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## ***Tinker, Taylor, Schoolhouse, Speech: The Impact of the Internet and Social Media on Public School Administrators' Authority to Control Student Speech***

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# ***Tinker, Taylor, Schoolhouse, Speech: The Impact of the Internet and Social Media on Public School Administrators' Authority to Control Student Speech***

*Olivia Broderick\**

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*I. Introduction: Can a School District Punish a Student for Speech Created Neither on School Property nor with School Property?*

In January 2011, Taylor Bell was upset after two female classmates told him that they felt uncomfortable about inappropriate actions and comments made to them by two coaches at Itawamba Agricultural High School (I.A.H.S.).<sup>1</sup> Bell decided to stand up for them by composing a rap, which he first posted on his private Facebook page and later publicly on YouTube.<sup>2</sup> After word of the rap spread, Bell was suspended and ultimately expelled from I.A.H.S. for violating a district policy that forbade threats, harassment, or intimidation of school employees.<sup>3</sup> Thus, the issue is whether and when a school district may punish a student for speech that is neither created on school property nor with school property or at a school event, as is the case with Bell’s rap.<sup>4</sup> Because of accessibility to online media on campus, administrators should have the power to proscribe speech, which foreseeably or actually does “materially and substantially disrupt the work and discipline of the school.”<sup>5</sup>

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1. See *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 283 (5th Cir. 2014) (describing the facts leading up to Bell’s suspension).

2. *Id.* at 285–86.

3. *Id.* at 288.

4. See *Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205, 214–16 (3d Cir. 2011) (ruling that there must be a sufficient nexus between the school and the speech in question in order for the district to punish a student who creates it).

5. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (explaining that students do not shed their First Amendment rights at the schoolhouse gate).

## *II. Background*

### *A. First Amendment Law*

The First Amendment to the Constitution prohibits Congress from making any law “abridging the freedom of speech.”<sup>6</sup> While this right is broad, it is not absolute.<sup>7</sup> The Supreme Court has long held that there are certain times and certain areas in which the prevention and punishment of speech is permissible under the Constitution.<sup>8</sup> These include “the lewd and obscene, the profane, the libelous, and . . . insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>9</sup> State bans on true threats are constitutional as well.<sup>10</sup> A statement constitutes a true threat when the speaker communicates intent to inflict unlawful physical violence upon another person or group of people.<sup>11</sup> Because such speech contains no social value and has the ability to cause substantial harm and disruption to the person threatened, these prohibitions are lawful regardless of whether the speaker actually intends to carry out the threat.<sup>12</sup>

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6. U.S. CONST. amend I.

7. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (discussing some classes of speech which may be prevented and punished without raising a constitutional issue).

8. *See* *Virginia v. Black*, 538 U.S. 343, 344 (2003) (explaining that prohibition of truly threatening language is lawful because of the detrimental effect that it has on the recipient).

9. *See* *Chaplinsky*, 315 U.S. at 571–72 (stating that there are certain classes of speech that lack any social value and are not essential to any form of expression, thus are not protected).

10. *Black*, 538 U.S. at 344.

11. *Id.*; *see also* *Watts v. United States*, 394 U.S. 705, 706 (1969) (explaining that, while some communication may contain threatening language, the threat itself is not protected by the Constitution).

12. *See* *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (“A threat may cause serious emotional distress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation.”).

### *B. Supreme Court Jurisprudence on Student Speech*

The Supreme Court long ago held that public school students retain some rights at school, but the extent of these protections remains unclear.<sup>13</sup> The few student speech cases that the Court has heard comprise the foundation upon which the current analysis is based.<sup>14</sup> In *Tinker v. Des Moines Independent Community School District*, the leading school speech case, several students sued the Des Moines, Iowa school district after they were suspended for wearing black armbands at school to protest the Vietnam War.<sup>15</sup> The Court held that students retain their free speech rights at school and that this form of censorship, suppression of expression of an individual's beliefs, is void "without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline."<sup>16</sup>

This burden is not met when the sole purpose for punishing student expression is to prevent the unpleasantness that follows an unpopular viewpoint.<sup>17</sup> Rather, the standard of review is that the expression must actually, or be reasonably forecasted to, disturb the school's work.<sup>18</sup> The passive act of the students in

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13. See *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (determining that constitutional protections remain in place at school because of the important duty of educators to prepare America's youth for citizenship, and that a student cannot be compelled to salute the flag); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (finding that the school district violated the students' free speech rights when it prohibited them from wearing black armbands in protest of the Vietnam War); *Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675, 681 (1986) (explaining that public schools are in the unique position of educating students both educationally and socially, so they may censor unacceptable social behavior); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (determining that "First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings . . .") (citing *Bethel*, 478 U.S. at 682); *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (ruling that the First Amendment does not require schools to tolerate student speech that advocates illegal drug use).

14. See *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985) (finding that "school officials act as representatives of the State, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from the Fourth Amendment's strictures.").

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

16. *Id.* at 511.

17. See *id.* at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

18. *Id.* at 508, 514.

*Tinker* created no actual disturbance on campus, nor were there any facts showing that administrators reasonably could have forecast any disruption, so the First Amendment protected them.<sup>19</sup> This remains the benchmark for determining the constitutionality of censoring student speech.<sup>20</sup>

Despite *Tinker's* seemingly bright-line rule, many questions arose in its wake, and subsequent decisions have consistently peeled back at its expansive reach. The Court now recognizes a limited set of circumstances in which school officials may constrain student speech even if it is “non-disruptive within the meaning of *Tinker*.”<sup>21</sup> In *Bethel School District No. 43 v. Fraser*, the Court upheld the school district’s decision to suspend a student for delivering a sexually explicit speech at a school assembly.<sup>22</sup> Even without any showing of substantial disruption, schools have latitude to prohibit otherwise protected speech because of their unique role of imparting upon the students the bounds of “socially appropriate behavior.”<sup>23</sup> Therefore, they may suppress expression that is “unrelated to any political viewpoint” and contains no merit, as this furthers their interest in protecting children from offensive conduct.<sup>24</sup> The reasoning for this is that “the constitutional rights of students in public schools are not coextensive with the rights of adults in other settings,” so speech which is protected in a public forum can be prohibited in the school context.<sup>25</sup> There is also a strong presumption in favor of school boards to determine exactly what language they find is inappropriate.<sup>26</sup>

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19. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

20. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015).

21. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 293 (5th Cir. 2014).

22. *See Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675, 676 (1986) (“The First Amendment did not prevent the School District from disciplining respondent for giving the offensively lewd and indecent speech at the assembly.”).

23. *See id.* at 681 (finding that because public schools are in the unique position of educating students both educationally and socially, they may censor unacceptable social behavior).

24. *See id.* at 684–85 (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 871–72 (1982) (Rehnquist, J., dissenting)); *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978) (defending this exception to First Amendment freedoms).

25. *See Morse v. Frederick*, 551 U.S. 393, 395 (2007) (quoting *Bethel*, 478 U.S. at 682) (establishing another method for validly circumscribing student expression in the school setting).

26. *Bethel*, 478 U.S. at 683.

*Tinker* was further eroded two years later in *Hazelwood School District v. Kuhlmeier*.<sup>27</sup> In this case the principal cut two articles from the student newspaper, produced as part of a journalism class, prior to their publication.<sup>28</sup> One article concerned the experiences of pregnant high school girls and the other discussed the impact divorce has on high school students.<sup>29</sup> The principal argued that the content of the articles might upset some younger students.<sup>30</sup> He also felt it was unfair to publish the divorce piece without allowing the parents a chance to respond.<sup>31</sup>

As a threshold matter, the *Hazelwood* court first analyzed whether the school newspaper was a “forum for public expression,” and was thus entitled to constitutional protection.<sup>32</sup> A public forum is created only when administrators open up school facilities, either by policy or in practice, for “indiscriminate use by the general public” or a portion of the public, like a student group.<sup>33</sup> Because school policy manuals described the newspaper as part of the educational curriculum, the Court found that the newspaper was not a public forum, but a “supervised learning experience for journalism students.”<sup>34</sup> As such, the administration could place reasonable restraints on speech contained within.<sup>35</sup>

*Hazelwood* did not completely undo the *Tinker* framework, but it established that the “substantial interference” standard does not apply with the same rigor to school-sponsored educational activities as it does to personal political beliefs held by members of the student body.<sup>36</sup> A school cannot be forced to “lend its name and

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27. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (holding that “First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings . . .”).

28. *Id.* at 262.

29. *Id.* at 263.

30. *Id.* at 260.

31. *Id.*

32. See *id.* at 267 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

33. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

34. See *id.* at 267 (relying on the definitions set out in the School Board Policy Manual and the Hazelwood East Curriculum Guide).

35. *Id.*

36. See *id.* at 273 (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are

resources to the dissemination of student expression.”<sup>37</sup> This is the crucial difference between *Hazelwood* and *Tinker*, where the students’ speech was completely unrelated to any school sponsored activity.

*Morse v. Frederick*<sup>38</sup> is the most recent Supreme Court decision on student expression, and the first time that the Court upheld a school’s decision to punish off-campus speech.<sup>39</sup> In January 2002, the principal of Juneau-Douglas High School, Petitioner Morse, suspended Respondent Frederick for displaying a banner which read “BONG HiTS 4 JESUS” across the street from the school, as the Olympic Torch Relay passed through town.<sup>40</sup> As a school-sanctioned activity, teachers and administrators were present to monitor the students and enforce the district’s student conduct rules.<sup>41</sup> Morse demanded that the students take down the banner as soon as she saw it.<sup>42</sup> Frederick refused and was suspended for violating the district policy forbidding promotion of illegal drug use.<sup>43</sup> Frederick sued under 42 U.S.C. § 1983, claiming a violation of his First Amendment rights.<sup>44</sup>

The Supreme Court agreed with Morse, holding that administrators can limit otherwise protected speech when it occurs on campus or at a school sponsored event, because of the “special characteristics of the school environment.”<sup>45</sup> Consistent with this

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reasonably related to legitimate pedagogical concerns.”).

37. *Id.* at 272–73.

38. 551 U.S. 393 (2007).

39. *See generally id.* (deciding that the principal did not violate the student’s free speech rights for confiscating a banner which promoted illegal drug use).

40. *Id.*

41. *See id.* at 393, 398 (“Juneau School Board Policy No. 5850 subjects [p]upils who participate in approved social events and class trips’ to the same student conduct rules that apply during the regular school program.”).

42. *Id.* at 398.

43. *See id.* (“Juneau School Board Policy No. 5520 states: ‘The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors.’”).

44. *Morse v. Frederick*, 551 U.S. 393, 399 (2007); *see also* 42 U.S.C. § 1983 (allowing a cause of action for any person within the United States to seek relief for “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”).

45. *See Morse*, 551 U.S. at 394–95 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (explaining that Congress has stated that such a “special characteristic” is to deter students from using illegal



principle, school officials may take actions to protect the students in their care.<sup>46</sup> Because there is a compelling government interest in combating illegal drug use, the Court held that Morse did not violate Frederick's rights when she suspended him.<sup>47</sup> This is a significant decision for this line of cases because the school's actions were upheld under the compelling interest analysis.<sup>48</sup> Therefore, schools have another avenue to lawfully proscribe student speech when they cannot prove that any substantial disruption did, or foreseeably could, result.<sup>49</sup> More importantly, this decision held that it is possible for the schoolhouse gate to extend off-campus.<sup>50</sup>

### *C. Lower Courts' Regulation of Off-Campus Speech*

The *Morse* decision acknowledged that the power of school officials to punish certain student speech is not completely limited by the physical boundaries of the campus.<sup>51</sup> Because it did not enumerate how far this reach extends, lower courts have considerable discretion to determine when conscription of off-campus student speech is valid.

Regulation of off-campus speech usually occurs when it makes its way to school somehow.<sup>52</sup> The extent that the arm of authority may reach beyond the schoolhouse gate has steadily expanded since the Second Circuit's decision in *Thomas v. Board of Education*.<sup>53</sup> In *Thomas*, several students sued the board of education after they were punished for creating and distributing a

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drugs).

46. *Id.*

47. *Id.*

48. *See id.* at 407 (finding that schools can punish students for expression that does not create a material or substantial disruption).

49. *Id.* at 408–09.

50. Scott L. Sternberg, *Outside the Schoolhouse Gate: The Limits of Tinker v. Des Moines Independent Community School District*, COMM'NS LAWYER (Sept. 2014), [http://www.americanbar.org/publications/communications\\_lawyer/2014/september14/tinker.html](http://www.americanbar.org/publications/communications_lawyer/2014/september14/tinker.html) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

51. *Id.*

52. *Sternberg, supra* note 50.

53. 607 F.2d 1043 (2d Cir. 1979).

satirical newspaper off-campus.<sup>54</sup> The paper, *Hard Times*, included articles regarding various members of the school community, masturbation, and prostitution.<sup>55</sup> The school board claimed that the paper was “morally offensive, indecent, and obscene” and predicted that it would have a “devastating’ effect on public education.”<sup>56</sup>

The Second Circuit’s opinion stressed the importance of the First Amendment, which protects all expression unless it is “capable of perpetrating grievous harm.”<sup>57</sup> When speech occurs outside of the schoolyard, the restrictions on the First Amendment lose effect.<sup>58</sup> Therefore, because the students purposefully printed and sold the paper off-campus, school officials had no authority to regulate its content.<sup>59</sup> This decision upheld the holding in *Tinker* that school boards do not have unfettered discretion to limit speech purely because they find it disagreeable.<sup>60</sup>

### 1. Regulation of Violent Speech

Discipline of speech that is not created or explicitly directed toward campus is upheld by many courts when the speech contains violent references.<sup>61</sup> The more specific references the threatening language contains, such as time, manner, and people the violence

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54. See *id.* at 1050 (finding that the fact that the students occasionally typed articles and stored publication materials at school was insufficient evidence to render the paper on-campus speech).

55. *Id.* at 1045.

56. *Id.* at 1046.

57. See *id.* at 1047 (“Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decision-making if all ideas, discoveries, and points of view are before the citizenry for its consideration”, citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.), *aff’d*, 326 U.S. 1 (1945)).

58. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979).

59. *Id.*

60. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (stating that proscription of speech is unlawful if done merely because of the “desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

61. See Sternberg, *supra* note 50 (giving examples of cases in which violent speech was disciplined).

is directed toward, the more seriously it will be taken.<sup>62</sup> In the years since the Columbine, Virginia Tech, and Sandy Hook shootings, and in light of the current reality of students committing horrendously violent acts upon school communities, these threats must be taken seriously.<sup>63</sup>

In *Doe v. Pulaski County Special School District*<sup>64</sup> a middle school student, J.M., was expelled from school for writing a violent letter to his ex-girlfriend, K.G.<sup>65</sup> The letter was made public by another student, who had found it at the author's house and brought it to school without J.M.'s knowledge or consent.<sup>66</sup> J.M.'s mother brought suit on his behalf, claiming that the school board violated her son's free speech rights when it disciplined J.M. for the letter, which he had written at home and never intended K.G. to receive.<sup>67</sup>

The court's analysis focused on whether a finder of fact should consider the speaker's or the recipient's point of view to determine whether speech constitutes a true threat and is void of First Amendment protection.<sup>68</sup> The court found that the nature of the alleged threat must be considered from the viewpoint of the reasonable recipient.<sup>69</sup> The Eighth Circuit further concluded that J.M. intentionally communicated a threat when he discussed the contents of the letter with a friend and K.G. herself, before it made its way to school.<sup>70</sup> The school board had authority to discipline this off-campus speech because "when a threatening idea or thought is

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62. *Id.*

63. *Id.*

64. 306 F.3d 616 (8th Cir. 2002).

65. *See id.* at 619 ("J.M. drafted two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder K.G.").

66. *Id.*

67. *Id.* at 620.

68. *See id.* at 622 ("The views among the courts diverge . . . Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the alleged threat") (*comparing* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Live Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc) *with* United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994), *cert. denied*, 513 U.S. 968 (1994)).

69. *Id.* at 623.

70. *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 620, 625 (8th Cir. 2002).

communicated . . . the government's interest in alleviating the fear of violence and disruption associated with the threat engages."<sup>71</sup>

By contrast, the Fifth Circuit in *Porter v. Ascension Parish School Board*<sup>72</sup> ruled that there was no intentional communication by the creator of a violent drawing that was accidentally brought to school. In *Porter*, Andrew Porter accidentally brought a two-year-old picture drawn by his brother, Adam, to class.<sup>73</sup> After another student found the drawing, which depicted various violent acts directed at the East Ascension High School building; school authorities suspended both Adam and Andrew.<sup>74</sup>

Because Adam never intended for the drawing to leave home, much less to end up on campus, the Fifth Circuit did not consider this a true school speech issue.<sup>75</sup> Rather their analysis rested on whether the threatening or disruptive content was knowingly or intentionally disseminated, which is required to remove First Amendment protection from allegedly threatening speech.<sup>76</sup> Ultimately, the Court determined that something more than accidental exposure in public is needed to prove a valid threat to the school community.<sup>77</sup> True threats require intent.<sup>78</sup> Otherwise, allowing such prohibition would impermissibly infringe free speech rights.<sup>79</sup>

In *Ponce v. Socorro Independent School District*,<sup>80</sup> intentional communication of a threat was not evaluated because student

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71. *Id.* at 624.

72. 393 F.3d 608 (5th Cir. 2004).

73. *See id.* at 611 (explaining that Andrew Porter brought a notepad including a two-year-old sketch drawn by his older brother, Adam, to school).

74. *Id.*

75. *See id.* at 617 (“[W]e need not decide whether Adam’s drawing would institute a true threat . . . because Adam did not intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment.”).

76. *Id.* at 618.

77. *Id.*

78. *See Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (“Adams’s drawing cannot be considered a true threat as it was not intentionally communicated.”).

79. *Id.*

80. 508 F.3d 765 (5th Cir. 2007) (finding that speech which poses a unique threat to the school environment has fewer protections than it would be afforded otherwise).

speech is not protected when it “poses a direct and demonstrable threat of violence unique to the school environment.”<sup>81</sup> In that case, the principal suspended a student after he discovered a diary, the contents of which threatened a Columbine-style attack on the school.<sup>82</sup> Generally, content-based restrictions on speech are presumed unconstitutional, and they may only be employed when that speech is likely to incite imminent lawless action.<sup>83</sup> However, the majority opinion sided with the school district in this case, because “some harms are in fact so great in the school setting that requiring a school administrator to evaluate their disruptive potential is unnecessary.”<sup>84</sup> This case narrowly extended *Morse* and held that *Tinker’s* substantial disruption requirement is inapplicable when speech that threatens mass murder of the school population is brought to campus.<sup>85</sup>

#### *D. Lewd Speech Online*

The necessary facts that must be proven to meet *Tinker’s* substantial disruption, or foreseeability of substantial disruption, standard have proven problematic for the circuit courts to apply uniformly. This is made all the more difficult when considering the “everywhere at once’ nature of the internet.”<sup>86</sup> A case from the Fifth Circuit, *Snyder v. Blue Mountain School District*, and a case from the Third Circuit, *Layshock ex rel. Layshock v. Hermitage School District*, consider what, if any, power school authorities have to curtail speech that is created by a student online, away from school.<sup>87</sup>

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81. See *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 298 (5th Cir. 2014) (citing *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (2007)).

82. See *Ponce*, 508 F.3d at 766 (describing the contents of the student’s diary).

83. See *Morse v. Frederick*, 551 U.S. 393, 437 (2007) (Stevens, J., dissenting) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

84. See *Ponce*, 508 F.3d at 770 (relying on Justice Alito’s concurrence in *Morse* that a substantial government interest in preventing violence at school overrides the necessity of a *Tinker* style analysis).

85. *Id.* at 772.

86. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring).

87. See *id.* at 915 (analyzing whether online speech off of school property can be restricted). *Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205

In *Snyder*, the Blue Mountain School District suspended a middle school student, J.S., for creating a derogatory and sexually explicit profile on the social networking site MySpace that impersonated her school's principal, James McGonigle.<sup>88</sup> J.S. made the profile at her home, on a weekend, and did not identify the principal or school by name; though an official photograph taken from the school district's website did appear on the profile.<sup>89</sup> The school's server blocked MySpace, so no student had access to the page on campus.<sup>90</sup> In fact, the only physical connection to the campus was a printout of the profile that McGonigle requested a student bring to him.<sup>91</sup> The school district did not argue that the profile created a substantial disruption in school, or that any substantial disruption was reasonably foreseeable as a result of its creation.<sup>92</sup>

The district court held J.S.'s suspension constitutional under *Fraser's* "vulgar and offensive" exception to the speech protections enumerated in *Tinker*.<sup>93</sup> In *Fraser*, the Supreme Court held that school officials can regulate lewd and plainly offensive speech in school because of their duty to "prepare pupils for citizenship in the Republic."<sup>94</sup> *Fraser* was inapplicable here however, because that exception applies only to speech that occurs "in school" or at some approved social event, as in *Morse*.<sup>95</sup> The Court warned that

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(3d Cir. 2011).

88. *Snyder*, 650 F.3d at 920.

89. *Id.*

90. *Id.* at 921.

91. *Id.*

92. See J.S. *ex rel.* *Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920, 922–23 (3d Cir. 2011) (finding that the only disruptions resulting from the profile were "general 'rumblings'" around school, one teacher quieting a group of students in class who were discussing the site, and that one guidance counselor rescheduled a few meetings).

93. *Id.* at 924.

94. See *Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675, 682 (1986) (discussing the importance of learning the boundaries of socially appropriate behavior); see also *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (reiterating that a central purpose of public education is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.").

95. See *Snyder*, 650 F.3d at 932 ("Specifically in *Morse*, Chief Justice Roberts, writing for the majority, emphasized that '[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected,'" quoting *Morse v. Frederick*, 551 U.S. 393, 405 (2007)).

extending *Fraser* to allow the school to sanction J.S. for creating the MySpace profile “would be to adopt a rule that allows 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 a school official, and is deemed “offensive”<sup>96</sup> The precedent created by such a rule would allow public schools to strip students of their First Amendment rights for speaking in a manner that is neither directed at nor disruptive to the school environment.<sup>97</sup>

This case is also informative for its discussion of the boundless nature of the Internet. Similar to the accidental dissemination of physical content in *Porter*, the fluidity of the Internet leads courts to focus on whether there is evidence of any intentional direction of the speech towards the school.<sup>98</sup> If however, the speech makes its way onto campus unintentionally, the creator has the same equal protections as any adult in the community at large and is subject to none of the school specific exceptions to freedom of expression.<sup>99</sup> This was not an issue in *Snyder*, but in Taylor Bell’s case the Fifth Circuit found that he had directed his rap to the school community to such an extent that it transformed into on-campus speech.<sup>100</sup> The court reasoned that because Bell admitted that he had created the song in order to increase awareness of the allegations against the coaches, he had engaged in intentional direction to the school.<sup>101</sup>

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96. *Id.* at 933.

97. *See id.* at 939 (Smith, J., concurring) (stating that allowing interference of wholly off-campus speech is not the law).

98. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (noting the importance of proof that the student intended their speech to reach campus).

99. *Id.*

100. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (reasoning that the rap was on-campus speech because a portion of Bell’s intended audience were students and faculty at I.A.H.S.).

101. *See id.* at 396 (“[T]here is no genuine dispute of material fact that Bell intended his rap recording to reach the school community. He admitted . . . that one of the purposes for producing the record was to ‘increase awareness of the [misconduct]’ and . . . he knew people were ‘gonna listen . . .’”).

*E. A New Test for Online Speech: Sufficient Nexus*

Similar to *Snyder*, in *Layshock ex rel. Layshock v. Hermitage School District*<sup>102</sup> a student, Justin Layshock, created a parody MySpace profile of school's principal and was suspended following a disciplinary hearing.<sup>103</sup> Layshock used a school computer to access the site on two occasions; once to show the page to some classmates, and a second time when he tried to delete the page.<sup>104</sup> Nevertheless, the school was unable to show that any widespread disorder resulted from the profile, and justified their discipline on the connection between the profile and the school.<sup>105</sup> Layshock subsequently filed suit, alleging a violation of the First Amendment because his expressive conduct "originated outside of the schoolhouse, did not disturb the school environment and was not related to any school sponsored event."<sup>106</sup>

In this case, as in *Snyder*, the school district could not defend its actions under *Tinker* or its exceptions, because they were unable to show that any material or substantial disruption occurred.<sup>107</sup> Instead the school district argued that its actions were justified because there was a sufficient nexus between the site and the school.<sup>108</sup> According to this sufficient nexus test, suppression of speech is acceptable if there is a credible link between the school and the information published online by the student.<sup>109</sup> Here, the district argued that Layshock entered school property when he copied a picture of the principal from their website.<sup>110</sup> He

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102. 650 F.3d 205 (3d Cir. 2011).

103. *Id.* at 208.

104. *Id.*

105. *Id.* at 218–19.

106. *See id.* at 207 (concluding that the school went further than the law allows in disciplining Layshock).

107. *See id.* at 214 ("[T]he School District is not arguing that it could properly punish Justin under the *Tinker* exception for student speech that causes a material and substantial disruption of the school environment.").

108. *See* U.S.C.A. amend. I (showing that circuit courts need not always adhere to the *Tinker* standard when evaluating student speech claims).

109. *See Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205, 214 (3d Cir. 2011) (explaining that the school district relied on this test because it could not prove a substantial disruption of the school environment caused by the student's speech).

110. *Id.*



intentionally directed his speech at the school when he showed the page to classmates.<sup>111</sup>

This new analysis illustrates a move by some courts and school districts to determine the precise limits of the schoolyard in light of the fluid nature of the Internet.<sup>112</sup> The court rejected the school district's argument that Layshock "entered" the school by accessing the district website.<sup>113</sup> Instead they relied on *Thomas*, finding the punishment unacceptable because nearly all of the communication was created off campus, with an inconsequential portion conducted within the schoolhouse gate.<sup>114</sup> Though the sufficient nexus test is a creative method for incorporating Internet speech into the school speech analysis, the Third Circuit found that it could create a "dangerous precedent to allow the state . . . to reach into a child's home and control his/her actions there to the same extent it can control that child when he/she participates in school sponsored activities."<sup>115</sup> The court affirmed that schools must prove a violation of *Tinker* or one of its exceptions to succeed on such a claim.<sup>116</sup>

### *III. The Fifth Circuit Sets New Precedent: Bell v. Itawamba County School Board*<sup>117</sup>

Taylor Bell recorded his rap during Christmas vacation and, upon returning to school, was questioned about it by school

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111. *See id.* at 209 ("Justin used a computer in his Spanish classroom to access his MySpace profile of Trosch. He also showed it to other classmates, although he did not acknowledge his authorship.").

112. *Id.* at 214.

113. *See id.* at 214–15 ("The School District's attempt to forge a nexus between the School and Justin's profile by relying upon his 'entering' the District's website to 'take' the District's photo of Trosch is unpersuasive at best.").

114. *Id.* at 215 (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045 (2d Cir. 1979)).

115. *Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205, 216 (3d Cir. 2011).

116. *See id.* at 219 ("We believe the cases relied upon by the School District stand for nothing more than the rather unremarkable proposition that schools may punish expressive conduct that occurs outside of school, as if it occurred inside the "schoolhouse gate," under certain very limited circumstances, none of which are present here.").

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

authorities.<sup>118</sup> Bell testified that he never encouraged anyone at school to listen to his song, nor did he ever play it at school.<sup>119</sup> However, one of the coaches listened to it on campus, using a student's cell phone.<sup>120</sup> After this questioning, Bell posted the video to YouTube.<sup>121</sup> The following day, Bell was suspended for violating a district rule prohibiting the use of threatening speech.<sup>122</sup> Though school authorities claimed that Bell was suspended because the principal believed that he was presently dangerous, he was allowed to wait on campus, unsupervised, until he could ride the bus home at the end of school day.<sup>123</sup> Additionally, at no point during any of these proceedings were the police notified, nor Bell's locker searched.<sup>124</sup> The school district held a disciplinary hearing to determine whether Bell had "threatened, intimidated, and/or harassed one or more school teachers."<sup>125</sup>

During the hearing, Bell stated that he did not intend to intimidate, threaten, or harass the coaches, but that the rap was artistic expression, which he hoped would increase awareness of the problem.<sup>126</sup> The school district did not claim that the rap created, nor was foreseen to create, a substantial disruption at school, but decided to uphold the suspension.<sup>127</sup> They reasoned that

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118. *See id.* at 285 ("Let me tell you a little story about these Itawamba coaches/ . . . Now you just another pervert coach . . . / I'm going to hit you with by rueger Think you got some game/cuz your f\*\*\*\*\* with some juveniles/ . . . Rubbing on black girls ears in the gym.").

119. *Id.*

120. *Id.*

121. *Id.* at 286.

122. *Id.*

123. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 286 (5th Cir. 2014).

124. *See Michael Render (aka "Killer Mike") & Erik Nielson, Killer Mike: Free speech - - unless it's rap?*, CNN (Feb. 18, 2016, 8:03 AM), <http://www.cnn.com/2016/02/17/opinions/rap-first-amendment-supreme-court-render-nielson/> (noting that young, poor, minority rappers are often prosecuted for their art and do not get the same respect as the numerous other artists that depict violent acts without repercussion) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

125. *See Bell*, 774 F.3d at 287 (citing the school board's assertion that it would take up the merits at a separate hearing as its reason for not accepting the affidavits Bell presented from the female students which corroborated his story).

126. *Id.*

127. *Id.* at 288; *see also Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 974 (5th Cir. 1972) (concluding that the *Tinker* standard can be found by showing "demonstrable factors that would give rise to any reasonable forecast by the

Bell's rap did harass and intimidate the coaches, but found the lyrics themselves too vague to make a determination whether they were actually threatening.<sup>128</sup> The school board then affirmed the Committee's decision, while adding that Bell did in fact threaten district employees.<sup>129</sup> The board provided no reasoning for this finding.<sup>130</sup>

Bell and his mother then brought suit in the United States District Court for the Northern District of Mississippi against the Itawamba County school board, the superintendent, and the I.A.H.S. principal, claiming a violation of Bell's right to freedom of speech under the First Amendment.<sup>131</sup> After the district court ruled in favor of the school board, a three-judge panel of the Fifth Circuit reversed.<sup>132</sup> The panel held that the school board had infringed Bell's rights and that there was insufficient evidence to prove his song "caused a substantial disruption of school work or discipline, or that school officials reasonably could have forecasted such a disruption."<sup>133</sup>

The school board appealed and the case was then heard by the Fifth Circuit en banc.<sup>134</sup> The Court reversed the earlier decision and found that schools may proscribe student conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."<sup>135</sup> This rule "[applies] when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when the speech originated, and was

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school administration of 'substantial and material' disruption.").

128. See *Bell*, 774 F.3d at 288 ("The School District's 'Discipline-Administrative Policy' prohibits '[h]arassment, intimidation, or threatening other students and/or teachers.'").

129. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 288–89 (5th Cir. 2014).

130. *Id.*

131. See *id.* at 282 (describing the procedural posture of the case); see also U.S. CONST. amend. I (protecting freedom of speech); U.S. CONST. amend XIV (protecting substantive due-process rights).

132. *Bell*, 774 F.3d at 282.

133. See *id.* (establishing that Bell's acts did not meet the *Tinker* test, which courts must use to determine whether student speech may be lawfully censored).

134. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 379 (5th Cir. 2015) (rehearing Bell's case).

135. *Id.* at 390.

disseminated, off campus.”<sup>136</sup> In so ruling, the Court effectively created a new rule, extending the parameters of school administrators’ authority to restrict student speech.<sup>137</sup> In the Fifth Circuit, *Tinker* now applies with equal force to off-campus speech.<sup>138</sup>

### A. *The Fifth Circuit’s Reasoning*

Several judges, and many legal pundits, are wary of the danger of the precedent that this decision creates. The principal dissent, authored by Judge Dennis, laments the majority opinion for failing to give a sufficient reason for applying the “material and substantial disruption” analysis to this situation, because this had previously been held not to apply off-campus.<sup>139</sup> He argues that *Hazelwood*, *Fraser*, and *Morse* provide the only exceptions to *Tinker*, and that school officials do not have “broad authority to invoke the ‘special characteristics of the school environment’ in order to circumvent their burden of satisfying the *Tinker* test.”<sup>140</sup> Writing for the majority in the panel decision, Judge Dennis argued that the school board provided no evidence to establish that a substantial disruption occurred or reasonably could have been forecasted based on the facts presented.<sup>141</sup> He specifically disapproved of the majority’s refusal to analyze the substance of Bell’s rap, noting that it could be protected as a matter of public concern, one of the key First Amendment values.<sup>142</sup> He argued “*Tinker* does not authorize school officials to regulate speech that occurs off campus and not at a school-sponsored event, where the

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136. See *id.* at 396 (establishing a new rule for determining when schools can sanction students for speech that reaches campus).

137. *Id.*

138. *Id.*

139. *Id.* at 404 (Dennis, J., dissenting).

140. See *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 293 (5th Cir. 2014) (arguing that Supreme Court jurisprudence only allows for proscription of student speech in limited circumstances).

141. *Id.* at 295.

142. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 404 (5th Cir. 2015) (Dennis, J., dissenting) (emphasizing that freedom of speech “occupies the highest rung of hierarchy of First Amendment values,” citing *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

potential ‘collision’ of interest upon which *Tinker*’s holding pivots simply is not present.”<sup>143</sup> Accordingly, Judge Dennis found that the decision was based on inapplicable precedent that now allows schools more authority to restrain students than any other circuit or state Supreme Court.<sup>144</sup>

#### IV. *Elonis v. United States and Intentional Threats Online*

While the Supreme Court has not addressed an online, off-campus student speech case, it recently heard *Elonis v. United States*,<sup>145</sup> an online threat case.<sup>146</sup> The issue in *Elonis* was whether conviction for communication of a threat requires proof of subjective intent by the speaker or objective intent understood by the reasonable person interpreting the statement.<sup>147</sup> *Elonis* was convicted under a federal criminal threat statute<sup>148</sup> for making threats on his Facebook page to injure his wife, an FBI agent, a kindergarten class, police officers, and employees and patrons of a park.<sup>149</sup> Though this is a criminal case, it is important to the *Bell* decision because the Supreme Court held for the first time that there is a mental state requirement to true threat convictions.<sup>150</sup>

*Elonis* argued that according to *Virginia v. Black*<sup>151</sup> his speech could not be a true threat because he lacked subjective intent to

143. *See id.* at 424 (disagreeing with the basis on which the majority placed its decision).

144. *See id.* at 433 (stating that the majority’s opinion undermines freedom of speech protections for all students).

145. 135 S. Ct. 2001 (2015).

146. *See id.* at 2013 (finding that a negligence standard alone is insufficient to convict someone under a criminal threat statute).

147. *See id.* at 2023–24 (Thomas, J., dissenting) (discussing how a reasonable jury uses an objective analysis).

148. *See* 18 U.S.C. § 875(c) (providing in part that any individual who “transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another” faces a felony charge of up to five years imprisonment).

149. *Elonis*, 135 S. Ct. at 2007.

150. *See id.* at 2012 (discussing the purpose and knowledge components of the mental state requirement).

151. 538 U.S. 343, 347–48 (2003) (concluding that there must be subjective intent to threaten by a speaker and that the act of cross burning alone cannot be prima facie evidence of intent to intimidate).

threaten.<sup>152</sup> Relying on the principle that “wrongdoing must be conscious to be criminal,” the Court agreed with *Elonis* that negligence alone is insufficient, and the government bears the burden to prove the defendant had a guilty mind.<sup>153</sup> However, because it failed to determine what level of intent is required, purpose or knowledge or simply recklessness, the Court did not provide complete clarity on the issue.<sup>154</sup> It determined that interpretation of the speech by the reasonable person is immaterial, because the speaker must transmit “communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat.”<sup>155</sup> Therefore, “what [*Elonis*] thinks does matter.”<sup>156</sup>

The objective approach, which the government here argued and the Third Circuit agreed with in the prior decision, finds that it does not matter what the defendant thinks.<sup>157</sup> Rather, it should only be relevant that the defendant knew the content and context of his or her speech and that a reasonable person would interpret the language as a genuine threat.<sup>158</sup> Justice Alito, writing separately from the majority opinion, agreed, arguing that the First Amendment should not protect speakers who claim that their words were meant only for therapeutic effect, as *Elonis* did.<sup>159</sup> He found this logic irrelevant because “whether or not the person making a threat intends to cause harm, the damage is the same.”<sup>160</sup>

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152. See *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring in part, dissenting in part) (arguing that a threat made for the therapeutic or cathartic benefit of the speaker is not protected by the First Amendment).

153. See *id.* at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

154. See Marie-Helen Maras, *Unprotected Speech Communicated Via Social Media: What Amounts to a True Threat?*, 19 J. INTERNET L. 3, 3–9 (2015) (asking whether recklessness or some other standard must be shown).

155. See *Elonis v. United States*, 135 S. Ct. 2001, 2004 (2015).

156. *Id.* at 2011.

157. See *id.* at 2007 (arguing that there need not be a requirement that the speaker intends to threaten, but that the statement should be judged by how the reasonable person would interpret it).

158. See *id.* at 2011 (discussing the mental state requirement involving a communicated threat).

159. See *id.* at 2016 (Alito, J., dissenting in part, concurring in part) (arguing that threatening speech should not be protected because it lacks any social value).

160. *Id.*

While Bell and Elonis's raps both contained violent messages and vulgar imagery, the court in each case refrained from addressing the First Amendment question, whether such online speech constituted a true threat.<sup>161</sup> The Fifth Circuit panel did take up the issue, holding that Bell's rap was not a true threat because it was not focused directly at the coaches, but was broadcast on public Internet sites.<sup>162</sup> The panel majority noted the significant difference between allegedly threatening speech communicated privately, thus aimed only at its target, and publicly, whose purpose is to "move public opinion and to encourage those of like mind."<sup>163</sup>

Judge Dennis noted that context is paramount when determining if an expression is actually threatening.<sup>164</sup> He also found fault with the majority's refusal to apply Supreme Court precedents, such as that just upheld in *Elonis*, requiring proof of more than negligence before upholding disciplinary action for "threatening" speech.<sup>165</sup> Furthermore, he suggested that music is metaphor, and as such, is not meant, nor should be taken, literally.<sup>166</sup>

Though *Elonis* has made no such claim, Bell argued that his song is artistic expression and should be understood as that and nothing more.<sup>167</sup> While this argument may seem like a convenient escape for anyone accused of threatening another person, the public-private distinction of the manner of the communication and the

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161. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 400 (5th Cir. 2015) (claiming it was unnecessary to address true threats because the case was decided under *Tinker*).

162. See *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 301–02 (5th Cir. 2014) (noting that the prevalence of violent rhetorical imagery in music is interpreted by the public as metaphor and not sincerely).

163. See *id.* at 302 (quoting *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d 1058, 1099 (9th Cir. 2002) (Kozinski, J., dissenting)).

164. See *id.* at 301–02 (citing Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J. L. & ARTS 1, 22 (2007)).

165. See *Bell*, 799 F.3d. at 404–05 (Dennis, J., dissenting) (listing and describing the majority's vague and fundamental errors).

166. See *id.* (suggesting that the song was an artistic expression and not a legitimate threat).

167. See *Bell*, 774 F.3d at 287 (stating that this song aimed to express real-life experiences and was not meant to threaten or intimidate others).

context of the dissemination can provide a reliable check on such spurious claims.<sup>168</sup>

### V. Analysis

The mission of the primary and secondary public education system in this country is to educate students, both academically and in proper social and cultural norms.<sup>169</sup> This balance is necessary for educators to maintain order so that they may create an efficient and effective learning environment.<sup>170</sup> Public schools are given significant discretion to constrain expression where it poses a risk to the success of other students at the school.<sup>171</sup> Outside of school, the issue becomes murkier. Since 1969, courts have agreed that public school officials lack authority to proscribe student speech that is created and disseminated off campus.<sup>172</sup>

The Internet and its boundless nature have created a new dimension to the student speech discussion. While Bell and the dissenting judges in the case argue that content created away from school and disseminated online cannot be analogous to pure on-campus speech, Judge Jordan's concurrence in *Layshock* notes:

For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-conscious communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.<sup>173</sup>

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168. See *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 302 (5th Cir. 2014) (“[C]ontextual cues are vital in assessing whether a reasonable listener would consider a statement a serious expression of an intent to cause harm . . .”).

169. See Sternberg, *supra* note 50, at 20–26 (finding that these two aims conflict with free speech protections).

170. *Id.* at 20.

171. *Id.* at 20–21.

172. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (discussing how the Constitution limits school officials ability to restrict freedom of speech expressions occurring outside of the classroom).

173. See *Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205, 220–21 (3d Cir. 2011) (Jordan, J., concurring) (noting that *Tinker* remains the applicable standard for analyzing off-campus student speech).



Bell argues that the Fifth Circuit went too far in upholding the school district's decision to reprimand him, and that there is now a split amongst the Circuit Courts of Appeal regarding whether school authorities may proscribe off-campus Internet speech.<sup>174</sup> He claims that the Second, Fourth, Fifth, Eighth, Ninth, and Eleventh circuits, which all hold that *Tinker* applies to off-campus Internet speech, are purportedly at odds with the Third Circuit.<sup>175</sup> Bell's argument is that the Third Circuit's decisions in *Layshock*<sup>176</sup> and *Snyder*<sup>177</sup> are inconsistent with the holdings of the other circuits, which have heard the issue.<sup>178</sup> In these two cases, the court found that they did not have sufficient evidence of a substantial disruption to reasonably uphold punishment of students for their Internet speech.<sup>179</sup>

The school board argues, however, that the decisions of the Third Circuit in these two cases actually create no circuit split. They find that the court did not categorically hold *Tinker* inapplicable to off-campus Internet speech, only that it was not applicable for disciplining the students in those specific situations. In *Layshock*, the school district found that the student's actions did not create any substantial disruption at school, therefore

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174. See Brief in Opposition, *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 400 (5th Cir. 2015) (No. 15-666), 2016 WL 245421, at \*13–18 (noting that Bell argues that the Supreme Court should hear the case because the Third Circuit has twice decided that the *Tinker* standard does not allow punishment for off-campus Internet speech, which is inconsistent with six other circuits).

175. See *Bell*, 799 F.3d at 393–94 (describing the precedent across each circuit which has heard the issue; all of which agree that the *Tinker* standard applies to certain off-campus situations).

176. See *Layshock*, 650 F.3d at 220 (applying *Fraser's* vulgar and offensive standard rather than *Tinker's* substantial disruption standard to uphold the school district's decision to suspend a student for a parody MySpace profile created away from school).

177. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (finding that *Tinker* applied to the student's speech, but that the expression did not rise to the level of a substantial disruption, nor a reasonable forecast of substantial disruption).

178. See Brief in Opposition, *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 400 (5th Cir. 2015) (No. 15-666), 2016 WL 245421, at \*13–15 (arguing that the Third Circuit has rejected the *Tinker* standard as applied to off-campus speech because it found *Tinker* inapplicable to the facts in *Layshock* and that there was no reasonable forecast of substantial disruption in *Snyder*).

179. *Id.*

defending its actions under the vulgar and offensive standard of *Fraser*.

In both *Thomas* and *Porter*, decided by the Second and Fifth Circuits respectively, *Tinker* was not applied to off-campus speech, because “[d]oing so would empower schools to regulate students’ expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.”<sup>180</sup> Ascertaining the student’s purpose in creating and distributing the speech is paramount when determining whether or not it is properly classified as on or off-campus.<sup>181</sup> In *Porter*, the speaker did not intend to direct his drawing to the school community, so *Tinker* was inapplicable and the school could not punish Porter without violating his constitutional rights.<sup>182</sup> In *Bell*, the same court justified applying *Tinker* the analysis to the rap because the school board showed sufficient evidence that Bell wanted the members of the school community to hear his rap.<sup>183</sup>

#### A. Public Policy Argument

The Fifth Circuit is not alone in finding instances where the use of *Tinker* in a wholly off-campus issue is acceptable.<sup>184</sup> However, there is a difference in the rationale of previous cases and that of the court in the case at bar. Unlike the parody profiles

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180. See *Snyder*, 650 F.3d at 939 (Smith, J., concurring) (warning of the danger that will result from extending *Tinker* further than current Supreme Court precedent).

181. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015) (noting that *Tinker* applies to off-campus speech where it is intentionally directed toward the campus).

182. See *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (threatening speech requires intentional or knowing communication by the speaker towards a specific person or a third party).

183. See *Bell*, 799 F.3d at 385 (“[A]cknowledging several times during the hearing that he posted the recording to Facebook because he knew it would be viewed and heard by students.”).

184. See *id.* at 394 (citing *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766–67 (8th Cir. 2011); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573–74 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 48–50 (2d Cir. 2008)).

created in *Layshock* or *Snyder*, which clearly had no basis in fact,<sup>185</sup> Taylor Bell wrote his rap in order to bring attention to a public policy issue.<sup>186</sup> Neither the school board nor the court addressed whether this speech is protected as a matter of public concern.<sup>187</sup> Bell stated several times that he created the rap because he wanted the administration to investigate the allegations against the coaches.<sup>188</sup> Despite four sworn affidavits by four of Bell's classmates, stating that they had in fact experienced sexual harassment by the coaches, there was never any investigation into the merits of the accusations.<sup>189</sup> Judge Dennis, in his dissent, argues that Bell's expression is protected precisely because of its social purpose.<sup>190</sup>

In an *amicus curiae* brief submitted to the United States Supreme Court by rapper Killer Mike, along with several other legal scholars and artists, the authors defended Bell's rap as a form of artistic expression.<sup>191</sup> They contend that Bell, an African American, was discriminated against by the court and by his school

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185. See J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011) (finding no reasonable forecast of substantial disruption because the profile was too outrageous to be believed).

186. See Kimberly Robinson, *School Can Punish Off-Campus Rap*, UNITED STATES LAW WEEK (BNA) (Aug. 25, 2015), <https://www.bloomberglaw.com/search/results/7ec2d338734dc9e657ec2f648a3398ac/document/X1MGFEM800000?jsearch=dk%253Abna%2520a0h1v3d1t9#jcite> (noting the 'special protection' afforded by the First Amendment to matters of public concern) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

187. See Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 404 (5th Cir. 2015) (Dennis, J., dissenting) (disagreeing with the majority's ruling because the First Amendment protects issues of public concern, no matter if the language used is offensive); see also Snyder v. Phelps, 562 U.S. 443, 452 (2011) (stating that a matter of public concern "occupies the highest rung of the hierarchy of First Amendment values").

188. See Bell, 799 F.3d at 385 (explaining Bell's defense of the rap).

189. *Id.* at 406; see also Liptak, *Hip-Hop Stars Support Mississippi Rapper in First Amendment Case*, N.Y. TIMES (Dec. 20, 2015) (questioning why these serious questions of sexual assault were never given any credence).

190. Bell, 799 F.3d at 404 (Dennis, J., dissenting) ("Bell's rap song constitutes speech on 'a matter of public concern' and therefore 'occupies the highest rung of the hierarchy of First Amendment values'") (quoting *Snyder*, 562 U.S. at 452).

191. See *Amici Curiae* Brief in Support of Petitioner, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (No. 15-666), 2015 WL 9315591, at \*5-\*6 (defending Bell's rap as artistic expression that should not be taken literally).

for expressing himself through the intentionally graphic rap subgenre “gangsta” rap.<sup>192</sup>

Anyone who is learned in law . . . is capable of separating art and lyrics, whether you agree with them or not, and actual human behavior. I think the courts understand it when it’s Johnny Cash. I think they understand it when it’s Robert Nesta Marley . . . [t]reating rap lyrics differently . . . persecutes poor young men based on their class and color.<sup>193</sup>

Accepting the violent imagery of other musicians, authors, and poets as fiction, while refusing to do the same for rap music, which the brief writers argue the court and school board did in their decisions, “perpetuates enduring stereotypes about the inherent criminality of young men of color.”<sup>194</sup>

Bell intended for his rap to effect change at I.A.W.S., not for the lyrics to be accepted as literal truth.<sup>195</sup> The brief argues however, that because rappers are often young minority men who strike a combative pose against authority figures, the school board and the Fifth Circuit allowed their inherent biases to cloud their acceptance of the rap as hyperbolic art.<sup>196</sup> Bell made no true threat, nor violated district policy, which would allow the authorities to reach outside of the school and reprimand him for violating *Tinker’s* substantial disruption standard.<sup>197</sup> Because of this, Bell’s First Amendment right to free expression was infringed and he was unlawfully expelled from school.<sup>198</sup>

192. *See id.* (asserting Bell’s defenses).

193. *See* Liptak, *supra* note 189, at 189 (questioning why school and court officials are unwilling to view rap music as hyperbole and not the sincere desire by the artist to carry out the acts they sing about).

194. *See Amici Curiae* Brief in Support of Petitioner, *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (No. 15-666), 2015 WL 9315591, at \*6 (“Studies establish that many people also harbor negative stereotypes about rap music that they do not have about other musical genres.”).

195. *Id.* at \*14. The course language, explicit themes, and violent rhetoric sometimes found . . . is also apparent in ‘the dozens,’ verbal competitions in which two opponents trade insults—often in rhyme—until a winner emerges. Taken literally, the barbs traded in the dozens may sound like threats or incitements to violence. But as with African American word games generally, linguistic virtuosity is prized above all else, and the winner is the person able to overpower an opponent intellectually rather than physically. *Id.*

196. *Id.* at \*11–12.

197. *Id.* at \*24.

198. *Id.* at \*32.

*B. Tinker Analysis Applied to Bell v. Itawamba County  
School Board*

The *Tinker* standard applies to off-campus conduct when “a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher.”<sup>199</sup> The issue before the Bell court was whether such an understanding can constitute a reasonable forecast of substantial disruption.<sup>200</sup> Though the court may be correct in its determination that Bell was lawfully punished for his rap, this rule gives schools more discretion than in any other circuit that has heard the issue.<sup>201</sup> Now, a public school can regulate off-campus speech by showing only that some third party interpreted it as a threat, harassment, or intimidation. This increased power is arguably the result of the language used, which came from the district’s disciplinary manual:<sup>202</sup>

[S]peech intentionally directed towards a school is properly considered on-campus speech. On the other hand, speech originating off campus does not mutate into on-campus speech simply because it foreseeably makes its way onto campus. . . . A bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters.<sup>203</sup>

This is what happened in the *Bell* decision. The facts show that the video never created any substantial disruption at school and that one of the coaches mentioned was the only person to view it at school.<sup>204</sup> However, Bell’s rap, which discussed school-related

199. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015).

200. *Id.* at 383.

201. *See id.* at 395 (listing the requirements in the Second, Fourth, Eighth, and Ninth circuits for applying *Tinker*).

202. *See id.* at 406 (Dennis, J., dissenting) (finding fault with the majority for transforming the disciplinary policy “into an unprecedented rule of constitutional law that effectively permits school officials across our circuit to punish a student’s protest of teacher misconduct regardless of when or where the speech occurs. . .”).

203. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring) (citing *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 205 (3d Cir. 2011); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1093 (2008)).

204. *See Bell*, 799 F.3d at 385 (noting that the coach admitted he did not feel threatened by the rap).

matters, was classified as on-campus, thus within the scope of I.A.H.S. disciplinary action.<sup>205</sup>

The *Tinker* decision itself specified that forecast of a substantial disruption cannot be based merely on an “undifferentiated fear or apprehension of disturbance” in order for school authorities to validly proscribe student speech.<sup>206</sup> There, the black armbands were symbolic of an emotionally charged subject of the era: displeasure over U.S. intervention in Vietnam.<sup>207</sup> The war dominated the news and political discourse, but still the Supreme Court found that this kind of charged political expression created no foreseeable disruption at school.<sup>208</sup> The Third Circuit noted in *Snyder* that the *Tinker* ruling created a high bar for schools to meet in order to validly claim a foreseeable substantial disruption, one that cannot be overcome because the school disagrees with the content.<sup>209</sup> Because of this, courts must staunchly require evidence that the school administration fears were legitimate and cannot simply punish a student because it disagrees with his message or find it offensive or distasteful.<sup>210</sup>

## VI. Conclusion

Student speech protection has never been absolute, and though Taylor Bell did not create nor access his rap on campus, the majority arrived at the correct conclusion. School authorities have a duty to create a safe learning environment, so they cannot condone speech that contains threatening language specifically directed at members of their community. In February 2016, the Supreme Court denied Bell’s petition for certiorari, so the decision of the Fifth Circuit stands.

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205. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 387 (5th Cir. 2015).

206. *See Snyder*, 650 F.3d at 930 (noting that school districts have a significant burden to meet to successfully claim some student speech was foreseeable to create a substantial disruption) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 503 (1969)).

207. *Id.* at 929.

208. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

209. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (arguing that creating a MySpace profile making fun of the school’s principal is less inflammatory than the students’ armbands in *Tinker*, so should also not be considered substantially disruptive).

210. *Id.* at 942.