.P., Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 480 (2009) (observing even though "hip-hop is now a well-recognized and accepted genus of music, it is mostly a foreign language to courts").

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speech rights. In opting to apply *Tinker* to Bell's purely off-campus expression, the majority opinion "obliterates the historically significant distinction between the household and the schoolyard" and extends "schools' censorial authority from the campus and the teacher's classroom to the home and the child's bedroom."[138] Even applying *Tinker*, the school officials' evidence never justified a reasonable forecast of substantial disruption.[139] Ultimately, the Fifth Circuit's decision goes about "teaching Bell that the First Amendment does not protect students who challenge those in power."[140] The decision amplifies the need for Supreme Court review of the implicated issues.

V. AN OPPORTUNITY FOR THE TWENTY-FIRST CENTURY

A. *Students and Schools Need a Supreme Court Solution*

Following the Fifth Circuit's decision, Taylor Bell petitioned for a writ of certiorari to the Supreme Court, joined by a number of high-profile supporters from the rap music industry.[141] As of early 2016, the Fifth Circuit's fractured *Bell* opinion was poised to serve as the most viable vehicle for the Court to at last settle the issue of "when, if ever, public secondary schools should have the power to restrict student expression that does not occur on school grounds during school hours."[142] Clashing

138. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 404 (5th Cir. 2015) (en banc) (Dennis, J., dissenting), *cert. denied*, 136 S. Ct. 1166 (2016); *see* Bendlin, *supra* note 99, at 241 (asserting *Tinker* should not be extended to apply to off-campus speech and situations).

139. Courts and scholars alike have recognized the weight of school officials' burden of proof to be significant for satisfaction of the *Tinker* test. *See* Curry *ex rel.* Curry v. Hensiner, 513 F.3d 570, 578 (6th Cir. 2008) (describing the *Tinker* test as a "high standard"); Chemerinsky, *What's Left of* Tinker*?*, *supra* note 13, at 533 (articulating the Court's desire to create a "heavy burden" for schools to meet). *But see* A.M. *ex rel.* McAllum v. Cash, 585 F.3d 214, 222 (5th Cir. 2009) (holding school officials do not have a high burden to satisfy in proscribing student speech); Patricia Anne Hamilton, *Freedom of Expression in Public Schools: Regulation of Student Newspapers and Other Publications*, 18 CUMB. L. REV. 181, 201 (1987) (asserting a typical circuit court "simply imposes a heavier burden on the side it disfavors" to reach particular judgments).

140. *Bell*, 799 F.3d at 432.

141. *See* Adam Liptak, *Hip Hop Stars Support Mississippi Rapper in First Amendment Case*, N.Y. TIMES (Dec. 21, 2015), http://www.nytimes.com/2015/12/21/us/politics/hip-hop-stars-support-mississippi-rapper-in-first-amendment-case.html?_r=0 (reporting the same) ("The rappers urged the justices to hear an appeal from Taylor Bell . . . ."); Daniel Kreps, *Killer Mike, T.I., Big Boi Brief Supreme Court in First Amendment Case*, ROLLING STONE (Dec. 21, 2015), http://www.rollingstone.com/music/news/killer-mike-t-i-big-boi-brief-supreme-court-in-first-amendment-case-20151221 (naming various rappers who supported Taylor Bell).

142. Papandrea, *Student Speech Rights*, *supra* note 49, at 1029. Taylor Bell asks the Supreme Court to consider "whether and to what extent public schools, consistent with the First Amendment, may discipline students for their off-campus speech." Petition for Writ of Certiorari at (i), Bell v. Itawamba

decisions by lower courts about the applicability of the *Tinker* substantial disruption test to off-campus student speech, in conjunction with the Fifth Circuit's *Bell* opinion, amplified the necessity for the Court's guidance.[143] On February 29, 2016, however, the eight-member Court denied review.[144]

Bell joins an "explosion of student speech cases."[145] Because "lower courts have not spoken with a unified voice"[146] on the issue of off-campus speech, schools and students are both left without clues as to how to proceed within the law.[147] Even since Bell rapped about the Itawamba coaches in 2010, litigation surrounding student online speech has continued to surface.[148] In light of the conflicting standards for student speech across the circuit courts, current "lack of guidance leaves schools in limbo, fearful of overstepping their boundaries, or not acting in time to prevent student harm."[149] Absent clear authority from the Court, schools may attempt to devise constitutionally overbroad policies monitoring student speech away from school.[150] By the same token, students are now at a loss for what they

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Cty. Sch. Bd., 136 S. Ct. 1166 (2016) (No. 15-666).

143. *See* Tomain, *supra* note 91, at 110 (characterizing student speech as "ripe" for a Supreme Court decision); Goldman, *supra* note 99, at 396 (noting the "plethora" of inconsistent lower court decisions attributable to lack of guidance from the Supreme Court); Lisa Smith-Butler, *Walking the Regulatory Tightrope: Balancing Bullies' Free Speech Rights Against the Rights of Victims to Be Let Alone When Regulating Off-Campus K-12 Student Cyber-Speech*, 37 NOVA L. REV. 243, 299 (2013) (providing examples of the confusion surrounding online student speech). *See generally* Bryan Starrett, Tinker*'s Facebook Profile: A New Test for Protecting Student Cyber Speech*, 14 VA. J.L. & TECH. 212 (2009) (describing the inconsistencies among the circuits in attempting to apply student speech jurisprudence to the Internet without direction from the Supreme Court).

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

145. Waldman, *Badmouthing Authority*, *supra* note 118, at 617.

146. Martha McCarthy, *Cyberbullying Laws and First Amendment Rulings: Can They Be Reconciled?*, 83 MISS. L.J. 805, 806 (2014) [hereinafter McCarthy, *Cyberbullying Laws*].

147. *See* Clay Calvert, *Punishing School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 220 (2009) [hereinafter Calvert, *Punishing School Students*] (describing how "school districts simply do not know what to do" in the absence of a Supreme Court decision on student cyberspeech).

148. *See, e.g.*, Bradford v. Norwich City Sch. Dist., 54 F. Supp. 3d 177, 185 (N.D.N.Y. 2014) (assessing First Amendment implications of school discipline for student text messages sent away from school); S.N.B. v. Pearland Ind. Sch. Dist., No. 3:13-CV-441, 2014 WL 2207864, at *1 (S.D. Tex. May 28, 2014) (upholding student suspension in online bullying case); Nixon v. Hardin Cty. Bd. of Educ., 988 F. Supp. 2d 826, 839 (W.D. Tenn. 2013) (mentioning the need to "rely on decisions from other circuits" in assessing online student speech).

149. Catherine E. Mendola, Note, *Big Brother as Parent: Using Surveillance to Patrol Students' Internet Speech*, 35 B.C. J.L. & SOC. JUST. 153, 181 (2015).

150. *See* Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 706 (W.D. Pa.) (striking down a school's student conduct policy as overbroad because it lacked geographical limitations); *see also* Michael Martinez, *California School District Hires Firm to Monitor Students' Social Media*, CNN (Sept. 18, 2013, 10:40 AM), http://www.cnn.com/2013/09/14/us/california-schools-monitor-social-media/

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have the right to say online.[151] The Supreme Court envisioned *Tinker* as a safeguard for the right of student speech, with only the most particular of circumstances scaling that right back over the past few decades.[152] Without an express ruling from the Court, courts are left to their own devices in determining how to apply the 1969 framework to the twenty-first century.[153] Students and schools alike can only "hope that the Supreme Court will soon give courts the necessary guidance to resolve these difficult cases."[154]

Social media and school violence merit some alteration to *Tinker* by the Court to adapt to the realities of modern public education.[155] The schoolhouse gate can no longer always be defined by geography.[156]

(reporting how a school district hired outside investigators to monitor students' social media accounts); Clay Calvert, *Punishing School Students*, *supra* note 147, at 220 (detailing an increase in overly broad school policies punishing student online speech).

151. *See* Brief for The Marion B. Brechner First Amendment Project As Amicus Curiae Supporting Petitioner at 4, Bell v. Itawamba Cty. Sch. Bd., 136 S. Ct. 1166 (2016) (No. 15-666) (noting the lack of fairness to the school students due to unclear court decisions).

152. *See* Martha McCarthy, *Student Expression Rights*, *supra* note 15, at 15 (naming *Tinker* the "magna carta" of student speech rights).

153. *See* James B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the* Tinker *Decision*, 58 AM. U. L. REV. 1193, 1207 (2009) (noting *Tinker* is "still good law" and continues to serve as the applicable framework for student speech cases).

154. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 433 (5th Cir. 2015) (en banc) (Prado, J., dissenting), *cert. denied*, 136 S. Ct. 1166 (2016).

155. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069 n.6 (9th Cir. 2013) ("Since the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newton and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights."). In the aftermath of school violence tragedies, courts commonly uphold schools' ability to prevent violence even in seemingly innocuous contexts. *See, e.g.*, Cuff *ex rel* B.C. v. Valley Cent. Sch. Dist., 677 F.d 109, 113 (2d Cir. 2012) (upholding the suspension of a ten year-old boy for drawing a picture of missiles targeting his elementary school as part of a creative art assignment). As the Ninth Circuit notes, however, school violence has only become more pronounced since Columbine. *See Wynar*, 728 F.3d at 1069 n.6 ("Since [Columbine] there have been two even deadlier shootings: at Virginia Tech and at Sandy Hook Elementary School."). Some commentators have expressed concern about the constitutionality of measures to enhance school security. *See* William Bird, *Constitutional Law—True Threat Doctrine and Public School Speech—An Expansive View of a School's Authority to Discipline Allegedly Threatening Student Speech Arising Off Campus*, 26 U. ARK. LITTLE ROCK. L. Rev. 111, 111 (2003) (discussing a rise in punishments for student speech perceived as threatening and cautioning schools' increased scrutiny may be unconstitutional).

156. *See* Anika Hermann Bargfrede, Note, *Demolishing the Schoolhouse Gate:* Tinkering *with the Constitutional Boundaries of Punishing Off-Campus Student Speech*, 2015 U. ILL. L. REV. 1645, 1679 (2015) (commenting on the disappearance of the schoolhouse gate); McCarthy, *Cyberbullying Laws*, *supra* note 146, at 827 (explaining how "school districts increasingly are offering online courses" and transforming the definition of on-campus speech). The First Amendment does not protect an individual's right to shout fire in a crowded theater; similarly, "no one supposes that the rule would be different if the man were standing outside the theater, shouting in." Layshock *ex rel.* Layshock v. Hermitage Sch. Dist.,

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Students speak through Facebook, Twitter, Instagram, Snapchat and YouTube, rather than the underground newspapers of days past; as a result, student speech proliferates at a pace the Court could have never foreseen in 1969.[157] Tragically, the epidemic of gun violence in public schools has similarly become more present in the public mind over the past decade.[158] In an environment where early detection of warning signs could help save lives,[159] schools should not be barred from disciplining a student for speech, on or off the school premises, warning of a mass school shooting or some other form of identifiable violence to the school environment.[160]

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650 F.3d 205, 221–22 (3d Cir. 2011) (en banc) (Jordan, J., concurring).

157. According to the Pew Research Center's findings, 92% of teenagers are online every day and 71% of teenagers use multiple social media outlets, the most commonly used website being Facebook with use by 71% of teenagers. 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/.

158. *See* Valerie Strauss, *How Mass Shootings Are Changing America's Schools*, WASH. POST (Dec. 9, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/09/how-mass-shootings-are-changing-americas-schools/; Mike Brunker & Polly Defrank, *Since Sandy Hook, an American Kid Has Died by a Gun Every Other Day*, NBC NEWS (Dec. 14, 2015, 5:01 AM), http://www.nbcnews.com/news/us-news/sandy-hook-american-kid-has-died-gun-every-other-day-n478746 (reporting on gun violence affecting American youth in the aftermath of school shootings); Malcolm Gladwell, *Thresholds of Violence*, NEW YORKER (Oct. 19, 2015), http://www.newyorker.com/magazine/2015/10/19/thresholds-of-violence (noting "more than a hundred and forty school shootings" have occurred in the United States since the Sandy Hook shooting in 2012). As the trend of school violence rose, school discipline for non-violent acts increased in the year immediately following Columbine. Kathryn E. McIntyre, Note, *Hysteria Trumps First Amendment: Balancing Student Speech with School Safety*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 39, 42 n.19 (2002). In the absence of guidance from the Court, commentators have cautioned schools that restraint may have to be the school disciplinarian's best legal option in some cases. *Cf.* Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 163 (2000) (cautioning schools to "think carefully" about restricting students' off-campus online speech before taking disciplinary action).

159. *See* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001) (noting the questions around how principals and teachers could have missed "telltale 'warning signs'" following school shootings); Katherine Newman, *In School Shootings, Patterns and Warning Signs*, CNN (Dec. 17, 2012, 11:35 AM), http://www.cnn.com/2012/12/17/opinion/newman-school-shooters/ (discussing the search for "warning signs" in potential school shooters). *But see* Boksenbaum, *supra* note 114, at 1578 ("Violent artwork and writing should not be deemed warning signs, as art is a particularly unreliable indicator of future violence and is fundamental to students' rights to creative expression.").

160. *See* Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1243 (2003) ("Students need to be able to go to school and feel safe to receive the full benefit of their education."). More than an aspirational goal, some believe schools to have an affirmative duty to keep students safe. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 (5th Cir. 1982) (noting schools have "both a right and a duty to provide a safe environment" for students); Alison Bethel, Comment, *Keeping Students Safe: Why Schools Should Have an Affirmative Duty to Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183, 185 (2004) (arguing for an affirmative duty on schools to provide a safe environment for students); Scott Farbish, Note, *Sending the Principal to the Warden's Office: Holding School Officials Criminally Liable for Failing to Report*

An updated form of the *Tinker* test could sufficiently provide for such discipline, but that determination will ultimately rest with the Court.[161]

B. *A Modified* Tinker *Proposal*

Any new standard for student speech "should ensure that public school students not only retain their constitutional rights at the schoolhouse gate but also on computers, cell phones or other forms of electronic communication when they are out of school."[162] On the other end of the spectrum, administrators should "have the authority to restrict student-authored threatening speech" endangering the school environment.[163] Cyberbullying, for example, has led to tragedies that could have been prevented through clearer school authority.[164] One rational solution for

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Cyberbullying, 18 CARDOZO J.L. & GENDER 109, 139 (2011) (calling for harsher penalties to school officials for failure to provide a safe environment for students). *But see* Rebecca Orel, Note, *Making It Better Now: How Advocates Can and Should Use a Critical Period for LGBT Youth to Create Sustainable Change*, 44 COLUM. HUM. RTS. L. REV. 577, 583 (2013) (noting most courts do not recognize an affirmative duty on schools to protect one student from another).

161. *See* Zande, *supra* note 50, at 136 (advocating for the application of *Tinker* to create a safer school environment for students in the context of online speech). *But see* Belnap, *supra* note 113, at 532 (noting the "inappropriate extension of power to government agents" by applying *Tinker* in off-campus situations).

162. Hudson, *supra* note 44, at 625.

163. Kathy Luttrell Garcia, *Poison Pens, Intimidating Icons, and Worrisome Websites: Off-Campus Student Speech that Challenges Both Campus Safety and First Amendment Jurisprudence*, 23 ST. THOMAS L. REV. 50, 88 (2010).

164. Tragedy struck San Antonio in January 2016, when Alamo Heights High School senior David Molak took his own life after "relentless cyberharassment from classmates at Alamo Heights." Express-News Editorial Board, *Cyberbullying, A Tragedy and So Many Questions*, SAN ANTONIO EXPRESS-NEWS (Jan. 15, 2016), http://www.mysanantonio.com/opinion/editorials/article/Cyberbullying-a-tragedy-and-so-many-questions-6759734.php. David Molak's passing sparked new conversation about the authority of school districts to prevent cyberbullying, as well as a push for Texas legislation that will "empower law enforcement and school administrators to go after and punish the bullies who prey on students." Melissa Fletcher Stoeltje, *San Antonio Senator Says He'll File 'David's Law" Bill Targeting Cyberbullying after Teen's Suicide*, SAN ANTONIO EXPRESS-NEWS (Jan. 20, 2016), http://www.mysanantonio.com/news/local/article/Legislation-to-stop-cyberbullying-finds-a-sponsor-6769228.php. The proposed bill would implement criminal penalties for cyberbullying, and "require school districts to establish cyberbullying policies, develop a system to anonymously report bullying and threats, and collaborate with law enforcement agencies to investigate bullying off campus, if the case affects the school environment." Shonn Brown, *David's Law Could Offer Balancing Act for Schools, Chance for More Education*, TEX. LAW. (Nov. 30, 2016), http://www.texaslawyer.com/id=1202773475363/Davids-Law-Could-Offer-Balancing-Act-for-Schools-Chance-for-More-Education. In 2013, 14.8% of young people surveyed nationwide reported they had been electronically bullied. *United States, High School Youth Risk Behavior Survey, 2013*, CTRS FOR DISEASE CONTROL & PREVENTION https://nccd.cdc.gov/youthonline/App/Results.aspx?LID=XX (last visited Feb. 22, 2017). Given the fact that schools are not required to wait until actual disruption occurs, it is likely that school action against cyberbullying could satisfy the *Tinker* standard. Zande, *supra* note 50, at 134.

balancing student speech rights with the need to ensure safety in schools could be the Court's adoption of the modified *Tinker* standard articulated in Judge Graves' *Bell* dissenting opinion.[165] Under this modified test, *Tinker* would continue to serve as a safeguard for student expression as envisioned by the Court in 1969, "while also recognizing that school officials should have some ability, under very limited circumstances, to discipline students for off-campus speech."[166] Judge Graves' test incorporates the strongest elements of appellate courts' varying standards, namely "foreseeability and the speech's predominant message."[167] In effect, the test would preserve the need for evidence of a forecast of substantial disruption while also adapting a sufficient nexus prong as advocated by the Fourth Circuit.[168]

First, the proposed test essentially requires school officials to conduct a *Tinker* analysis and "provide evidence of facts which might reasonably have led school authorities to forecast a substantial disruption OR evidence of an actual, substantial disruption."[169] Second, school officials would have to "demonstrate a sufficient nexus" exists between the student's speech and the school's pedagogical interests in justifying discipline.[170] Factors to be considered in satisfying the sufficient nexus prong would include whether the speech might reasonably have been expected to arrive at the school environment,[171] whether the school's interest in protecting student wellbeing outweighs the respect for parental discipline[172] in off-campus

165. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 435 (5th Cir. 2015) (en banc) (Graves, J., dissenting), *cert. denied*, 136 S. Ct. 1166 (2016).

166. *Id.*

167. *Id.*

168. *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) (establishing a nexus standard in evaluating student speech); *see also* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 215 (3d Cir. 2011) (en banc) (dismissing school district's attempt to create a nexus in a student speech case)

169. *Bell*, 799 F.3d at 436.

170. *Id.* at 435–36. Commentators frequently advocate for the implementation of such a nexus standard in the student speech doctrine. *See* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 660 (2011) (promoting schools' use of a nexus standard in drafting and implementing anti-bullying policies); Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV. 1563, 1583 (2009) (characterizing a nexus standard as more protective of student speech rights than application of *Tinker*); Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 CASE W. RES. L. REV. 63, 112 (2014) (encouraging implementation of the "helpful" nexus test as created by the Fourth Circuit).

171. *See* Jon. G. Crawford, *When Student Off-Campus Cyberspeech Permeates the Schoolhouse Gate: Are There Limits to* Tinker*'s Reach?* 45 URB. LAW. 235, 254 (2013) (including the question of whether a student's off-campus speech would reach the school premises as an element for officials to consider).

172. *See* New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (holding school officials do not act as

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matters, and whether the student's predominant message is afforded a heightened level of constitutional protection.[173] Judge Graves' test is an effective proposal because it maintains courts' historic, and now widespread,[174] reliance on *Tinker* while incorporating elements of the nexus test from the Third Circuit. The test recognizes that with the rise of the Internet, off-campus expression also has the possibility of creating substantial disruptions to the school environment, but the school district must be able to build its case for an abridgement of speech according to the factors commonly found relevant by circuit courts.

In application, Judge Graves' test would differentiate Taylor Bell's rap from other situations requiring discipline.[175] A student's Facebook post or Tweet threatening an identifiable form of school violence would not be protected speech. First, speech about planned, identifiable violence at school would provide officials with the evidence necessary to reasonably forecast a substantial disruption to the school environment. Second, a sufficient nexus would be present between the student's speech and the school's interests justifying discipline, as evident by the need to protect other students and faculty members and the lack of special protections for the speaker's purely violent predominant message.[176]

On the contrary, as Judge Graves notes, disciplinary action against Bell would not survive the modified test and would constitute an impermissible

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surrogates for students' parents); Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. the Right to Be Let Alone in the Context of Off-Campus "Cyberbullying"*, 81 MISS. L.J. 189, 203 (2011) (discussing the rights of parents in bringing up their children); Jocelyn Ho, Note, *Bullied to Death: Cyberbullying and Student Online Speech Rights*, 64 FLA. L. REV. 789, 814 (2012) (suggesting parental control as one method of stopping unwelcome off-campus student speech in the context of cyberbullying).

173. *Bell*, 799 F.3d at 435; *see, e.g.*, Hans Bader, *Bong Hits 4 Jesus, The First Amendment Takes a Hit*, 2007 CATO SUP. CT. REV. 133, 163 (2007) ("The Supreme Court frequently exempts speech on matters of public concern from regulations that prohibit speech of lesser importance, recognizing that state interests that are strong enough to justify restricting ordinary speech may be inadequate to justify restricting public debate or core political speech.").

174. *See Bell*, 799 F.3d at 393 (majority opinion) (noting six circuit courts support the extension of *Tinker* to some form of off-campus speech). *But see* Morse v. Frederick, 551 U.S. 393, 422 (2007) (Thomas, J., concurring) ("I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so."); R. George Wright, *Post-*Tinker, 10 STAN. J. C.R. & C.L. 1, 25 (2014) (advising the abolition of the *Tinker* test); William C. Nevin, *Neither* Tinker, *Nor* Hazelwood, *Nor* Fraser, *Nor* Morse*: Why Violent Student Assignments Represent a Unique First Amendment Challenge*, 23 WM. & MARY BILL RTS. J. 785, 851 (2015) (advocating for schools to turn to other standards than *Tinker* for particular forms of speech).

175. *Bell*, 799 F.3d at 436 (Graves, J., dissenting).

176. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1069–70 (9th Cir. 2013) (holding a nexus between off-campus speech and the school was present where a student with "confirmed access to weapons" sent instant messages threatening a planned school shooting and other students contacted school authorities).

incursion on protected speech.[177] Given the expressive context of Bell's speech and the absence of any evidence showing a detrimental effect on the school environment, Itawamba school officials' forecast of substantial disruption lacked the critical *Tinker* element of reasonableness. Without evidence of an identifiable, impending threat from Bell, the school had no strong need to protect student wellbeing which would need to outweigh Bell's right to speak or Mrs. Bell's right to discipline her son for actions he took away from school. Finally, Bell's rap addressed an issue of public concern and should have received the constitutional deference typically afforded in such situations, even though the rap came in the form of a medium the Itawamba County School Board might have found inappropriate.[178] Should the Court choose to embrace a modified *Tinker* test requiring both substantial disruption and sufficient nexus prongs, Taylor Bell's rap would be considered protected from school discipline.

VI. CONCLUSION

The Supreme Court justices who decided *Tinker* would find today's public schools to be fundamentally different places than the schools where a group of Des Moines children protested the Vietnam War in the 1960s.[179] Now approaching fifty years old, *Tinker* was not written for a world of teenagers on social media, school violence and cyberbullying in the news, or debates about the inherent meaning of rap lyrics. Taylor Bell's case presented an opportunity for the Court to reaffirm its commitment to the constitutional rights of students while providing guidance on the extent of school disciplinary authority. By denying certiorari, the Court has left the parameters of student speech rights in a state of disarray where all that is certain is that more litigation is to come. The time is ripe for the Supreme Court to define the borders of the schoolhouse gate for the twenty-first century, but until that decision comes, students and school administrators alike must tread carefully.

177. *See Bell*, 799 F.3d at 436 (hypothesizing if the proposed *Tinker-Bell* test were applied to Taylor Bell's case, the school's discipline would not have been permissible).

178. *Id.* at 404.

179. As Mary Beth Tinker, one of the petitioners from the *Tinker* case, said in a 2014 interview: "Today, students have more than armbands." Wheeler, *supra* note 121.