University of Cincinnati Law Review

Volume 84 | Issue 2 Article 7

April 2018

Mo Speech Mo Problems: The Regulation of Student Speech in the Digital Age and the Fifth Circuit's Approach in Bell v. Itawamba County School Board

Michael Begovic

Follow this and additional works at: https://scholarship.law.uc.edu/uclr

Recommended Citation

Michael Begovic, *Mo Speech Mo Problems: The Regulation of Student Speech in the Digital Age and the Fifth Circuit's Approach in Bell v. Itawamba County School Board*, 84 U. Cin. L. Rev. (2018)
Available at: https://scholarship.law.uc.edu/uclr/vol84/iss2/7

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ronald.jones@uc.edu.

MO SPEECH MO PROBLEMS: THE REGULATION OF STUDENT SPEECH IN THE DIGITAL AGE AND THE FIFTH CIRCUIT'S APPROACH IN *BELL V. ITAWAMBA COUNTY SCHOOL BOARD*

Michael Begovic

I. INTRODUCTION

When Taylor Bell, a senior at Itawamba Agricultural School, learned about sexual misconduct allegations that female students had made against two of his teachers, he turned to his rap music to vent his frustration and shed light on the problem.[1] He did not anticipate that he would eventually be expelled for the rap song he created and uploaded to the Internet on his own time.[2] Although Bell did not access the rap song at school or intend to cause any harm, school officials determined that Bell's song contained lyrics that were threatening, harassing, and intimidating and therefore, warranted an expulsion.[3]

Taylor Bell's story is not an uncommon one. Students regularly use the Internet as a platform to discuss school-related matters, and this trend is only growing.[4] The Internet has changed how students communicate by creating new channels of communication that operate outside of school grounds accessed by anyone at any time. Students can now reach the whole student community with ideas and messages by clicking a button. Consequently, students operating off-campus can impact the school community in a way never before possible. Herein lies the dilemma: with potential threats and problems originating off-campus, schools now have a greater interest in monitoring and regulating off-campus speech but must do so in a way that does not exceed the bounds of their legal authority.[5] The question of how far that authority reaches is unclear.[6] Underlying this uncertainty is a clash between the free speech rights of students and the need for schools to

1. Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 282-89 (5th Cir. 2014), *reh'g en banc granted*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

2. *Id.* at 286-89.

3. *Id.* at 288-89.

4. Emily Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL OF RTS. J. 591, 591 (2011) (alluding to studies which found that ninety-three percent of middle school and high school students use the Internet, and that nearly sixty-three percent of them discuss school-related topics).

5. *See* 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, 3397-98 (2011) (online threats, such as cyberbullying and violence, are a cause for serious concern for today's schools).

6. *Id.* at 3399 (arguing that it is uncertain whether and when schools may lawfully restrict speech by students that occurs off-campus).

Published by University of Cincinnati College of Law Scholarship and Publications, 2018

University of Cincinnati Law Review, Vol. 84, Iss. 2 [2018], Art. 7

eliminate potential threats and to protect the school community. The advent of the Internet has obfuscated traditional physical boundaries that historically defined legal protections for students and the limits of authority for schools regulating student speech.[7] It has forced a reexamination of the legal standards and constitutional protections in play when courts deal with student free speech. Not surprisingly, schools now have more opportunities and tools to monitor students' online activities, and have tested the limits of their authority by using these new tools to do so.[8] This has led to a spike in litigation amidst growing conflict. The Supreme Court has "provided little guidance to public schools on this issue,"[9] and lower court decisions have been inconsistent.[10] Consequently, public schools are left in a precarious position, as they are faced with considerable uncertainty regarding the limits of their authority to regulate off-campus student speech.[11]

Part II of this Casenote provides an overview of the relevant case law dealing with student free speech. Specifically, Part II explains the standard formulated in *Tinker v. Des Moines Independent Community School District*, a case involving student speech occurring on-campus The *Tinker* standard remains the preferred standard when courts are dealing with student free speech cases, even when that speech is off-campus.[12] Part II also sets the backdrop by discussing the problems that arise with student free speech in the digital age, and the countless legal conflicts that have resulted from this phenomenon. Part III of this note elaborates on Taylor Bell's story and examines the Fifth Circuit's en banc decision to uphold Taylor Bell's expulsion in *Bell v. Itawamba County School Board* on the grounds that Taylor Bell's speech was not protected by the First Amendment. Finally, Part IV of this Casenote argues that the Fifth Circuit's decision was incorrect because it

7. *See* Waldman, *supra* note 4, at 619 (noting that in the pre-Internet age, courts were more easily able to rely on the geographic on-campus/off-campus division when analyzing schools' authority over off-campus speech); *see also* Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979) (in holding that a school could not punish students for distributing a satirical newspaper off-campus, the court relied on the off-campus location of the speech).

8. Somini Sengupta, *Warily, Schools Watch Students on the Internet*, N.Y. TIMES (Oct. 29, 2013), http://www.nytimes.com/2013/10/29/technology/some-schools-extend-surveillance-of-students-beyond-campus.html?_r=0 (one school district paid Geo Listening, a technology company, $40,500 to monitor social media posts).

9. Shannon M. Raley, *Tweaking Tinker: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 774 (2011).

10. *Id.* at 776 (noting that lower courts are unsure of what constitutes a "substantial disruption" under the *Tinker* standard).

11. *Id.* at 774 (noting that inconsistent lower court decisions have provided little guidance to schools).

12. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (en banc) (noting that of the six circuit courts to decide whether *Tinker* applies to off-campus speech, five have held that *Tinker* applies to off-campus speech).

erroneously applied *Tinker*'s less protective standard to Bell's off-campus speech. More broadly, Part IV of this Casenote discusses the problems with extending *Tinker*'s less protective standard to off-campus speech and argues that *Tinker* should never extend to off-campus speech. Part IV concludes by advocating for a more protective standard when off-campus speech is at issue—one in which a school board's decision can only be justified if it proves that the speech poses a grave and substantial danger. This standard supplies adequate protection to students while still allowing schools to address potential threats. It strikes the right balance because, unlike *Tinker*, a student's speech is not subject to a school board's reasonable interpretation. Instead, this standard places a higher burden on the school to show that the off-campus speech at issue posed a grave and substantial danger. By requiring schools to meet this heightened burden, off-campus speech will not be quelled in a way that runs afoul of basic First Amendment principles.

While lower courts have been applying *Tinker* to off-campus speech under certain circumstances, the Supreme Court has yet to decide whether the *Tinker* standard applies to off-campus speech. In denying certiorari in *Bell*, the Supreme Court passed up an opportunity to resolve this question. To this end, the Supreme Court should take advantage of the next opportunity it has to hear a case involving off-campus student speech and declare that *Tinker*'s less protective standard does not apply to student speech originating off-campus.

II. BACKGROUND

A. The Birth and Evolution of Student Free Speech

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech."[13] This limitation applies not only to the federal government, but to state actors as well,[14] including school boards.[15] While it is well-established that students do not, "shed their

13. U.S. CONST. amend I.

14. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) (noting that the First Amendment, through the Due Process Clause of the Fourteenth Amendment, applies to state actors, in addition to the federal government).

15. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the Due Process Clause of the Fourteenth Amendment prevents states from forbidding the teaching of a foreign language to young students); Dixon v. Ala. State Bd. Of Educ., 294 F.2d 150, 157 (5th Cir. 1961) (invalidating a decision to expel a student at a public school without specific charges as a violation of the Fourteenth Amendment and noting that, without sufficient education, the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens).

constitutional rights to freedom of speech at the schoolhouse gate,"[16] students do not enjoy the same rights when they enter the school setting.[17]

The first noteworthy attempt to formulate a standard for student free speech cases came from the Supreme Court in *Tinker v. Des Moines Independent Community School Disttrict.* In *Tinker*, two high school students[18] challenged their suspensions, claiming that the school board's decision to suspend them violated their First Amendment right to freedom of speech.[19] The two students in *Tinker* wore black armbands to school in protest of the Vietnam War.[20] After the students refused to comply with the newly-adopted school policy banning such armbands, they were sent home and subsequently suspended.[21]

The *Tinker* Court reaffirmed the principle that students, like any other regular citizens, possess fundamental constitutional rights that the state cannot infringe upon.[22] However, the *Tinker* Court also recognized that the Court has repeatedly emphasized the need for affirming the comprehensive authority of school officials to prescribe and control conduct in the school.[23] In lieu of these concerns, the Supreme Court adopted a framework for examining First Amendment claims inside of a school setting, known as the *Tinker* standard.[24]

Under *Tinker*, a school may restrict student speech or expression that would either: (a) cause a substantial and material interference in the operation of the school or (b) collide with the rights of other students.[25] The *Tinker* Court noted that this protection is ubiquitous in the school setting, applying not only to the classroom, but to a student, "when he is in the cafeteria, or on the playing field, or on the campus during the authorized hours."[26] Applying this framework to the students' speech at

16. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (citing *Meyer*, 262 U.S. 390).

17. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings).

18. Mary Beth Tinker filed an amicus brief in support of Appellants/Plaintiffs. *See* Brief for Mary Beth Tinker as Amicus Curiae Supporting Appellant, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (No. 12-60264), 2015 WL 6107618.

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

20. *Id.*

21. *Id.*

22. *Id.* at 511.

23. *Id.*

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

25. *Id.* (Students are free to express their opinions on school property, if they do so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school" and without "colliding with the rights of other students.").

26. *Id.* (noting that student communication is a vital part of the education process; it is not confined to the supervised and ordained discussion which takes place in the classroom.).

issue in *Tinker,* the Supreme Court found no evidence supporting the school board's claim that the black armbands caused a substantial interference with the school's activities.[27] Instead, the Supreme Court inferred that the school's decision was based on its desire to suppress an unpopular opinion and avoid the resulting controversy.[28] Although the *Tinker* Court did not explicitly suggest or indicate that the framework should apply to student speech occurring off-campus,[29] many lower courts have used it when analyzing student speech originating off- as well as on-campus.[30]

B. Supreme Court Carves Out Exceptions to Tinker

The Supreme Court, after *Tinker*, carved out a number of exceptions to the standard by identifying certain types of speech that, based on content, deserve less protection and consequently are not subject to the *Tinker* framework. These exceptions include: (a) speech that is lewd or vulgar;[31] (b) speech that occurs during a school-sponsored event if the restriction on such speech is reasonably related to a pedagogical concern;[32] and (c) speech that is reasonably viewed as promoting the use of illegal drugs.[33] In each of these cases, the Supreme Court eschewed

27. *Id.* at 514 (noting that the armbands facilitated discussion outside of the classroom, but did not interfere with the work or lead to disorder).

28. *Id.* at 510 (noting that other political symbols aimed at expressing a political opinion were not suppressed).

29. *See* Marcus-Toll, *supra* note 5, at 3395, 3407-08 (noting that while the wording in *Tinker* is arguably broad enough to support application to the off-campus setting, the *Tinker* Court did not expressly contemplate that possibility, instead harping on the "special characteristics of the school environment"); *see also* Bell v. Itawamba County Sch. Bd., 774 F.3d 280, 291 (5th Cir. 2014) (noting that *Tinker* did not decide under what circumstances a public school may regulate students' online, off-campus speech).

30. *See, e.g.*, Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1065-67 (9th Cir. 2013) (applying *Tinker* to a student who wrote about weapons on MySpace); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 567-68, 574 (4th Cir. 2011) (applying *Tinker* to a student who ridiculed and bullied a classmate through a webpage); Doninger v. Niehoff, 527 F.3d 41, 44-45 (2d Cir. 2008) (applying *Tinker* to a student who was barred from running for class secretary based on a derogatory blog the student posted on a web site about a school principal).

31. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (distinguishing *Fraser* from *Tinker* by pointing out that the speech at issue in *Fraser* involved "sexual content" while the speech at issue in *Tinker* involved a political message; the Court held that a school can restrict lewd or vulgar behavior without having to meet the *Tinker* standard).

32. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (holding that a school did not violate a student's First Amendment right to freedom of speech when it censored content that a student wanted to publish in the school newspaper and emphasizing that unlike *Tinker*, the restriction here was "curricular" in nature, and consequently schools have more control and are awarded more deference).

33. Morse v. Frederick, 551 U.S. 393, 407 (2007) (upholding a school board's decision to suspend a student for holding up a "BONG HiTS 4 JESUS" banner during a school field trip. Recognizing the state's compelling interest in deterring illegal drug use, the court found that speech promoting illegal drug use conflicts with the school's goal of protecting students.).

the *Tinker* framework and awarded more deference to schools because the content of the speech in question fell into one of these narrow categories. Furthermore, the Supreme Court recognized that schools have a compelling interest in regulating certain categories of speech.[34] In all of these cases, the speech at issue was indisputably being disseminated either on school grounds or at a school-sponsored event.[35] In fact, the Supreme Court has never heard a case involving a student's off-campus free speech rights. These three cases, along with *Tinker*, represent the full body of Supreme Court precedent with respect to student free speech.[36] In them, the court drew an important distinction between the political nature of the speech at issue in Tinker,[37] and the nonpolitical nature of the speech at issue in the post-*Tinker* cases.[38] The post-*Tinker* case law makes clear that school officials may restrict certain forms of speech that would otherwise be protected outside of the school setting. The justification for doing so is predicated on the idea that the "special characteristics"[39] of a school environment remove the protection that a student normally has in the public sphere. However, if the speech does not fall under one of the post-*Tinker* categories, it is subject to *Tinker's* more protective standard: a school must show that either a substantial disruption was forecasted or that the speech collided with the rights of other students.

C. Lower Courts Struggle with Off-Campus Student Speech

Although a state's decision to restrict a student's free speech can be justified by either of two separate prongs under *Tinker*, the majority of lower-court jurisprudence has arisen under the substantial disruption prong.[40] Courts have rarely used the second prong when evaluating a student's free speech claim.[41] Some commentators have pointed out that

---

34. *See Fraser*, 478 U.S. at 681 (schools have an interest in promoting "socially appropriate behavior"); *see also Kuhlmeier*, 484 U.S. at 271 (In the curricular context, schools have an interest in ensuring that students learn the intended academic lessons and that educational content is age appropriate.). *See also Morse*, 551 U.S. at 407 (Schools have an interest in educating students about illegal drug use.).

35. *See Fraser*, 478 U.S. 675; *see also Morse*, 551 U.S. at 403; *Kuhlmeier*, 484 U.S. 260.

36. *See* Waldman, *supra* note 4, at 594.

37. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 at 509 (noting that the state, "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

38. *See Fraser*, 478 U.S. at 680 (distinguishing sexually explicit speech from political speech).

39. *Tinker*, 393 U.S. at 506.

40. Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 363-64 (2007). *See also* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1042 (2008).

41. *See* Marcus-Toll, *supra* note 5, at 3409.

the Supreme Court has not offered much guidance on application of the *Tinker* standard.[42] This is due, in part, to the Supreme Court's unwillingness to articulate a more precise definition of "substantial disruption."[43] As a result, lower courts have had trouble applying this prong consistently to cases involving a student's free speech rights,[44] promulgating varying threshold standards for determining when speech is protected under *Tinker*.[45]

Lower courts are split on whether *Tinker* applies to student speech that originates off school grounds but eventually finds its way into the school.[46] In fact, lower courts employ a number of different approaches when dealing with off-campus student speech. In *Thomas v. Board of Education*, the Second Circuit decided that *Tinker* did not apply to a satirical newspaper produced and sold after school hours and off school property,[47] noting that, "while prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the school gate."[48] For the Second Circuit, the fact that the satirical newspaper and its controversy found its way onto campus was not sufficient to lower the standard that the government must meet for justifying suppression of free speech in the public arena.[49] In other words, because the school board was interfering with speech that did not occur on school grounds, it had to justify suppression of the speech as if the speech were occurring in the regular public sphere; the government could not avail itself of the less protective standard embodied in the *Tinker* framework.

Most circuit courts that have dealt with student speech originating off-campus have analyzed the speech under *Tinker's* substantial disruption standard.[50] Some circuits applying *Tinker* to off-campus speech have ostensibly established different threshold tests for

---

42. *Id.* at 3401.

43. *Id.*

44. *See* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 405 (2011) (noting that lower court decisions do not identify how a court should go about determining whether a substantial disruption has occurred).

45. *See* Marcus-Toll, *supra* note 5, at 3401 (noting that "lower courts have developed several threshold standards for determining the circumstances under which the *Tinker* standard may permit school regulation of off-campus speech).

46. *Id.* at 3416-17.

47. Thomas v. Bd. of Educ., 607 F.2d 1043, 1045 (2d Cir. 1979) (only an occasional article was written within the school building after classes).

48. *Id.* at 1050.

49. *Id.* at 1050-51 (the court also opined that if the school had authority to punish the students for making an off-campus newspaper, then it would also have the authority to punish a student for watching an X rated film at home).

50. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1068-69 (9th Cir. 2013) (noting that the Second, Fourth, and Eighth Circuits have concluded that *Tinker* applies to certain off-campus speech, but that the Third and Fifth Circuits have left the question open).

determining whether *Tinker* applies to off-campus speech,[51] while also suggesting that *Tinker*'s application to off-campus speech should have some limitations.[52] The Ninth Circuit, however, has held that *Tinker* applies to off-campus speech without any qualifications.[53] In *Lavine v. Blaine School District*, the Ninth Circuit had to rule on a school board's decision to temporarily expel a student who had written a poem off-campus in which he meticulously described committing a shooting.[54] Without considering the possibility or argument that *Tinker* may not apply to speech originating off-campus, the Ninth Circuit applied the *Tinker* framework to determine if the school board's action was permissible.[55] Viewing all of the factors surrounding the suspension, including the student's behavior, the Court determined that the school board's decision to expel the student was based on a reasonable fear of a substantial disruption and upheld the school board's decision.[56]

Some commentators have posited that the likelihood a lower court will apply *Tinker* is increased if the facts weigh in favor of a finding that there was a substantial disruption.[57] Not surprisingly, many courts employing *Tinker*'s less protective standard still place a considerable amount of weight on the off-campus origin of the speech.[58] Many Courts will look at the origin of the speech when analyzing a school board's decision under the substantial disruption prong.[59] This factor is

51. Kowalski v. Berkeley Cty. Schools, 652 F.3d 565, 573 (4th Cir. 2011) (finding that *Tinker* applied to a student who ridiculed a fellow student on MySpace because the speech had a "sufficient nexus" to the school's pedagogical interests); S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (*Tinker* applies to off-campus speech when it is reasonably foreseeable that the speech will reach the school community).

52. *Kowalski*, 652 F.3d at 573 (noting that there is surely a limit to the scope of a high school's interest in the order, safety, and well-being of students when the speech at issue originates outside the schoolhouse gate); Layshock v. Hermitage Sch. Dist. 650 F.3d 205, 216 (3d Cir. 2011) (noting that while *Tinker*'s schoolhouse gate is not construed solely on the bricks and mortar surrounding the school, the concept of the school yard is not without boundaries and the reach of school authorities is not without limits).

53. Lavine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).

54. *Id.* 983-87.

55. *Id.* at 988-89.

56. *Id.* In doing so, the Ninth Circuit made clear that it was considering other factors besides the poem—such as Lavine's suicidal thoughts that he had shared and a domestic dispute that was bothering him—just as the school board had.

57. *See* Raley, *supra* note 9, at 789 (noting that although some courts are reserved about applying *Tinker* to off-campus speech, it is more likely that a court will do so if the threat of a substantial disruption exists).

58. *See* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (noting that "the lack of evidence, combined with the above findings regarding the out-of-school nature of the speech, indicates that the plaintiff has a substantial likelihood of success on the merits of his claim").

59. *See id.* at 1088 (emphasizing that the evidence, combined with the out-of-school nature of the speech, did not allow a school to expel a student for a web page made at home); *see also* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (finding that the school's decision to punish a student for online activity he engaged in while at his grandmother's house would set a dangerous

usually relevant when evaluating whether there was a substantial disruption, and *Tinker*'s framework is certainly flexible enough to permit its consideration. Some courts have even gone so far as to proclaim that a school's authority to regulate off-campus speech is much more limited than its authority over on-campus speech, even if the *Tinker* standard may still apply.[60] Nevertheless, the overwhelming weight of authority has analyzed student speech under *Tinker*, regardless of where the speech originated.[61] In determining whether the *Tinker* standard has been satisfied, lower courts have considered a plethora of other factors. These factors include: (a) the identity of the speaker;[62] (b) whether the speech was brought in by the speaker or a third party[63]; and (c) whether the speech would meet the definition of a "true threat."[64]

D. Regulation of Student Speech Is Tricky in the Internet Age

There are two colliding trends that underlie the debate over student speech in the digital age—trends that complicate and inform the debate moving forward. They make regulation of student speech an increasingly contentious yet important issue today. First, the number of middle-school and high-school-age students using the Internet and social media to discuss school-related topics is large and rapidly growing.[65] Second, recent school shootings, cyberbullying, and online threats are all pressing issues that school administrators must deal with.[66] Not surprisingly, these problems have emboldened schools that want to test the expanding limits of their regulatory authority by asserting more control over student speech originating off-campus.[67] Schools continue to push the bounds of their regulatory authority for a number of reasons, including efforts to: (a) address threats made towards students and

precedent).

60. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001).

61. *Id.* at 454.

62. *See* Lavine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2000) (placing significant weight on the mental issues that the speaker was experiencing).

63. *See Killion*, 136 F. Supp. 2d at 457 (in invalidating a school board's decision, placing significant weight on the fact that a satirical piece about a teacher was brought in by a third party and not the speaker).

64. *See* Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 300-05 (5th Cir. 2014).

65. *See* Waldman, *supra* note 4, at 591 (alluding to studies which found that ninety-three percent of middle school and high school students use the Internet, and that nearly sixty-three percent of them discuss school-related topics).

66. *See* Marcus-Toll, *supra* note 5, at 3397-3400.

67. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (invalidating a school's decision to punish a student who created a parody MySpace profile of his principal); *see also Killion*, 136 F. Supp. 2d 446 (invalidating a school's decision to punish a student who created a "top ten" list that mocked a school official); Sengupta, *supra* note 8.

school officials; (b) eliminate cyberbullying; and (c) limit conduct that reflects poorly on the school.[68] The result has been a conflict between free speech rights and school officials attempting to eliminate these problems by testing the bounds of their authority. This conflict has led to a growing number of legal disputes.

The emergence and exacerbation of school-related problems in the Internet age complicates an age-old debate surrounding free speech in the school setting: What is the role of public schools in shaping the youth of our county and in imparting our principles and values to children.[69] Few would argue that schools should not be tasked with imparting democratic principles in a way that prepares students for civic life. But in order to maintain order and safety, schools need to operate as non-democratic entities by abridging certain liberties.[70] The resulting paradox and the normative questions it raises are at the center of student free speech conflicts; these fundamental questions will continue to permeate student free speech cases and usually inform an individual's opinion on specific student free speech cases.[71] In this sense, individual views on how government should balance personal liberties with safety and order may align with, and be an indicator of, opinions about student free speech issues.

Cases involving a student's free speech rights fall under a number of different sub-categories. Some of these cases involve cyberbullying,[72] a serious concern for teachers and school administrators. Another subcategory of these cases involves students that may pose a threat to the safety of the school and have expressed intent to harm the school or its students in some way.[73] But the vast majority of these cases have involved speech viewed as hostile towards a school official.[74] The

68. *See* Marcus-Toll, *supra* note 5, at 3397.

69. *See* Maureen Sullivan, *Democratic Values in a Digitalized World: Regulating Internet Speech in Schools to Further the Educational Mission*, 96 MARQ. L. REV. 689, 696-697 (2012) (noting that public schools are valued by society because they instill in students a common set of core principles and values, such as respect, honesty, citizenship, responsibility, and integrity; public schools were established to teach students how to exercise their democratic rights as citizens and cultivate a sense of nationalism.); *but see* Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1271, 1275-76 (1991) (arguing that the role of public schools should not be concerned with fostering a marketplace of ideas).

70. *See* Waldman, *supra* note 4, at 594 (describing the paradox in the following way: schools have the important mission of educating each generation of new citizens so they will have the tools necessary to preserve and protect tenants of democracy, but teachers need to take away some liberty in order to maintain order in the classroom setting).

71. *Id.* at 595 (positing that the way in which one conceives the public schools' institutional role necessarily will inform one's view of the extent to which students' constitutional rights should be recognized).

72. *See* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 567 (4th Cir. 2011).

73. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1064 (9th Cir. 2013).

74. Waldman, *supra* note 4, at 592 (noting that all of the cases dealing with Internet speech that

Begovic: Mo Speech Mo Problems: The Regulation of Student Speech in the Di

Internet is the most commonly used platform for disseminating this type of speech.[75] Students can now criticize, harass, embarrass, and threaten school officials online with ease and convenience.[76] This gossip can spread like wildfire and usually comes to the attention of school officials. As illustrated in the previous section, the new digital age of "school gossip" has created problems for courts, blurring traditional geographic boundaries they have historically relied on.[77] Additionally, psychological research shows that hostility manifesting on the Internet can be harsher in tone than hostility manifesting through more conventional means,[78] making it even more difficult to strike the right balance between student free speech rights and the need for increased school regulatory authority.

The speech at issue in a large number of student free speech cases is banned because it mocks, criticizes, or embarrasses a school official. Students are continuing to find new ways to vent their frustration over school officials and are doing so on their own time through the Internet. In *Killion v. Franklin Regional School District*, a district court granted summary judgment to a student who was suspended after making a "top ten" list about the school athletic director, which included insulting statements about his genitals.[79] The *Killion* court ultimately found that the school district failed to demonstrate that a substantial disruption had occurred as a result of the student's speech, and that there was no evidence in the record to suggest that the teachers were incapable of teaching or controlling their classes after the speech.[80]

Similarly, in *Layshock v. Hermitage School District*, the Third Circuit sided with a student who created a fake Internet profile of his high school principal that included a photograph of the principal copied from the school district's website.[81] In *Layshock*, the Third Circuit repudiated the idea that a school, absent exceptional circumstances, could "reach into" a student's home to regulate his conduct in the same way it could during normal school hours.[82] Student free speech cases involving this

have reached the circuit court level have involved this type of speech).

75. *Id.* at 618 (noting that the issue has exploded in the digital age, given the prevalence of communicating via the Internet).

76. *Id.* at 592.

77. *See* Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979) (finding that a school could not punish students for distributing an off-campus satirical newspaper that made fun of teachers); *see also* Waldman, *supra* note 4, at 619 (noting that in the pre-Internet age, courts could easily rely on geographic boundaries).

78. *See* Waldman, *supra* note 4, at 592.

79. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001).

80. *Id.* at 455-56 (rejecting the school board's argument that the anger teachers felt over the list constituted a substantial disruption).

81. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011).

82. *Id.* at 216 (noting that it would be an uneasy and dangerous precedent to allow the state, in

Published by University of Cincinnati College of Law Scholarship and Publications, 2018

University of Cincinnati Law Review, Vol. 84, Iss. 2 [2018], Art. 7

type of speech are very common.[83] They illustrate the wide disagreement between courts and school officials on the extent of a school's regulatory authority over off-campus student conduct. School officials often believe they are justified in punishing students for off-campus speech that embarrasses, mocks, or criticizes a teacher, while courts are usually unwilling to leave such speech unprotected.

Certainly, it is difficult, if not impossible, to discern a student's true intent behind speech that may be aimed at everything from harassment to harmless mocking. Young students using the Internet to vent their frustration or poke fun at a teacher may not know when they have gone too far. Taking all of this into consideration, school administrators are placed in a difficult position when attempting to protect their students and teachers from the cascade of existential threats without exceeding their legal authority. Unfortunately, the varying tests established by lower courts for determining when *Tinker*'s substantial disruption prong has been satisfied,[84] and the different ways in which lower courts have approached student free speech cases, add to the uncertainty for school officials. The inconsistent outcomes, circuit splits, and reversals coming out of the judiciary provide little assistance and leave administrators searching for more guidance.[85]

III. TAYLOR BELL'S RAP SONG AND THE ENSUING LEGAL BATTLE

A. Taylor Bell's Story

Taylor Bell's story is the latest controversy in a long saga of student free speech cases. In August of 2010, Taylor Bell was a senior at Itawamba Agricultural School.[86] Bell was also an aspiring musician, pursuing music since his childhood.[87] During his senior year, several of Bell's friends told him that two male teachers at the school had made

---

the guise of school authorities, to reach into a child's home and control his or her actions).

83. *See, e.g.*, Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (school's decision to punish a student who created a Facebook group titled that a certain teacher was the worst she'd ever met was ruled unconstitutional); *see e.g.*, Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979) (finding that a student's free speech rights were violated when a school expelled students who created a satirical newspaper off-campus).

84. Marcus-Toll, *supra* note 5, at 3401 (noting that "lower courts have developed several threshold standards for determining the circumstances under which the *Tinker* standard may permit school regulation of off-campus speech).

85. Brief for National School Boards Association as Amicus Curiae Supporting Petitioners, at 3, Morse v. Frederick, 551 U.S. 393 (2007) (No. 06-279).

86. Bell v. Itawamba Cty. Sch. Bd., 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).

87. Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 282-83 (5th Cir. 2014); Brief of Appellants at 10, Bell v. Itawamba Cty. Sch. Bd. (5th Cir. 2014) (No. 12-60264) (at the time, Bell had not had any serious disciplinary infractions in four years, including no fights and no charges of insubordination).

https://scholarship.law.uc.edu/uclr/vol84/iss2/7

sexually charged comments towards them and had touched them inappropriately on multiple occasions.[88] While Bell did not report these complaints to school authorities,[89] he did turn to his rap music to vent his frustration over what was happening.[90] He also hoped that his music would shed light on the problem.[91]

During winter break, Bell composed and recorded a rap song about the sexual misconduct allegations at a recording studio unaffiliated with the school.[92] In the song, Bell criticizes, in a rather vulgar and hostile manner,[93] the two male teachers that were the subjects of the allegations.[94] After Bell finished recording the song, he uploaded it to his Facebook profile from his home computer.[95] At no point did Bell play or discuss the song at school.[96] School regulations blocked Facebook on school computers and students were prohibited from accessing it and other similar sites on their phones at school.[97] Eventually, one of the accused teachers became aware of the song and watched it on another student's phone during school hours.[98] This was the only documented instance of someone listening to Bell's song at school.[99]

School officials, including the school district's attorney, questioned Bell about the song and the allegations contained in it.[100] Bell was sent home for the day without receiving a clear explanation as to why such steps were being taken.[101] The school was closed until Friday of the

---

88. *Id.* at 283 (the record contains affidavits from female students stating that one of the teachers had told another student that she had a "big butt" and that he would date her if she were older; she also stated that one of the teachers had looked down her shirt; another student said that one of the coaches had rubbed her ears).

89. *Id.* at 283, 287 (during the disciplinary hearing, Bell stated that he did not bring these complaints to school authorities because the school's authorities had a history of ignoring such complaints).

90. *Id.* at 283.

91. *Id.* at 287.

92. *Id.* at 283.

93. For an excerpt from Bell's rap song, see Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 284–85 (5th Cir. 2014) reprinted at *infra* Appendix A.

94. *Id.* at 283 (the song discussed the specific allegations made against the teachers).

95. *Id.* at 285; Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 385 (5th Cir. 2015) (en banc) (a screenshot of Bell's Facebook profile page shows that the rap song was open to and viewable by the public).

96. *Bell*, 774 F.3d at 285.

97. *Id.*

98. *Id.* at 285-86 (the accused teacher's wife confronted him about the song after hearing about it from a friend).

99. Brief of Appellants at 14, Bell v. Itawamba County Sch. Bd., 774 F.3d 280 (No. 12-60264) (5th Cir. 2014).

100. *Bell*, 774 F.3d at 286 (the principal, superintendent, and school district's attorney held a meeting with Bell to discuss the song).

101. *Id.*

following week, during which time Bell uploaded a polished version of the song to YouTube, with a brief monologue at the conclusion.[102] When Bell returned to school on Friday, the principal informed him that he was being suspended, pending a disciplinary hearing.[103]

At the hearing, Bell was again asked about the song and his motivations for writing it.[104] Bell responded by saying that he was concerned with the teachers' misconduct and did not believe that school authorities were properly addressing the issue.[105] He also reassured the committee that the song was a form of artistic expression and that he had no intention of harming the teachers or encouraging anyone else to threaten, harm, or harass them.[106] Furthermore, Bell told the committee that he did not tell anybody to listen to the song at school; there was no evidence that anyone had played the song at school, aside from the one incident involving the accused teacher.[107] None of the Itawamba school officials brought up the possibility that Taylor's song disrupted the school; their main focus at the hearing was whether Taylor's song threatened, harassed, or intimidated school officials.[108]

The day after the disciplinary hearing, the committee rendered its decision.[109] Bell's suspension was upheld and he was placed in an alternative school for the remainder of the grading period.[110] A letter was sent to Bell's parents informing them of the committee's conclusion that Bell's song harassed and intimidated the teachers in violation of school board policy.[111] In February 2011, Bell's parents filed a civil action in the United States District Court for the Northern District of Mississippi, alleging that the school board violated Bell's First Amendment right to freedom of speech by suspending him for the rap

102. *Id.* (the monologue read as follows: "It's . . . something that's been going on . . . for a long time that I just felt like I needed to address. I'm an artist . . . I speak real life experience . . . I'm going to have a child. If something like this was going on with my child . . . it'd be 4:30 . . . that's just how it is).

103. *Id.*

104. *Id.* at 287 (the school district's attorney stated that the purpose of the hearing was to determine whether Bell had threatened, intimidated, and/or harassed one or more school teachers).

105. *Bell*, 774 F.3d at 287; Reply Brief of Appellants, at 7, Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (No. 12-60264) (5th Cir. 2014) (At the school board hearing, Bell did provide school board officials with affidavits from the alleged victims corroborating Bell's accusations against the teachers).

106. *Bell*, 774 F.3d at 287 (Bell did, however, concede that the lyrics could lead to the possibility of a parent or relative retaliating against one of the teachers).

107. *Id.* at 287-88 (there was no evidence presented that any student or the staff had listened to the song on-campus).

108. Reply Brief of Appellants, at 6, Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (No. 12-60264) (5th Cir. 2014).

109. *Bell*, 774 F.3d at 288.

110. *Id.*

111. *Id.*

song.[112]

The district court held a hearing for Bell's requested preliminary injunction, during which a number of different witnesses testified.[113] The testimony of the two accused teachers differed with respect to whether they felt threatened by the song.[114] However, both teachers testified that Bell's song affected them by changing how they interacted with students.[115] At the conclusion of the hearing, the district court granted summary judgment in favor of the school board.[116] Relying on the framework promulgated in *Tinker*, the district court found that: (1) Bell's speech caused a material and/or substantial disruption at the school and; (2) it was reasonably foreseeable to school officials that the song would cause such a disruption.[117]

A divided panel on the Fifth Circuit reversed the district court's decision on a number of grounds, and most importantly, held that *Tinker*'s less protective standard does not apply to Bell's off-campus speech.[118] According to the court, even if *Tinker* would apply to the off-campus speech, the evidence did not demonstrate that there was a substantial disruption, or that such a disruption was foreseeable by school authorities.[119] Employing a standard less deferential to the school board, the Fifth Circuit concluded that the school board's decision could not be removed from judicial scrutiny simply because the board determined, pursuant to its own policy, that the song's lyrics constituted harassment.[120] Finally, the Fifth Circuit rejected the school board's claim that Bell's song could have been viewed as a threat, given the "rhetorical" nature of the rap song.[121]

---

112. *Id.* at 289 (The lawsuit named as defendants; (a) the Itawamba County School Board; (b) the superintendent (individually and in her official capacity); and (c) the principal (individually and in his official capacity)).

113. *Id.* at 289-90.

114. *Id.* at 289 (One teacher testified that the song was "just a rap, not to be taken seriously" and that if he had just "let it go, it probably would have died down," but the other teacher testified that he took the lyrics "literally" and that he felt "scared.").

115. *Bell*, 774 F.3d at 289 (One teacher testified that he became more "cautious" around students; the other teacher testified that he avoided interactions that might have been seen as "inappropriate.").

116. *Id.* at 290.

117. Bell v. Itawamba Cty. Sch. Bd., 859 F. Supp. 2d 834, 840 (N.D. Miss. 2012).

118. *Bell*, 774 F.3d 280.

119. *Id.* at 291, 295 (The court supported this conclusion by citing to the school board's own acknowledgment that students were not listening to or discussing the song during school hours and the teacher's admission that most of the students seemed to be acting "normal" after the song came out.).

120. *Id.* at 293, 297 (stating that "school officials cannot circumvent their burden of showing that a substantial disruption occurred . . . simply by adopting a policy that categorizes certain speech as a severe or substantial disruption without any reasonable factual predicate that such speech would likely lead to substantial disruption") (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504, 511 (1969)).

121. *Id.* at 300, 303 (According to the Fifth Circuit, this was underscored by the Disciplinary

B. The Fifth Circuit's En Banc Decision

After a divided Fifth Circuit granted summary judgment for Bell, an en banc review of the case was granted.[122] The Fifth Circuit first had to determine whether *Tinker*'s substantial disruption test applied to Bell's rap song.[123] In its analysis, the court acknowledged that the advent of the Internet makes the tasks of evaluating threats and protecting students even more challenging for administrators because students can now disseminate and access a potentially threatening or disruptive message anywhere and anytime.[124] Citing Fifth Circuit precedent,[125] and that of other circuits, the Fifth Circuit found that *Tinker* could apply to off-campus speech in some circumstances.[126] However, the Fifth Circuit's panel declined to adopt a specific rule governing when *Tinker* would apply to off-campus speech and instead relied, in part, on Bell's admission that he intentionally directed his song towards the school community to hold that *Tinker* applied.[127] This finding was predicated on the notion that the intent of the student speaker matters when determining whether *Tinker* applies.[128] The Fifth Circuit buttressed this finding by positing that the advent of the Internet has "obfuscated the on-campus/off-campus distinction,"[129] thus making it impracticable to separate online student speech from the school community.[130] Essentially, Bell's song was directed at the school community because he intended for members of the school community to hear it and posted the song online to achieve this end,[131] even though Bell never attempted to physically "bring" the speech into the schoolhouse gate by accessing the song at school.[132] According to the court, the application of *Tinker* was also warranted because the lyrics in the rap song constitute threats, harassment, and intimidation, as a reasonable layperson would

---

Committee's own determination that Bell's song may have constituted only a "vague threat.").

122. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (en banc) (the only issue before the court was Bell's First Amendment claim).

123. *Id.* at 391-92.

124. *Id.* at 392-93.

125. *Id.* at 393-94 (discussing Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972) (applying *Tinker* to students who were distributing a newspaper near campus, but not on campus)).

126. *Id.* at 394-95.

127. *Bell*, 799 F. 3d at 394-95.

128. *Id.* at 395 (citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608 (5th Cir. 2004) (finding that *Tinker* did not apply because a book containing threatening drawings was brought to school accidentally by the student's brother and thus, the student did not intend to bring the book to school)).

129. *Id.* at 395-96.

130. *See id.*

131. *Id.* (noting that Bell admitted that he knew people were going to listen to his song).

132. Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 296 (5th Cir. 2014).

Begovic: Mo Speech Mo Problems: The Regulation of Student Speech in the Di

understand the terms.[133] In sum, the majority concluded that *Tinker* applied to the unique facts of Bell's case because Bell's rap song was directed at the school community and contained threatening, harassing, and intimidating lyrics.[134]

The next question the Fifth Circuit addressed was whether *Tinker*'s substantial disruption test was satisfied.[135] In answering this question, the court awarded deference to the school board, noting that school boards are in the best position to balance discipline and expression.[136] Ultimately, the Fifth Circuit held that *Tinker*'s substantial disruption test was satisfied because the school board's decision to suspend Bell—on the grounds that his conduct could have led to a substantial disruption—was objectively reasonable.[137] In support of this conclusion, the court emphasized that Bell's lyrics were interpreted as threats by the named school officials, which was a direct violation of the school district's policy,[138] and also made it more difficult for the named teachers to do their jobs.[139] Despite considerable pressure from outside groups to hear the case,[140] the Supreme Court denied writ of certiorari, leaving in place the status quo within the lower courts.[141]

IV. DISCUSSION

The Fifth Circuit's underlying rationale for applying *Tinker*'s substantial disruption standard to Bell's speech is twofold: (1) precedent establishes that *Tinker* can apply to off-campus speech in some circumstances; and (2) Bell intended to direct his speech at the school community and therefore, *Tinker* applies Bell's speech. The court also

133. *Bell*, 799 F.3d at 396 (finding that the school board only had to show that the interpretation was reasonable; unlike proving that a threat qualified as a "true threat," intention of the speaker was irrelevant).

134. *Id.* at 394.

135. *Id.* at 397.

136. *Id.*

137. *Id.* at 398-99.

138. *Id.* (finding that although a court cannot rely on *ipse dixit* in evaluating the school board's actions, a policy violation can be used as evidence to support the reasonable forecast of a future substantial disruption).

139. *Id.* at 399-400 (noting that teachers are the cornerstone of education and that without teaching, there can be no education).

140. *See, e.g.*, Brief of Erik Nielson, Charis E. Kurbin, Travis L. Gosa, Michael Render (aka Killer Mike) and Other Scholars and Artists as Amici Curiae in Support of Petitioner on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Bell v. Itawamba Cty. Sch. Bd., On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (No. 15-666), 2015 WL 9315591; *see also* Brief of Advancement Project and One Voice as Amici Curiae in Support of Petitioner on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Bell v. Itawamba Cty. Sch. Bd., (No. 15-666), 2015 WL 9315592.

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

Published by University of Cincinnati College of Law Scholarship and Publications, 2018

concluded that Bell's speech was threatening and harassing, as understood by a reasonable person, and thereby comports with the general principles of *Tinker*'s less protective standard. Although the Fifth Circuit explicitly declined to adopt a bright line rule, its reasoning ostensibly established the following rule: When off-campus speech is reasonably interpreted as threatening, harassing, or intimidating and is directed at the school community, it is subject to *Tinker*'s less protective standard.[142] According to the Fifth Circuit, Bell intended for his speech to reach the school community because it mentioned school officials by name and was posted online where the school community could access it anywhere and anytime. Additionally, Bell's speech reasonably could be interpreted as threatening. Thus, Bell's speech satisfied this rule.

A. Qualifying Tinker*'s Application to Off-Campus Speech by Requiring a Requisite Form of Intent to Reach the School Community Is Problematic and Unworkable*

The Fifth Circuit qualified its application of *Tinker* to Bell's speech by emphasizing that Bell possessed the intent to reach the school community while operating off-campus, thereby suggesting that intent to reach the school community is necessary for application of *Tinker* to off-campus speech. The Fifth Circuit based its conclusion that Bell intended to reach the school community on the grounds that: (1) Bell expected and wanted other members to watch the video and; (2) the speech was school-related and online. Attempting to ascertain whether an off-campus speaker intended for his speech to reach the school community is a difficult endeavor for courts; it can be speculative and wildly inaccurate. A student disseminating a message online might not intend for his speech to reach the physical boundaries of the school, in the sense that it is delivered to the school in printed form or accessed by students on school grounds. However, the student may intend to reach school community members when they are off-campus and online, as was the case with Bell. Other community members may or may not access this online speech at school; they may or may not use it to cause a disruption within the school. This raises an interesting question unaddressed in the majority opinion: What exactly is the intent that triggers application of *Tinker*? Is it the intent of the speaker to reach community members at any time or place, or the intent to cause a disruption in the school environment during normal school hours? In its

142. *See Bell*, 799 F.3d 379 at 401 (Elrod, J., concurring) (noting that *Tinker* applies in this case only because the speech was directed at the school and reasonably interpreted as threatening, harassing, and intimidating); *see also id.* at 402-3 (Costa, J., concurring) (noting that the decision limits *Tinker*'s application to those where the speech is threatening, intimidating, or harassing).

Begovic: Mo Speech Mo Problems: The Regulation of Student Speech in the Di

opinion, the majority cites *Porter v. Ascension Parish School Board.*[143] for the proposition that "a speaker's intention that his speech reaches the school community, buttressed by his actions in bringing about that consequence" supports the application of *Tinker*. But the majority in *Bell* did not clearly define "school community" when deciding whether Bell's speech was intentionally directed at the school community or whether his actions brought about that consequence. Nevertheless, the majority's conclusion that the speech was directed at the school community, combined with its mention of the "everywhere at once" nature of the Internet, suggests that the definition of "school community" adopted by the Fifth Circuit is expansive; speech that is intended to reach community members would fall under the definition, even if the speaker only intended to reach community members when they are online and off-campus.

By looking to this type of intent, the Fifth Circuit is essentially awarding schools heightened authority over any school related off-campus, online conduct, as long as the school board can reasonably interpret the speech as threatening, harassing, or intimidating. Under the Fifth Circuit's precedent in *Bell*, any intent to reach school community members off-campus is synonymous with intent to reach the school community as a whole. Bell admitted that he intended to reach the school community, but students using the Internet as a platform to discuss school related matters are always intending to reach other community members unless they engage in private conversations with non-community members. Qualifying *Tinker*'s application by requiring intent to reach the school community or other community members is therefore a meaningless qualification that leaves most off-campus speech unprotected. It defeats the purpose of using the Internet as an outlet to discuss school-related topics without fear of the school exerting control over it.

Such an expansion of *Tinker*'s less protective standard fails to provide adequate safeguards to students, who are increasingly turning to the online world to discuss school-related topics. It also runs afoul of the Supreme Court's limitation of *Tinker* to the "schoolhouse gate." The effect is to chill and constrain student off-campus expression. The Fifth Circuit, by concluding that Bell intended to reach the school community, is essentially treating the Internet differently than any other platform in light of its "everywhere and anywhere" nature. It tells students that they need to be careful about what they say online because online speech is ubiquitous. This effectively negates the primary benefits of the Internet.

143. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608 (5th Cir. 2004) (holding that speech was protected when a notebook with violent depictions was brought to a school by the speaker's younger brother on the grounds that the speaker never intended for the drawing to reach the school).

Under *Bell*'s precedent, student online speakers cannot take advantage of the ease and convenience of disseminating a message online without considering how the school might interpret it. In finding that intent to disseminate a school related message online is synonymous with intent to reach the school community, the Fifth Circuit has turned this advantage into a disadvantage. While it may be suggested that this concept of intent can be narrowed to exclude other cases where, for example, students may not intend to reach all school members but only a few, this limitation is unfeasible. Given the nature of the Internet, a message thrown into the ubiquitous, unpredictable online world is accessible to anyone. But this accessibility does not mean that the message will in fact be accessed by every community member. In many cases, the number of community members an online speaker intends to reach would be unascertainable for courts, as it is hard to predict for even the speaker.

Conversely, instead of looking at a speaker's intent to reach the school community, courts could view the requisite intent for application of *Tinker* as the speaker's intent to disrupt the school community during normal school hours. While this approach could lead to a more protective standard for students, the intent is still difficult to ascertain. For example, Taylor Bell did not intend for his rap song to be accessed at school.[144] In fact, the record contained only one incident where the song was played at school, at the request of a teacher. But Bell surely anticipated that the accusations he publicized in his song would be heard by students[145] and reverberate throughout the school during normal school hours. Moreover, it was foreseeable that students would gossip about the song and the accusations contained in it, interact differently with the accused teachers, and potentially express anger. However, these types of reactions do not rise to the level of a substantial disruption warranting punishment.

Furthermore, any actions from other parties reasonably foreseeable to Bell are too attenuated to hold him accountable for them. Students cannot be expected to anticipate that other students will, upon hearing their expressive conduct, respond in an unlawful manner during normal school hours. They cannot be held responsible when community members access the online speech and, acting on their own accord, facilitate disruptions unintended by the speaker. In retrospect, a

144. Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 285 (5th Cir. 2014) (Bell testified that he never encouraged anyone at school—students or staff—to listen to the song and that he never played the song at school; this leads to an inference that he did not intend for the song to be accessed at school).

145. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 386 (5th Cir. 2015) (en banc) (When questioned during the disciplinary hearing, Bell admitted that he knew students would hear the song because it was on Facebook, and that nearly 2,000 people had contacted him about the song.).

speaker's intent may be viewed as congruent with a disrupter's—more aligned than what it actually was at the time the message was formed and disseminated. The fact that a disruption occurred from a third party should not be used to support a finding that the speaker intended such a disruption. There may be cases where a speaker's intent to cause a disruption during school hours is clear. For example, a speaker may tell another student to carry out an act that would qualify as a substantial disruption. But these cases would be the exception, not the norm. Usually, the intent of an expressive speaker will be less clear. A student in Bell's position should not be hesitant to disseminate an important message online, in the form they choose, for fear that they will be held accountable if someone drastically overacts to the message.

For these reasons, the consideration of a speaker's intent when they disseminate speech off-campus is nebulous; it involves too many unascertainable variables and thus, can be unfair to the speaker. Application of a less protective standard should not turn on whether an off-campus speaker intended to reach the school community or cause a disruption. Courts should not consider an off-campus speaker's intent and instead, should limit the application of *Tinker* to situations where the speech is physically brought on to school grounds. The Fifth Circuit's holding effectively eliminates any meaningful barrier between the school environment and the home environment. The Supreme Court has, as recently as 2007, suggested that this barrier should remain in place.[146]

B. Allowing Application of Tinker *to Off-Campus Speech to Turn on a Question of Reasonableness Is Unfair to Students and Removes Needed Protection*

Some may argue that off-campus speakers receive enough protection under the Fifth Circuit's precedent because the school board's interpretation of the speech as threatening, harassing, or intimidating must be reasonable for *Tinker* to apply. Some disagreeing with the final outcome in *Bell* may argue that the Fifth Circuit's interpretation of Bell's speech was not reasonable. However, these arguments overlook the high degree of deference that is—and must be—awarded to school boards when courts consider reasonableness and the extent to which certain forms of speech are subject to different reasonable interpretations.

Rap music is perhaps the perfect example to illustrate the latter point.

146. *See* Morse v. Frederick, 551 U.S. 393, 403 (2007) (Writing for the majority, Chief Justice Roberts stressed that the school's disciplinary action over a student who hung up a banner was justified only because it occurred at a school-sponsored event.).

Rap music, especially when traced to its "gangsta rap" origin, can be inherently violent, vulgar, and hyperbolic.[147] Indeed, rap culture has emerged with its own set of norms and a unique identity.[148] Yet many people do not understand or empathize with rap culture and consequently, view the culture in a negative light.[149] In fact, courts have traditionally viewed rap music negatively.[150] The lyrics contained in Bell's rap song, when taken out of context or viewed by someone unfamiliar with rap music, could reasonably be interpreted as threats. But Bell, an aspiring rapper, wrote the lyrics in the context of a rap song and, more broadly, a rap culture. Because of the school board's presumable lack of familiarity with rap music, its interpretation was not unreasonable. The reasonableness of its interpretation is further supported by the motivations—explicit or not—of the school board to put student safety ahead of everything else and its vested interest in suppressing controversy. Bell's interpretation and the school board's both were reasonable. As Judge Dennis points out in his dissent, "reasonable minds may differ about when speech qualifies as threatening, harassing or intimidating."[151] In other words, one man's rap lyric is another man's threat. Herein lies the problem: any reasonable interpretation of a student's off-campus speech as threatening, harassing, or intimidating will make it subject to *Tinker*'s less protective standard. This ruling forces students to predict how a school board might reasonably interpret their off-campus speech. Students should not be placed in this difficult position, nor should they have their speech quelled because of fears that a reasonable interpretation—often influenced by an imperative to keep students safe—might beget punishments down the road. The application of

147. *See* Edward G. Armstrong, *Gangsta Misogyny: A Content Analysis of the Portrayals of Violence Against Women in Rap Music, 1987-1993*, 8(2) J. OF CRIM. JUST. & POPULAR CULTURE 96, 96 (2001) (discussing a finding that twenty-two percent of gangsta rap music songs contain violent and misogynist lyrics); *see also Bell*, 774 F.3d at 299 (noting that Bell's song contains violent imagery typical of the hyperbolic rap genre).

148. *See* Jason E. Powell, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L. J. 479, 483-84 (2009) (briefly discussing the evolution of rap music). For an in-depth discussion of the evolution of rap and hip hop culture, see Becky Blanchard, *The Social Significance of Rap and Hip Hop Culture*, ETHICS OF DEVELOPMENT IN A GLOBAL ENVIRONMENT (July 26, 1999), http://web.stanford.edu/class/e297c/poverty_prejudice/mediarace/socialsignificance.htm.

149. *See* Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J. L. & ARTS 355, 382-83 (2008) (noting that rap music often reflects a generation of black youth, something that white people do not understand and as a result, attempt to suppress).

150. *See* Powell, *supra* note 148, at 480 (noting that rap music is a foreign language to courts, and accordingly, is perceived negatively).

151. Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 418 (5th Cir. 2015) (en banc) (Dennis, J., dissenting) (stating that "one man's vulgarity is another's lyric") (citing Cohen v. California, 403 U.S. 15, 25 (1971)).

Tinker to off-campus student speech based on whether a school board's interpretation of the speech was reasonable strips away protection for students in a way that is antithetical to First Amendment principles.

C. Other Problems and Concerns with Applying Tinker *to Off-Campus Speech*

Allowing courts to continue the trend of applying *Tinker* to off-campus speech will allow schools to cast a wide net over student online speech. The rationale underlying *Tinker*'s less protective standard is predicated on advancing goals relating to the "special characteristics of the school environment,"[152] including the need to maintain order and protect the educational process.[153] But the Supreme Court has never suggested that the purpose of school regulation of speech is to control what students hear or say.[154] While schools maintain an interest in protecting their students from threats or problems originating off-campus that may overflow to campus, this interest, and *Tinker*'s underlying rationale, are weaker when the speech originates off-campus and is never "brought in" to the school.[155] Applying *Tinker* to off-campus online speech enables schools to paternalistically control what their students hear and say when they are off-campus. It replaces parental authority to discipline and monitor a child with the school's authority,[156] and additionally, deprives students of the right to engage in constitutionally protected activities that are at the center of our core democratic principles—activities such as satire, criticism, mockery, and, in Taylor Bell's case, hyperbolic rap music.

What type of off-campus speech constitutes a "substantial disruption" under *Tinker* is a difficult question for lower courts and school administrators to answer. School administrators may envision a definition that is much broader than a court's definition because of a school's vested interest in suppressing controversy. As the Third Circuit in *J.S. ex rel. Snyder v. Blue Mountain School, District* put it, adopting a

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

153. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

154. Brief for Appellants at 10, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (No. 12-60264), 2015 WL 1814763.

155. Brief for Student Press Law Center as Amicus Curiae Supporting Appellee, at 11, Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (5th Cir. 2014) (No. 12-60264), 2012 WL 2374248 (arguing that one of the reasons that off-campus speech and on-campus speech are treated differently is that on-campus speakers are a captive audience, whereas off-campus speakers are not).

156. Brief for Mary Beth Tinker as Amicus Curiae Supporting Appellants, at 14, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (No. 12-60264), 2015 WL 1607912 ("Given the primary role of parents, one could argue that school officials have no business punishing students for off-campus speech unless someone affirmatively brings it on campus. . . .").

less protective standard for certain off-campus speech would "allow school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of the school official, and is deemed offensive by the prevailing authority."[157] Furthermore, a school board might, as was the case in *Bell*, justify its punishment by claiming a substantial disruption, even though such a claim never appeared until litigation was brought.[158] Schools can invoke *Tinker* retroactively to mask the true motivation behind a punishment: a content based suppression based on dissatisfaction with the speaker's message. This punishment might be imposed to protect the image of a school official. *Tinker*'s flexibility and deference toward school boards make it easy for schools to do this; it would be harder for school districts to retroactively invoke a more protective standard.

Because the Internet transcends physical boundaries, it might seem strange to even categorize certain online speech as either "off-campus" or "on-campus." It can be argued that this transcendence leads to a false dichotomy and undermines any attempt to create two different standards for online speech. The following scenario demonstrates how strange the dichotomy can seem: student A posts a Facebook message on his phone poking fun at a school official during his car ride home while student B posts the same message in his gym class. Employing two different standards for student A and student B could, some might argue, be unfair in that scenario. But this distinction is nevertheless an important one. Taylor Bell never attempted to access or play his rap song at school. Had Taylor Bell made a deliberate attempt to bring the song into school by playing his rap song to other students during school hours, the analysis would have changed completely. One would be hard pressed to maintain that Bell would not be more culpable if he accessed the song at school. Furthermore, using cell phones during school hours is a violation of school rules, meaning that students who access their online speech at school are already causing a disruption pursuant to school policy. Undoubtedly there will be scenarios where the degree of culpability for a student speaker differs depending on whether that student made a deliberate attempt to disseminate his online speech on school grounds by accessing it. Thus, applying two different standards to on-campus and off-campus speech is not as counterintuitive as some

157. J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011) (finding that a school's decision to punish a student who created a fake Internet profile for the school principal was unconstitutional because there was no substantial disruption).

158. Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 288 (5th Cir. 2014) (noting that no evidence was presented at the disciplinary hearing to indicate that the song had caused a disruption; at the end of the hearing, one committee member told Bell, "I would censor your material . . . because everybody doesn't really listen to that kind of stuff . . . don't put all of those bad words in it.").

Begovic: Mo Speech Mo Problems: The Regulation of Student Speech in the Di

may contend.

D. Schools Have Other Alternatives to Tinker

The right to express an unfavorable opinion is deeply rooted in our nation's history and a staple of our democracy.[159] Given that one of a public school's many goals is to prepare students for adult life, suppressing speech like Taylor Bell's sends students the wrong message; it is a message that does not reflect the realities of adult life or teach students that the right to express such speech is cherished and celebrated in our society. Instead, it tells students that if they want to speak out on a public issue, it must be done in a way that will not be interpreted as hostile, vulgar, or offensive. This message conflicts with one of the main goals of public education: teaching students the values of citizenship that are necessary for our democracy to function.[160] In fact, as some commentators have pointed out, a school's hostility towards student dissent most likely stems from an unwillingness to view children as citizens, as well as a reluctance to operate the school in a way that fosters a practical understanding of constitutional principles.[161]

In most circumstances, it is easier for school officials to punish a student for vulgar off-campus dissent in an efficient, authoritarian way. But this type of approach bypasses the difficult, yet more appropriate method for dealing with dissent: engaging with the student to discern his motive for expressing the speech and discussing potential solutions in a constructive way that fosters an understanding of a democratic response to dissent.[162] By doing this, schools can engender a more inclusive environment where students' concerns and perspectives are embraced, not repressed. When a problem manifests from student dissent, school officials should refrain from taking the easy route, and instead, should find ways to address the speech that do not infringe upon the student's right to express such speech outside of the school. Schools are undoubtedly equipped with the tools and minds needed to propose alternatives to harsh punishment and suppression. Additionally, if

159. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969) ("In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.").

160. *See* Sullivan, *supra* note 69, at 696-97 (noting that public schools are valued by society because they instill in students a common set of core principles and values, such as respect, honesty, citizenship, responsibility, and integrity; public schools were established to teach students how to exercise their democratic rights as citizens and cultivate a sense of nationalism.).

161. *See* Josie Foehrenbach Brown, *Inside Voices: Protecting the Student-Critic in Public Schools*, 62 AM. U.L. REV. 253, 254-55 (2012).

162. *See id.* at 255.

Published by University of Cincinnati College of Law Scholarship and Publications, 2018

student speech crosses a legal line so as to remove it from normal constitutional protection, it can be dealt with through criminal enforcement or civil remedies. This may be the case if it asserts falsehoods in a way that would constitute defamation or is interpreted as imminently threatening and consequently punishable through the criminal justice system.[163]

One often-cited concern is that taking away a school's ability to invoke *Tinker* will render schools powerless to deal with problems such as bullying and school-related violence. Without *Tinker* applying to off-campus speech, some argue, a school may be unable to take preemptive action against a student who threatens, harasses, or intends to harm a school official. However, even without *Tinker*, there are a number of ways for schools to address these problems. First and foremost, many states have enacted anti-bullying legislation aimed at enabling and/or mandating schools to take action against bullying.[164] The U.S. Department of Education also has renewed its dedication to eliminating bullying by reminding educators that certain federal statutes may be invoked when addressing a bullying issue.[165] Accordingly, a school can utilize legislation to combat cyberbullying, as long as the speech in question meets the requirements laid out in such legislation. Cyberbullying laws would apply to a narrow category of speech, therefore leaving certain forms of expressive speech, such as Taylor Bell's rap song, untouched.

E. A More Protective Standard for Off-Campus Speech

Schools also can deal with threats and school-violence originating off-campus without invoking the *Tinker* standard to justify their decisions. In *Ponce v. Socorro Independent School District*, the Fifth Circuit upheld a school board's decision to expel a student who brought a notebook to class that described his plans to commit a Columbine-style attack on the school.[166] In cases where there is a strong reason to believe that a student intends to inflict grievous harm on a school, few would argue that speech evincing the student's intent should be

163. Brief for Student Press Law Center as Amicus Curiae Supporting Appellee, at 3-4, Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (5th Cir. 2014) (No. 12-60264), 2012 WL 2374248.

164. Matthew Fenn, *Symposium: The Goals of Antitrust: Note: A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729, 2737 (2013) (noting that forty-nine out of fifty states have enacted some type of antibullying legislation).

165. *Id.* at 2739 (noting that Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex. Thus, if bullying is based on any of these protected classes, the federal statute may be implicated.).

166. 508 F.3d 765, 766 (5th Cir. 2007).

protected. The question becomes: what type of standard would validate a school board's decision to take preemptive action to prevent a student from carrying out a violent attack on a school?

It is not hard to imagine a standard more protective than *Tinker* which, if met, would validate a school's decision in this type of scenario. In fact, the *Ponce* court stated that such speech is not protected because it, "poses a direct and demonstrable threat of violence unique to the school environment."[167] In *Ponce*, the court declined to apply *Tinker* to speech that "gravely and uniquely threatens violence including massive deaths, to the school's population as a whole."[168] The Fifth Circuit's language and holding in *Ponce* suggests that a separate standard can be crafted to handle speech that poses a serious threat to the safety of the students and the school. While *Ponce* did not explicitly establish a new standard, it demonstrates that such a standard can exist independently of *Tinker*. Under such a standard, a court would have to find that there is a strong interest in preventing physical danger to students.[169] Unlike the speech at issue in *Bell*, which was subjected to a deferential standard of reasonableness with respect to the school's interpretation, the speech at issue in *Ponce* evinced a more obvious intention to inflict harm on the school. Conduct that may be unprotected under *Tinker*'s substantial disruption standard, such as Bell's rhetorical rap song, would not rise to the level of conduct that would satisfy a standard derived from the language used in *Ponce*. Even without the formation of a new, independent standard, courts can draw from this type of language when dealing with off-campus speech. Adoption of this more protective standard would notify schools that they cannot suppress a student's off-campus speech unless the speaker's intent to harm the school is obvious or the speech poses a grave danger to the school. Thus, a school would know that its decision to punish a student for his off-campus speech could not hinge on unfounded fears or on fears over speech subject to multiple reasonable interpretations. By establishing that schools must go beyond a mere showing of reasonableness, courts would send the clear message that certain forms of off-campus speech—such as mockery, criticism, and expressive conduct—do not fall outside of First Amendment protection.

167. *Id.* at 771-72.

168. *Id.* at 772.

169. Brief for Mary Beth Tinker as Amicus Curiae in Support of Appellants, at 15-16, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (No. 12-60264) (arguing that the case should be decided under the narrow exception to *Tinker* carved out in *Ponce*, whereby the school can prohibit Bell's speech only if there is a strong interest in preventing physical danger to the students that might be incited by the rap); *see also* Morse v. Frederick, 551 U.S. 393, 424-25 (2007) (Alito, J., concurring) ("Due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence.").

While much uncertainty still surrounds *Tinker*'s application to off-campus speech, one thing is clear: lower courts have applied *Tinker* to certain off-campus speech in different situations and with different qualifications. *Bell* presented the Supreme Court with an opportunity to decide a student free speech case involving off-campus speech. The Court should have taken advantage of that opportunity and declared that off-campus speech is not subject to *Tinker*'s less protective standard. Such a holding would have limited *Tinker*'s application to on-campus speech in a way that is consistent with its original holding and underlying rationale. By not doing so, the Supreme Court has allowed the uncertainty surrounding off-campus speech to persist and failed to remedy the erosion of First Amendment rights for students in the off-campus setting.

V. CONCLUSION

The question of when a school can take measures to punish a student for his off-campus speech is a controversial one. It involves a confrontation between freedom of speech principles and the needs of schools to tackle emerging problems that have the potential to negatively impact the school and its students. The advent of the Internet has created a new platform for student speakers, raising new questions about the reach of school authority and the protections that off-campus, online speakers should be given. It has forced a reevaluation of the standards by which student speech is traditionally evaluated. Student online speech shows no signs of slowing down any time soon, nor does the litigation involving such speech. Taylor Bell's rap song was just one in a long line of student free speech cases. Despite precedent, there is still a cloud of uncertainty hanging over cases like Bell's because courts have applied different standards and have reached inconsistent outcomes.

The Fifth Circuit upheld Bell's suspension on the grounds that his speech was not protected by the First Amendment. In doing so, the Fifth Circuit applied *Tinker*'s less protective standard because Bell's speech could reasonably be interpreted as threatening and Bell intended for his speech to reach the school community. This Casenote has argued that the Fifth Circuit's approach in Bell should be repudiated for a number of reasons. First and foremost, the consideration of a student's intent to reach the school community is nebulous and unfair to the student. Considering a student's intent to reach the school community with off-campus, online speech is antithetical to the foundations of *Tinker*'s less protective standard. Secondly, a standard of reasonableness is deferential and all-encompassing. Therefore,

application of *Tinker*'s less protective standard should not turn on whether a court finds that a school's interpretation was reasonable. The problems with the Fifth Circuit's approach and its justifications for narrowly applying *Tinker* under the circumstances demonstrate that *Tinker* cannot be extended to off-campus speech in a way that adequately safeguards the rights of students disseminating speech off-campus. For this reason, a bright line rule prohibiting the application of *Tinker* to off-campus speech is necessary. As additional support for this position, this Casenote has discussed the problems and concerns, theoretical and practical, of eschewing such a rule. Instead, courts should adopt a more protective standard for off-campus speech, such as the "uniquely and gravely threatens violence" standard adopted by the Fifth Circuit in *Ponce*.

The digital age has made policing more difficult for schools. Schools should be given the tools they need to help them police the rapidly growing digital world and eliminate problems such as cyberbullying and school-related violence. They already have many tools at their disposal. However, allowing schools to expand their authority by broadly extending *Tinker* to off-campus speech is not the answer. The harms of this expanded authority greatly outweigh the potential benefits. When Taylor Bell turned to his rap music to publicize allegations of sexual assault, he was not worried about how the school might view his music. He had the expectation that, because the endeavor was on his own time, the school would not exercise control over it. Bell and other students are entitled to this expectation. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[170]

APPENDIX A:
EXCERPT FROM TAYLOR BELL'S RAP SONG[171]

Let me tell you a little story about these Itawamba coaches
Dirty ass niggas like some fucking coacha roaches
Started fucking with the whites and now they fucking with the blacks
That pussy ass nigga Wildmon got me turned up the fucking max.
Fucking with the students and he just had a baby
Ever since I met that cracker I knew that he was crazy
Always talking shit cause he know I'm from the city
The reason he fucking around cause his wife ain't got no titties
This nigga telling students that they sexy, betta watch your back

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

171. Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 284–85 (5th Cir. 2014).

University of Cincinnati Law Review, Vol. 84, Iss. 2 [2018], Art. 7

I'm a serve this nigga like I serve the junkies with some crack
Quit the damn basketball team / The coach a pervert
Can't stand the truth so to you these lyrics going to hurt
What the hell was they thinking when they hired Mr. Rainey
Dreadlock Bobby Hill the second / He the same see
Talking about you could have went pro to the NFL
Now you just another pervert coach, fat as hell
Talking about you gangsta / Drive your mama's PT Cruiser
Run up on T-Bizzle / I'm going to hit you with my rueger
Think you got some game / Cuz you fucking with some juveniles
You know this shit the truth so don't you try to hide it now
Rubbing on the black girls' ears in the gym
White hoes, change your voice when you talk to them
I'm a dope runner, spot a junkie a mile away
Came to football practice high, remember that day
I do, to me you a fool nigga / 30 years old fucking with students at the school / Hahahah You's a lame and it's a damn shame
Instead you was lame, eat shit, the whole school got a ring mutherfucker
Heard you textin' number 25 / You want to get it on
White dude, guess you got a thing for them yellow bones
Looking down girls' shirts / Drool running down your mouth
You fucking with the wrong one / Going to get a pistol down your mouth
Pow / OMG took some girls in the locker room in PE
Cut off the lights you motherfucking freak
Fucking with the youngins / Because your pimpin game weak
How he get the head coach I don't really fucking know
But I still got a lot of love for my nigga Joe
And my nigga Makaveli and my nigga Cody
Wildemon talk shit bitch don't even know me
Middle fingers up if you hate that nigga
Middle fingers up if you can't stand that nigga
Middle fingers up if you want to cap that nigga
Middle fingers up / he get no mercy nigga.